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Date Delivered:	25 Nov 2016
Case Class:	Civil
Court:	Environment and Land Court at Malindi
Case Action:	Judgment
Judge:	Oscar Angote
Citation:	Kalumass Company Limited & another v Emmanuel Charo Tinga & another [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Land and Environment
History Magistrates:	-
County:	Kilifi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application is dismissed with costs.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 125 OF 2009**

**1. KALUMASS COMPANY LIMITED**

**2. MASSIMO SPENELLI ALESANDRO.....PLAINTIFFS**

**=VERSUS=**

**1. EMMANUEL CHARO TINGA**

**2. COUNCILLOR ALI DIDI.....DEFENDANTS**

**J U D G M E N T**

**Introduction:**

1. In their Plaint dated 22<sup>nd</sup> February, 2007 and filed in this court on 23<sup>rd</sup> February, 2007, the Plaintiffs averred that at all material times, the 1<sup>st</sup> Defendant was a director and shareholder of the 1<sup>st</sup> Plaintiff holding 4,000 shares; that on various dates between the year 1999 and 2005, the 1<sup>st</sup> Defendant diverted and converted funds and assets meant for and belonging to the 1<sup>st</sup> Plaintiff for his own use and that he acquired assets in his name using the 1<sup>st</sup> Plaintiff's monies.

2. The Plaintiffs have averred in the Plaint that due to the 1<sup>st</sup> Defendant's conduct, the 1<sup>st</sup> Plaintiff called for a Board meeting on 3<sup>rd</sup> January, 2007 and replaced the 1<sup>st</sup> Defendant as a director of the 1<sup>st</sup> Plaintiff.

3. Other than buying several cars and plot number 808 using the 1<sup>st</sup> Plaintiff's monies, the Plaintiffs have averred in the Plaint that the Defendants jointly and severally fraudulently subdivided the 1<sup>st</sup> Plaintiff's parcel of land known as Kilifi/Jimba/419 into three titles, to wit, Kilifi/Jimba/1120, 1121 and 1122 and caused plot number 1122 to be registered in the 2<sup>nd</sup> defendant's name.

4. The Plaintiffs particularised the alleged fraudulent dealings by the Defendants to include causing Plot No. 419 to be subdivided; alleging that the Title Deed to Plot No. 419 was lost and causing Plot No. 1112 and 808 to be registered in the 1<sup>st</sup> Defendant's name without the consent of the 1<sup>st</sup> Plaintiff.

5. The Plaintiffs finally averred that the 1<sup>st</sup> Defendant owes the 1<sup>st</sup> Plaintiff Kshs.700,000 and the 2<sup>nd</sup> Plaintiff Kshs.3,000,000 respectively.

6. The prayers that the Plaintiffs have sought in the Plaint are for a permanent injunction restraining the Defendants from interfering with the 1<sup>st</sup> Plaintiff's assets and in particular motor vehicles Registration number KAM 249D, KAP 249E, KAN 122P and KAN 123P and Plot numbers Kilifi/Jimba/808, 1120 and 1121.

7. The Plaintiffs are also praying for an order cancelling the registration of the 1<sup>st</sup> Defendant or any other party as the owner of the assets listed above and the name of the 1<sup>st</sup> Plaintiff to be registered instead.

8. The Plaintiffs finally prayed for an order directing the 1<sup>st</sup> Defendant to deliver accounts to the Plaintiffs and for a refund to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs of Kshs.700,000 and Kshs.3,000,000 respectively.

9. In his Defence, the 1<sup>st</sup> Defendant admitted being a director and shareholder of the 1<sup>st</sup> Plaintiff but denied that he ceased being a director of the 1<sup>st</sup> Plaintiff.

10. The 1<sup>st</sup> Defendant denied diverting and converting funds and assets meant or belonging to the 1<sup>st</sup> Plaintiff. It is the 1<sup>st</sup> Defendant's Defence that the motor vehicles enumerated in the Plaintiff belong to him and further that plot nos 879/1 and 879/2 Watamu were acquired and financed by his own resources.

11. The 1<sup>st</sup> Defendant further denied that he received Kshs.3,000,000 from the 2<sup>nd</sup> Plaintiff to acquire parcel of land known as Kilifi/Jimba/1126; that at no time was plot no. 1126 registered in his name and that the suit is bad in law and should be struck out with costs.

12. The 2<sup>nd</sup> Defendant also filed a Defence in which he denied the allegations raised in the Plaintiff.

13. On 6<sup>th</sup> December, 2012, the Plaintiffs withdrew the suit as against the 2<sup>nd</sup> Defendant.

14. The matter proceeded for hearing on 10<sup>th</sup> December, 2012, 11<sup>th</sup> December, 2012, 8<sup>th</sup> May, 2013 and 17<sup>th</sup> September, 2015. In between, the matter was adjourned for one reason or the other by the Plaintiffs' counsel.

#### **The Plaintiffs' case:**

15. PW1 informed the court that he knows the 2<sup>nd</sup> Plaintiff and the Defendant. PW1 stated that he has a company known as Kagel Contractors and that he has been in the construction industry for over 30 years.

16. While renovating a hotel known as "Hotel Golden Palm" in Watamu in 1995, it was the evidence of PW1 that he met the 2<sup>nd</sup> Plaintiff who requested for a quotation in respect to a building he wanted to put up; that he gave the 2<sup>nd</sup> Plaintiff the quotation although the 2<sup>nd</sup> Plaintiff never engaged him and that it was not until 1999 that the 2<sup>nd</sup> Plaintiff instructed him to make furniture for his residence at "Ocean Breeze" which he did.

17. It was the evidence of PW1 that the 2<sup>nd</sup> Plaintiff used to pay him for his services through the 1<sup>st</sup> Defendant while outside the country and that the 2<sup>nd</sup> Plaintiff paid him a total of Kshs.3.6 Million.

18. Other than the furniture, it was the evidence of PW1 that he also did a small roof at the gate and the finishing of the swimming pool at the 2<sup>nd</sup> Plaintiff's residence.

19. PW1 stated that he met the 1<sup>st</sup> Defendant who is from his home area, at "Ocean Breeze". It was the evidence of PW1 that everything that the 2<sup>nd</sup> Plaintiff was doing was done through the 1<sup>st</sup> Defendant.

20. It was the evidence of PW1 that after being paid, he lent to the Defendant Kshs.20,000 which he repaid by way of a cheque which he produced in evidence.

21. PW1 informed the court that while working for the 2<sup>nd</sup> Plaintiff, it is the 1<sup>st</sup> Defendant who paid him Kshs.500,000 in two installments and thereafter Kshs.2.1 million; that the said amount was paid to him in cash and that he delivered all the furniture to the 2<sup>nd</sup> Plaintiff's residence.

22. It was the evidence of PW1 that when the 2<sup>nd</sup> Plaintiff went back to Italy, he complained to him that he was the only one who was running the affairs of the company (the 1<sup>st</sup> Plaintiff). PW1 stated that at that time, the 2<sup>nd</sup> Plaintiff was constructing "Kalumass Petrol Station" in Watamu and on that basis, he declined to lend PW1 Kshs.1.2 Million that he had requested.

23. PW1 informed the court that it is the 2<sup>nd</sup> Plaintiff who built the Petrol station; that the 1<sup>st</sup> Defendant always worked under the 2<sup>nd</sup> Plaintiff and that the 2<sup>nd</sup> Plaintiff's residence is at "Ocean Beach".

24. In cross-examination, PW1 stated that Kalumas Company Ltd, the 1<sup>st</sup> Plaintiff, was incorporated by the 2<sup>nd</sup> Plaintiff and the Defendant; that he did not know the 1<sup>st</sup> Defendant when he did the first quotation for the 2<sup>nd</sup> Plaintiff; that he did not have the documents in respect of the 1<sup>st</sup> Plaintiff; that he did not have any invoices for the works he did and that by the time he made the furniture for the 2<sup>nd</sup> Plaintiff, "Ocean Breeze Hotel" had already been constructed.

25. PW1 informed the court that he did not know the person who built "Ocean Breeze"; that he did not know the plot number that the said hotel stands on and that he did know in whose name the plot is registered.

26. PW1 further stated that he did not have evidence to show that the money that the 1<sup>st</sup> Defendant paid him for the furniture was wired on the 1<sup>st</sup> Defendant's account by the Plaintiff.

27. It was the evidence of PW1 that he did not know the plot number that "Kalumas Petrol Station" was standing on although he knows that the Petrol Station was built by the 2<sup>nd</sup> Plaintiff.

28. The second witness, PW2, informed the court that he is a small time businessman running a bar and restaurant; that the 2<sup>nd</sup> Plaintiff while in the company of the 1<sup>st</sup> Defendant went to his plot number 419 in 1996 and that he agreed to sell an acre of his plot to the 2<sup>nd</sup> Plaintiff.

29. It was the evidence of PW2 that he sold to the 2<sup>nd</sup> Plaintiff an acre of plot 419 for Kshs.1,500,000 and that thereafter the 1<sup>st</sup> Defendant started developing a hotel on the land that was later on known as "Ocean Breeze".

30. It was the evidence of PW2 that after selling the said plot, he was never involved in the construction of the hotel on the plot and that he had no idea as to the person who paid for the construction.

31. According to PW2, he was paid Kshs.1,500,000 in cash and that the land he sold was registered in the name of Kalumass Company Limited; that indeed, the whole land measuring 5.5 acres was registered in the name of Kalumass Company Ltd although he only sold one acre and that he did not have a title Deed as at the time of the sale of the property.

32. PW2 informed the court that he does not know the directorship of the 1<sup>st</sup> Plaintiff and that he reported the issue of the registration of the whole of his land in the name of the company to the CID.

33. In cross-examination, PW2 stated that he did not have a copy of the sale agreement in respect of the one acre that he sold to the 2<sup>nd</sup> Plaintiff; that he did not have any documents to show that he owned plot No. 419 and that he knew the 1<sup>st</sup> Defendant as a contractor.

34. PW3 informed the court that he is an accountant working with "Ocean Breeze" as a manager.

35. It was the evidence of PW3 that "Ocean Breeze" is owned by the 2<sup>nd</sup> Plaintiff who lives in Italy; that

prior to being employed at Ocean Breeze, he used to work for Kalumass Company Limited and that the said company was registered on 13<sup>th</sup> March, 2000.

36. PW3 informed the court that the 1<sup>st</sup> Plaintiff was involved in the business of touring and petrol station services and that the directors of the Company were the 2<sup>nd</sup> Plaintiff, the 1<sup>st</sup> Defendant and Ann Spinelli.

37. According to PW3, his work at the company involved keeping books and doing banking reconciliations. It was the evidence of PW3 that the company had a petrol station and offices which it let to third parties who included Aziz Driving School, G4S, Malindi Water Company and Fly Bank Tours.

38. PW3 informed the court that the 1<sup>st</sup> Defendant was the Managing Director of the company and that he later on ceased to be a director and remained as a simple shareholder.

39. In cross-examination, PW3 stated that "Ocean Beach" stands on plot no. 819 although he did not know the registered proprietor of the said plot.

40. It was the evidence of PW3 that when he was employed, the 1<sup>st</sup> Plaintiff had already been incorporated and that he did not have a copy of the Memorandum and Articles of Association of the company.

41. According to PW3, the tenancy agreements that he saw referred to plot number 879/1 and not plot 879/2; that he did not know the circumstances under which the 1<sup>st</sup> Defendant ceased to be a director in the 1<sup>st</sup> Plaintiff's company and that he did not know the plot number that the Petrol station was standing on or the person who built it.

42. PW4, a valuer, informed the court that in the year 2000, the 1<sup>st</sup> Defendant instructed him to value plot number Kilifi/Jimba 808, 419 and 1100 and other movable assets.

43. According to PW4, plot no. 808 was in the name of the 1<sup>st</sup> Defendant, while plot 419 and 1100 were in the names of Kalumas Tours Safari Limited.

44. It was the evidence of PW4 that he valued plot no. 808 at Kshs.4.5 Million, Plot NO. 419 at Kshs.14 Million, Plot No. 1100 at 4.5 Million, loose assets at Kshs.400,000 and the motor vehicles at Kshs.4.1 Million.

45. PW4 informed the court that during the valuation, plot no. 808 had a building which was 60% done while plot number 419 had a house with a swimming pool, a small bakery, a garage and servant quarters. Plot number 1100 was vacant.

46. According to PW4, he was informed that a petrol station was to be put on plot number 808.

47. PW4 stated that he was paid by his instructing client, the 1<sup>st</sup> Defendant and that plot number 808 was in the name of the 1<sup>st</sup> Defendant while plot number 419 was in the name of Kalumass Tours Safaris Limited, so was plot number 1100.

**The Defence case:**

48. The 1<sup>st</sup> Defendant closed his case without tendering any evidence.

**The Plaintiff's submissions:**

49. The Plaintiffs' counsel submitted that the 2<sup>nd</sup> Plaintiff, together with his sister and the 1<sup>st</sup> Defendant were the first directors of the 1<sup>st</sup> Plaintiff; that the other directors entrusted the 1<sup>st</sup> Defendant to run the affairs of the company and that the 2<sup>nd</sup> Plaintiff and his sister purchased land known as Kilifi/Jimba 419 from PW2.

50. Counsel submitted that in the Plaintiffs' bundle of documents, the Plaintiffs have exhibited bank statements showing how the 2<sup>nd</sup> Plaintiff sent to the 1<sup>st</sup> Defendant money to invest in the affairs of the 1<sup>st</sup> Plaintiff; that the 1<sup>st</sup> Defendant embarked on a fraudulent and self-enrichment acts which were not known to his co-directors by causing to be registered a company known as Kalumas Tours and safaris Limited and by sub-dividing plot 419 into three plots and that the 1<sup>st</sup> Defendant also re-wired the funds that were meant to purchase the cars for the 1<sup>st</sup> Plaintiff to his account.

51. The Plaintiffs' counsel summarised the evidence f PW1, PW2, PW3 and PW4 which I have already summarised above.

52. Counsel urged this court to also consider the witness statements of Masimo Spinelli, Anna Spineli, Ken Munene and Mr. Shilunga who never testified in this matter.

53. Counsel also urged this court to consider the Plaintiffs' bundles of documents that were filed in this court but were never produced in evidence.

54. The Plaintiffs' advocate submitted that no evidence was adduced by the 1<sup>st</sup> Defendant to rebut the Plaintiffs' statements or evidence on record; that no evidence was adduced by the 1<sup>st</sup> Defendant on the source of his income to enable him acquire prime properties and that the 1<sup>st</sup> Defendant admitted in his statement of having received funds from Italy.

55. The Plaintiffs' advocate submitted that the consequence of failure by the 1<sup>st</sup> Defendant to adduce any evidence in support of his claim or even to rebut the Plaintiffs' claim and evidence is and can only be one: that the Plaintiffs' evidence stands as uncontroverted.

56. Counsel submitted that the Plaintiffs have proved that the Defendant unjustly enriched himself; that this court should not reward the Defendant's acts of fraud and that this court is a court of law and equity.

57. The Plaintiffs' counsel finally submitted that the Plaintiffs have proved that Kalumass Company Limited was registered earlier in time than Kalumass Tours and Safaris Limited; that the 1<sup>st</sup> Defendant fraudulently had all the assets meant for the 1<sup>st</sup> Plaintiff registered in his company's name; that the 1<sup>st</sup> Defendant opted to keep quiet regarding the source of his capital and that the record is replete with proper documents and evidence but neither the 2<sup>nd</sup> Plaintiff nor his sister Ann Spinelli got a chance to testify.

#### **The Defendant's submissions:**

58. The 1<sup>st</sup> Defendant's advocate quoted the provisions of Sections 107, 108 and 109 of the Evidence Act and submitted that the Plaintiffs failed to discharge the burden of proof of the allegations in the Plaintiff.

59. Counsel submitted that the evidence of PW1, PW2, PW3 and PW4 was insufficient to prove the allegations pleaded in the Plaintiff and that there was no prove to show that the properties subject of the suit alleged to belong to the Plaintiffs were actually theirs and not the 1<sup>st</sup> Defendant's.

**Analysis and findings:**

60. The Plaintiffs initially sued two Defendants. However, the Plaintiffs withdrew their suit as against the 2<sup>nd</sup> Defendant leaving the 1<sup>st</sup> Defendant as the only Defendant.

61. The allegations in the Plaintiffs' Plaint are that the 1<sup>st</sup> Defendant was a Director of the 1<sup>st</sup> Plaintiff; that on various dates between the year 1999 and 2005, the 1<sup>st</sup> Defendant diverted and converted funds and assets meant for and belonging to the 1<sup>st</sup> Plaintiff for his own use and that the 1<sup>st</sup> Defendant acquired assets in his name by using the 1<sup>st</sup> Plaintiff's monies.

62. Other than buying several cars whose registration numbers have been enumerated in the Plaint and land known as Kilifi/Jimba 808 using the 1<sup>st</sup> Plaintiff's funds, the Plaintiffs averred in their Plaint that the 1<sup>st</sup> Defendant fraudulently sub-divided parcel of land known as Kilifi Jimba/419, which had been purchased by the Plaintiffs, into three portions, to wit, Kilifi Jimba/1120, 1121 and 1122 and caused the said plots to be registered in his name.

63. The Plaintiffs' further claim in the Plaint is that the Defendants owe the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> Plaintiff Kshs.700,000 and Kshs.3,000,000 respectively.

64. The Plaintiffs are seeking for an order cancelling the registration of the 1<sup>st</sup> Defendant or any other party as the owner of motor vehicle registration numbers KAM 249D, KAP 249E, KAN 122P and KAN 123P and plot numbers Kilifi/Jimba/808, 1120 and 1121. The Plaintiffs have also prayed for an order directing the Defendants to refund them Kshs.3,700,000.

65. As was expected, the 1<sup>st</sup> Defendant denied in his Defence that he diverted the 1<sup>st</sup> Plaintiff's funds to purchase the said motor vehicles and the enumerated plots.

66. The Defendants further denied that they owe the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs Kshs.700,000 and Kshs.3,000,000 respectively.

67. From the pleadings, the issues for determination are as follows:-

**(a) Whether the Plaintiffs financed the purchase of motor vehicles registration number KAM 249D, KAP 249E, KAN 122P and KAN 123P.**

**(b) Whether the Plaintiffs financed the purchase of parcels of land number 419 which was allegedly sub-divided by the 1<sup>st</sup> Defendant to create parcel of land numbers Kilifi/Jimba 1120, 1121 and 1122;**

**(c) Whether the Plaintiffs financed the purchase of parcel of land number Kilifi/Jimba 808 and 1126;**

**(d) Whether the 1<sup>st</sup> Defendant had the said motor vehicles and the parcels of land fraudulently registered in his name;**

**(e) Whether the said registration of motor vehicles and parcels of land should be cancelled and instead be registered in favour of the Plaintiffs;**

**(f) Whether the Defendants owe the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs Kshs.700,000 and Kshs.3,000,000 respectively and;**

**(g) Who should pay the costs of the suit.**

68. The Plaintiffs called a total of four witnesses.

69. The first Witness, PW1, informed the court that initially, the 2<sup>nd</sup> Plaintiff had wanted him to put up a building for him. However, after giving the 2<sup>nd</sup> Plaintiff his quotation, the 2<sup>nd</sup> Plaintiff never engaged him.

70. However, it was the evidence of PW1 that later on, the 2<sup>nd</sup> Plaintiff instructed him to make for him furniture for his hotel and a petrol station.

71. According to PW1, he made the said furniture and was paid Kshs.3.1 Million by the 2<sup>nd</sup> Plaintiff, through the 1<sup>st</sup> Defendant.

72. Other than being paid Kshs.3.1 million by the 2<sup>nd</sup> Plaintiff for the furniture, PW1 informed the court that he was not aware about the plot number on which "Ocean Breeze" or Kalumass Petrol Station stands on.

73. In a nutshell, PW1 informed the court that he was not aware about the people who were registered as the proprietors of the suit properties.

74. It was the evidence of PW1 that that the 2<sup>nd</sup> Plaintiff used to send to the 1<sup>st</sup> Defendant monies while he was abroad. However, PW1 did not produce any evidence by way of bank statements or otherwise to support that allegation.

75. The purported owner of parcel of land number Kilifi/Jimba 419, PW2, informed the court that the said plot measured 5.5 acres; that he sold to the 2<sup>nd</sup> Plaintiff one (1) acre and that he was paid Kshs.1,500,000 by the 2<sup>nd</sup> Plaintiff.

76. However, instead of hiving off only one acre, it was the evidence of PW2 that the 1<sup>st</sup> Defendant had the whole land subdivided and registered in his favour.

77. PW2 informed the court that "Ocean Breeze" has been build on a portion of the land that he sold to the 2<sup>nd</sup> Plaintiff. However, it was the evidence of PW2 that as at the time he sold plot number 419, he did not have a Title Deed and that he never reduced the agreement he entered into with the Plaintiffs in writing.

78. PW2 did not produce any evidence to show that indeed parcel of land number Kilifi/Jimba 419 belonged to him and that he sold a portion of the said plot to the 2<sup>nd</sup> Plaintiff for Kshs.1,500,000 or at all.

79. PW2 did not also produce any evidence to show that indeed it is the Plaintiffs who built "Ocean Beach" on plot number 419. Indeed, PW2 admitted that he was not aware of the person who constructed or who financed the construction of "Ocean Beach". PW2 was not also aware of the directorship of the 1<sup>st</sup> Plaintiff.

80. The Manager of "Ocean Breeze", PW3, informed the court that the 1<sup>st</sup> Defendant was initially the 2<sup>nd</sup> Plaintiff's Managing Director; that before he moved to "Ocean Beach" he used to keep the 1<sup>st</sup> Plaintiff's books of accounts and that "Ocean Beach" is on plot No.419.

81. It was the evidence of PW3 that he did not have the Memorandum and Articles of Association of the 2<sup>nd</sup> Plaintiff and that he did not know the registered proprietor of plot no.419.



82. PW4, a valuer, informed the court that he was engaged by the 1<sup>st</sup> Defendant to value plot number 808, 419 and 1100; that during the said valuation; he was made aware that plot number 808 was registered in the name of the 1<sup>st</sup> Defendant while plot numbers 419 and 1100 were in the names of Kalumas Tours Safaris.

83. Neither the Plaintiffs nor the Defendants testified in this matter.

84. None of the Plaintiffs' witnesses produced evidence to show the relationship between the 1<sup>st</sup> Plaintiff, the 2<sup>nd</sup> Plaintiff and the 1<sup>st</sup> Defendant.

85. Indeed, no evidence was placed before this court by the Plaintiffs' witnesses to show that the Plaintiffs made any payments, either to them or to the 1<sup>st</sup> Defendant for the purpose of purchasing the motor vehicles and the parcels of land enumerated in the Plaint.

86. In fact none of the Plaintiffs' witnesses produced the books of accounts or the bank statements of the Plaintiffs which would have supported the Plaintiffs' assertion that the assets enumerated in the Plaint were purchased by the 1<sup>st</sup> Defendant using the Plaintiffs' funds.

87. Although the Plaintiffs' counsel has urged this court to consider the statements of the 2<sup>nd</sup> Plaintiff and his co-director which are on record, it is trite that this court cannot consider the said statements and documents unless the same are produced in court on oath.

88. The failure by the 1<sup>st</sup> Plaintiff's director(s) to adduce evidence to prove the allegations that the suit properties were purchased using the Plaintiffs' funds renders the suit a non-starter.

89. Indeed, considering the serious allegations of fraud leveled against the 1<sup>st</sup> Defendant, and in view of the provisions of sections 107, 108 and 109 of the Evidence Act, it was incumbent upon the Plaintiffs to adduce evidence to show that the 1<sup>st</sup> Defendant fraudulently acquired the named assets before the 1<sup>st</sup> Defendant could be called upon to rebut the said evidence.

90. Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.

91. It was therefore for the Plaintiffs to prove that a company by the name "Kalumas Company Limited" was incorporated; that the 2<sup>nd</sup> Plaintiff channelled funds through the said company and that the 1<sup>st</sup> Defendant used those funds to purchase the suit properties and had them registered in his name. It was not for the 1<sup>st</sup> Defendant to disprove those facts before the Plaintiffs could discharge their burden of proof.

92. At the risk of sounding repetitive, the Plaintiff always has the burden of proof to produce evidence to prove his case. If that burden is met, then the burden of proof shifts to the other party, putting the Defendant in the position of having the burden to prove his defence.

93. Having failed to discharge their burden of proof by not producing any evidence to support the allegations in the Plaint, the 1<sup>st</sup> Defendant was not under any legal obligation to testify in this matter.

94. It may be true that all assets enumerated in the Plaint are registered in the name of the 1<sup>st</sup> Defendant. However, without any form of evidence that tend to show that the 1<sup>st</sup> Defendant acquired those assets fraudulently, or that even those assets are registered in favour of the 1<sup>st</sup> Defendant using the Plaintiff's funds, the 1<sup>st</sup> Defendant was not under any obligation to prove that he acquired those items

lawfully because he who alleges must proof.

95. The Plaintiffs having failed to attend court to prove their case even after being given numerous opportunities to do so, the most appropriate order that should ensure is for the dismissal of the Plaint.

96. For those reasons, I dismiss the Plaintiff's Plaint dated 22<sup>nd</sup> February, 2007 with costs.

**Dated, signed and delivered in Malindi this 25<sup>th</sup> day of November, 2016.**

**O. A. Angote**

**Judge**



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