Case Number:	Civil Case No. 617 of 1995
Date Delivered:	13 Mar 2006
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Erastus Mwaniki Githinji
Citation:	Yogendra Purshottam Patel v Pascale Mireille Baksh (Nee Patel) & 2 others [2006] eKLR
Advocates:	-
Case Summary:	Land – tenancy in common – trust – Benami transaction – plaintiff claiming to have solely purchased and developed land and that the registration of his deceased brothers was a Benami transaction making them trustees for him – defendants claiming tenancy in common in equal shares – defendants claiming that if there was a trust, then the transaction was void for want of the consent of the Land Control Board – Land Control Act section 6(2) – whether a grant or title under the Registration of Titles Act is subject to unregistered equitable rights – whether the agreement of sale, conveyance and certificate of title contained an express declaration of trust – whether the court had jurisdiction to imply a resulting trust or a Benami transaction in favour of the plaintiff – whether the concept of a Benami transaction part of Kenyan law – presumption of resulting trust EVIDENCE – oral versus documentary evidence – whether extrinsic evidence is admissible to proof the term of a contract or a grant or any disposition of property - Evidence Act sections 97, 98

Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 617 of 1995

YOGENDRA PURSHOTTAM PATEL …….... PLAINTIFF

VERSUS

1. PASCALE MIREILLE BAKSH (nee Patel)

2. NILESH PRAHLADBHAI PATEL

3. CHANCHALBHEN PURSHOTTAM PATEL ….…… DEFENDANTS

J U D G M E N T

This dispute relates to the ownership of three properties namely; Nairobi West house L.R. No. 37/243/2, and – L.R. No. 12826 and L.R. No. 12442 (which both comprise Kigwa Estate) all registered in the names of Yogendra Purshottam Patel (Y. P. Patel – plaintiff); Rajnikant Purshottam Patel (R. P. Patel) (deceased) and Prahladbhai Purshottam Patel (P. P. Patel) (deceased) as tenants in common in equal shares.

The plaintiff unfortunately died on 12th February, 2006 before this judgment was read. His son Nishitt Yogendra Patel has been joined as his legal representative.

The first defendant Pascale Mireille Baksh is the administratrix of the estate of R. P. Patel who died on 10th August, 1983 while the second defendant Nilesh Prahladbhai Patel is the administrator of the estate of P. P. Patel in Kenya who died on 21st April, 1991.

The three registered owners – that is Y. P. Patel, R. P. Patel (deceased) and P. P. Patel (deceased) are brothers. Their father Purshottam Jirabhai Patel (P. J. Patel) died on 15th January, 1952 while their mother the third defendant died on 8th March, 1995.

1. PLEADINGS

The plaintiff avers mainly that he solely purchased the Nairobi West plot and constructed a building thereon as well as the Kigwa farm without any contributions from his deceased brothers and that the registration of the plaintiff's deceased brothers was a BENAMI transaction and further that the plaintiff's deceased brothers were registered as mere trustees and Benamidars for the plaintiff.

The main reliefs sought in the Re-Amended Plaint are:

1. *The plaintiff be declared the sole proprietor of the Nairobi West house L.R. No. 37/243/2, I.R. No. 12237 as well as the farm L.R. No. 12826 I.R. 47884 and L.R. No. 12442, I.R. No. 33904.*

2. …

3. …

4. …

5. A declaration that the late brothers, P. P. Patel and R. P. Patel held the Nairobi West House L.R. No. 37/243/2 and Kigwa Farm – L.R. No. 12826 I.R. 47884 and L.R. No. 1244, I.R. 33904 in trust as Trustees for the plaintiff.

6. In the alternative, the plaintiff claims against the Defendants, jointly and severally special demages in the sum of Kshs.88,166,667/= with interest thereon at court rates from the date of filing this suit until payment in full.

7. …

8. Declaration that plaintiff is the real true rightful and beneficial owner of Kigwa Farm and Nairobi West property and his later (sic) Brothers … were mere Benamidars".

Additionally, plaintiff seeks seven other consequential reliefs.

The first defendant denies that plaintiff solely bought and developed the three properties and avers that the three brothers jointly purchased the three properties and each is entitled to 1/3 share of the properties.

By way of counter-claim she prays for a declaration that the estate of her father R. P. Patel is entitled to the income and proceeds accruing out of the partnership of Kigwa estate (L.R. Nos. 12826 and 12442) and Nairobi West property (L.R. No. 37/243/2) since the date of death of R. P. Patel and an order that the suit properties be sold and net proceeds be shared equally between the plaintiff, the estate of R. P. Patel and the estate of P. P. Patel.

The second defendant similarly denies the plaintiff's claim and avers that the purchase price for three properties was raised by the three brothers and developed out of the proceeds of income from the three properties and that each of the three brothers is entitled to an equal share of the suit properties. By counter-claim, he seeks a declaration that the estate of his deceased father is entitled to income or proceeds accruing from the suit properties; an account of income and an order that plaintiff do pay any sum found due to the estate upon the taking of accounts.

The suit against the 3rd defendant who died a month after suit was filed was discontinued. That in essence is the nature of the dispute before the court.

2. <u>FAMILY HISTORY:</u>

Plaintiff and his two deceased brothers are sons of P. J. Patel who was born in India but came to Kenya in early 1920s. He had also three daughters Kantaben J. Patel, Ramaben P. Patel and Urmiltaben D. Patel (Urmillaben). Urmillaben who gave evidence for defendants as DW4 was born on 8th April, 1936 and is the youngest in the family.

P. P. Patel was born in Kenya in 1927. He went to India for studies in 1935. He came back to Kenya in 1951 after getting a BSC in Chemistry. He started working in 1952. He got married to Shardaben Patel (DW6) in India in 1946. After coming back to Kenya he was employed as a civil servant earning a salary of Shs.600 – 700 per month plus house allowance. He resigned from Government service in

1968 and in 1969 he left Kenya to settle in UK. He was a British citizen. He left his wife and two children at Kigwa farm. In 1972 his wife left for UK leaving her children Nilesh (2nd defendant) and Anita at Kigwa farm. She returned to Kenya in 1974 and left for UK for good in 1975. In 1976 she and her husband bought a house in UK. He had four children namely, Rajendra, Jaykumar (DW5), Anitaben and Nilesh (2nd defendant). Rajendra, Jaykumar, Anitaben and their mother shardaben live in the UK while Nilesh lives in Kenya.

R. P. Patel was born in Kenya in 1931. He was a British citizen. He was educated in India where he obtained a BSc. in Mechanical Engineering. He was briefly employed by the Kenya Power and Lighting Company Ltd in 1954. In September 1954 he left for St. Andrews University Scotland. He returned to Kenya in 1959 after obtaining degrees in Mechanical electrical and structural engineering. He was employed by Royal Technical College (now University of Nairobi) as an Assistant Lecturer w.e.f. 1st October, 1959 on temporary terms. He was employed on permanent terms w.e.f. 17th May, 1960. He was awarded a scholarship for a 2 year Masters Degree course at McGill University Montreal Canada upto to September 1962. He met Mireille Rota at the University and married her on 18th August, 1962. Mireille Rota, a French, gave evidence for the defence as DW2.

He returned to Kenya with his wife and resumed his duties at the Royal Technical college on 10th January, 1963. The first defendant was born in Kenya on 20th august, 1963; she is the only child of the marriage. His wife, Rota, left for Canada for further studies in 1966. In June 1967 he was awarded a scholarship to complete his Ph.D. degreeat McGill University and he left for Canada where he joined his family.

He successfully completed PHD degree and returned to Kenya with his family in 1970. On 28th September, 1970 he resumed his duties at the University. He rose through the ranks to become an Associate Professor on 1st February, 1972. In 1974 he separated with his wife and in 1976 the marriage was dissolved and his wife left Kenya to live in Germany. He retired from the University of Nairobi as a Dean in the faculty of Engineering in 1969. He retired at Kigwa farm.

He was running a consultancy – Etitet Consultants Limited with other partners. He fell ill in 1983 and in July 1983 he went to UK for treatment. He died in UK on 10th August, 1983 where he was cremated.

Y. P. Patel was also born in Kenya. He went to India for Primary education in 11935. He came back to Kenya in 1948. He was employed by Kenya Farmers Association in 1949. Later he was employed by Standard Vacuum Oil Company (now ESSO). He left Esso in 1981 when his salary was Shs.11,000 p.m.

From 1955 to 1959 he was running Paramount steel wares in partnership with Bachubhai Patel – a business mainly dealing with hardware. In 1959 they took another partner – Induben w/o Chumbhai Khushalbhai Patel. This was a cash business where partners used to share profits on daily basis.

Y. P. Patel pulled out of the business in 1969 to concentrate on farming at Kigwa farm. The same partners were also running a provision store – Nagara stores from 1953. According to Y. P. Patel he also pulled out from Nagara stores in 1969. He has two children Nishitt Yogendra – born in 1952 and Chietna – a married daughter – born in 1972.

From about 1951 P. J. Patel and some members of his family were living in a rented flat at Park Road, Nairobi. These were his wife, his sons P. P. Patel and Y. P. Patel, his daughters Urmillaben Patel and Rammaben, his daughter in-law Shardaben Patel (P. P. Patel's wife) and some of his grand children. R. P. Patel was in UK at that time.

In about 1960 the family moved to Nairobi West house (one of the suit properties). Urmillaben left the house in 1964 after she got married. At that time R. P. Patel was in Canada.

In 1962 R. P. Patel and his wife Rota came back to Kenya. They lived in the Nairobi West house with the rest of the family. R. P. lived in that house with his wife for a couple of months. He then moved to a University flat.

In about August, 1963 R. P. Patel, his wife (Rota) and child (1st defendant) moved to Kigwa farm (in dispute). Chandalbhen (R. P. Patel's mother) moved to Kigwa farm shortly after. In about 1968, the rest of the family moved to Kigwa farm where they again lived in one house.

DESCRIPTION OF THE SUIT PROPERTIES:

3. (i) L.R. NO. 37/243/2 (NAIROBI WEST HOUSE)

The vacant plot measuring 0.1991 of an acre is a leasehold for 99 years from 1st April, 1955 and registered under the Registration of Titles Act. It belonged to Vithaldas vishram Patel (V. V. Patel). By a transfer dated 11th June, 1960, he transferred the plot to P. P. Patel, Y. P. Patel and R. P. Patel as tenants – in – common in equal shares at consideration of Shs.18,500/=. The transfer was registered on 4th July, 1960.

By a charge dated 20th July, 1960 the three proprietors charged the property to South African Mutua Life Assurance Society (SAML) to secure a loan of Shs.90,000/= for the construction of the house on the plot. The charge shows the contract price for the construction of the house was Shs.120,000/= out of which the three proprietors had to raise Shs.30,000/= before the first instalment of the loan could be released. The charge further shows that the principal sum was to be paid by consecutive monthly instalments of Shs.808/95 comprising principal and interest (with effect from 31st December, 1960). The charge was registered against the title on 21st July, 1960 and was discharged on 7th October, 1974. A double storey six-bedroomed house with domestic quarters and double carport was constructed on the plot. The property was valued at Shs.5,000,000/= as at 10th December, 1978 and Shs.5,200,000/= as at 12th December, 1999.

Y. P. Patel pleads in paragraph 8 of the Re-Amended Plaint thus:

"8. The plot L.R. No. 37/243/2 Nairobi West was purchased for shillings 18,500.00 in 1955 and developed in 1960.

The plaintiff spent Shs.120,000 on developing this plot. The plaintiff secured a loan of Kshs.90,000 with interest from South African Mutual now called the Old Mutual which he repaid over the next 15 years. The last payment being made in July 1973 at a monthly rate of Shs.809 which was paid by standing orders through his bank account".

He further pleads that he paid that the purchase price and development cost from his own resources without any contribution from P. P. Patel and R. P. Patel; that in 1955 one Ambalal Patel – a distant relative of the Y. P. Patel and closely associated with freedom fighters (Mau Mau) advised him to buy assets in joint names of plaintiff and his two brothers, that plaintiff's mother Chanchalbben supported the idea' that R. P. Patel was studying in Scotland when the plot was bought, that P. P. Patel did not have the means to make contributions towards the purchase and development of the plot; that he never intended to confer a beneficial interest to his two brothers; that his two late brothers never claimed an interest or rental income during their life time and that plaintiff has been in continuous and uninterrupted

possession and receipt of rental income.

The defendant deny those averment in their respective defence and counter-claim.

3. (ii) KIGWA ESTATE:

Kigwa Estate comprised of two adjacent pieces of land – original L.R. No. 45082 (now L.R. No. 12826) comprising of 111 acres and L.R. No. 4884/2 (now L.R. No. 12442) comprising 90 acres – total 200 acres, situated on eastern side of Kiambu Road about 5 km from Nairobi city centre. It was originally registered under the Government Lands Act.

By an agreement of sale dated 5th September, 1963 Evaline Bessie Bontague Straton, the proprietor agreed to sell the two pieces of land to four persons namely, N. K. Patel, Y. P. Patel, R. P. Patel and P. P. Patel at a consideration of Shs.200,000/= a deposit of Shs.60,000/= was to be paid to Dan Sauvage Limited (land agent for the vendor) before the signing of the agreement. The balance of purchase price – Shs.140,000/= was to be paid on or before 30th September,1963 if the purchasers succeeded in obtaining a loan or alternatively, by annual instalments of Shs.20,000/= or one – half of the proceeds of coffee crop whichever was greater together with interest at 7% p.a., the first instalment being payable on 31st December, 1964 if the purchasers failed to obtain a loan.

It was further agreed that if the purchasers failed to get a loan, they would execute a legal mortgage in favour of the vendor to secure the payment of Shs.140,000/= with interest thereon. The agreement of sale was signed by the vendor and the four purchasers. The conveyance was produced as exhibit. According to that conveyance dated 30th January, 1967, the vendor conveyed the two parcels of land to three purchasers, R. P. Patel, Y. P. Patel and P. P. Patel as tenants in common in equal shares. There is evidence that N. K. Patel left the country before the conveyance was executed.

Apparently the purchasers failed to get a loan and by a legal mortgage dated 31st January, 1967 the three purchasers mortgaged the two pieces of land to the vendor to secure a loan of Shs.55,000/= and interest. The mortgage was discharged by a deed dated 14th June, 1969 acknowledging that the mortgage debt and interest had been fully paid. The farm had 50 acres under coffee at the time it was bought. By 1995 when the suit was filed, there were 230 high pedigree milk cows in the farm.

The two parcels of land comprising Kigwa farm were valued by W. D. Armstrong on 12th December, 1999 for the purposes of this suit. The following information is derived from the valuation report L.R. No. 12442 was surveyed in 1977 for an approved sub-division scheme of residential sub-plots – L.R. Nos. 12442/2 – 12442/25 of approximately 2.5 acres each after which 5.686 acres was surrendered to the Government, for road purposes.

The sub-division L.R. No. 12442/24 was sold in 1982 to Mr. and Mrs. Gathenji for Shs.500,000/= but the conveyance was not registered. The sub-division scheme was abandoned after it was found to be economically not viable. The title for L.R. No. 12442 was surrendered to the Government and replaced with a Grant of lease to. Y. P. Patel, R. P. Patel and P. P. Patel a tenants in common in equal shares for 99 years from 1st April, 1976. The lease is registered under the Registration of Titles Act. Similarly, L.R. No. 12826 was converted to a freehold title. The Grant dated 14th July, 1989 of freehold title was made under the Registration of Titles Act to Y. P. Patel in his personal capacity and as a legal representative of R. P. Patel (deceased) and P. P. Patel as tenants in common in equal shares. The two pieces of land are used for dairy and coffee farming.

According to the valuation report, the open market value of 12442 and 12826 is Shs.26,500,000/=

and Shs.100,500,000/= respectively - total Shs.127,000,000/= as at 12th December, 1999.

Plaintiff avers in paragraph 9 of the plaint that Kigwa farm were purchased in 1962/63 for Shs.200,000/=; that he paid Shs.20,000/= in 1962 and Shs.40,000/= in 1963 at the time of taking possession and the balance by instalments without any contribution by his two brothers. These averments are of course denied by the defendants.

4. THE CONDUCT OF THE SUIT:

The hearing of this suit has consumed a lot of time over a long period. Lengthy Oral evidence was adduced including evidence from witnesses who live abroad. Voluminous documentary evidence was also produced. To compound the dispute long written submissions and numerous legal authorities were filed by respective counsel. It is impossible within the time available to either deal with every factual or legal issue raised in these proceedings or deal with them exhaustively. I propose to deal with only the vital issues raised in the suit.

Mr. Kimani Kiragu for the defendants have raised some legal issues both in the pleadings and in his submissions which go to the jurisdiction of the court to entertain the plaintiff's claim which is mainly based on resulting trust or Benami or to the competence of the suit.

It is convenient that I should have dealt with some of those legal issues at the outset.

4. (i) CONSENT OF LAND CONTROL BOARD

It is pleaded in paragraph 10 of the Re-Amended Defence of first defendant that if there was a trust as claimed by the plaintiff then the transaction was void for all purposes for lack of the consent of the Land Control Board.

The second defendant has also pleaded the same legal issue in paragraph 13 of the Amended Defence and counter-claim. Plaintiff pleads that Kigwa farm was transferred to the purchasers in January 1967 before the Land Control Act (Cap 301) came into operation in December, 1967 and further that the Act has no application to a resulting trust and a Benami transaction. The defendant's counsel has traced the history of the land control legislation since the Land Control Regulations 1961 upto the enactment of the current Land Control Act and referred to relevant provisions of the Independence Constitution and submitted that the creation of a trust in respect of Kigwa estate is a dealing in land which required and still require the consent of the Land Control Board.

Mr. Sharma, learned counsel for the plaintiffs submitted, among other things, that the Land Control Regulations and the Land Control Act did not apply to a "trust" and that even after the 1980 amendment to the Land Control Act, the Act does not still apply to resulting trusts which come into being by the operation of the law. He submitted that the Act only applies to express trusts declared by a settlor.

According to ***section 6 (1) (a)*** of the Land Control Act:

"the sale transfer lease, mortgage, exchange, partition or other disposal or dealing with any agricultural land".

which is situated within a land control area is void for all purposes unless the land control board for the area has given its consent in respect of the transaction.

If I understand the submissions by the defendant's counsel correctly, he contends that since such similar legislation existed at the time the alleged trust in respect of Kigwa farm was created, the consent of the land control board was required which consent has not been shown to have been given.

Section 6 (2) of the land control Act was inserted in 1980 to clarify the law following confusion in the law brought about by the conflicting decisions of the High Court at that time. (See ***Gitimu Kinguru v Muya Gachangi*** [1976] KLR 253 and ***Githuchi Farmers Co. Ltd v. Gichamba*** [1973] EA 8).

Section 6 (2) provides:

"For avoidance of doubt it is declared that the declaration of a trust of agriculture within a land control area is a dealing in that land for purposes of subsection (1)".

What does the phrase, "a declaration of a trust of agricultural land", mean"

In ***Gitimu Kinguru*** case, (supra), the High Court (Madan J, as he then was) was dealing with a claim of trust to land registered in the name of another arising from the relation of the parties and the circumstances of registration. In allowing the claim for a declaration that the registered owner held half share of the land in trust for the defendant, the court held that the creation of trust over agricultural land does not constitute "other disposal of or dealing" in the agricultural land for purposes of ***section 6 (1) (a)*** of the Land Control Act.

I agree with the construction given to ***section 6 (1) (a)*** and ***6 (2)*** of the Act by Mr. Sharma that a declaration of trust therein refers to an express trust created by a settlor indicating the ownership of the beneficial interest. The legislature could not have intended to include the equitable doctrines of implied trusts such as a resulting trust which is not a declaration of trust but is merely a presumption resulting from a judicial construction of the destination of the beneficial interest (in the absence of clear intention of the parties) arising from such factors as the circumstances of transfer of the property and the relation of the parties to the suit. There is no resulting trust in this suit until the court presumes one. It follows that inspite of the enactment of ***section 6 (2)*** of the Act, the decision in ***Gitimu Kinguru*** case is still good law in so far as it refers to implied trusts as opposed to express trusts.

In the present case it has not been shown conclusively that there was legislation requiring the consent of the land control board before a trust could be created. Even assuming that such legislation existed, it is clear that no declaration of trust was created by any party at the time of sale and transfer of Kigwa farm. In the circumstances, no consent of the land control board was required and none is required before the court can pronounce a presumption of resulting trust in a dispute involving beneficial ownership of property.

4. (ii) WHETHER A GRANT OR A TITLE UNDER THE REGISTRATION OF TITLES ACT IS SUBJECT TO UNREGISTERED EQUITABLE RIGHTS

The defendants counsel relying on ***section 23*** and ***32*** of the Act contended, in effect, that not only is an unregistered trust ineffectual to pass any land but also that the title of the registered proprietor is absolute and indefeasible and subject to challenge only on the grounds of fraud or misrepresentation to which he is proved to be a party.

That is what the statute says. However, the plaintiff's claim to land is not based on express trust or any written contract. He is asking the court to presume a resulting trust or existence of a benami transaction in his favour.

In ***Doge v Kenya Canners Ltd*** [1989] KLR 127, the High Court applied equitable principles (promisory estopped) to a land registered under the registration of Titles Act. That the registration of a person as a proprietor of land under R.T.A. does not relieve him of any duties imposed on him as a trustee is implicit from ***section 54*** which states:

"Any person registered as the representative of a deceased person shall hold the land in respect of which he is registered for purpose to which it is applicable according to equity and good conscience and subject to any trusts upon which the deceased proprietor held it, but for purpose of any registered dealings with the land he shall, subject to the provisions of the Act be deemed to be the absolute proprietor therefore".

The English doctrines of equity are parts of our law and are applicable to land registered under RTA so long as they are not inconsistent with the provisions of the statute. In ***Bilous v Bilous*** [1957] EA 96, the defunct Court of Appeal for Eastern Africa subjected the legal estate of land (apparently registered under RTA) to equitable doctrine of trust and authoritatively stated the law, at page 99 paragraph 1 thus:

"It was suggested that system of registration of deeds such as apply in Kenya are in some way incompatible with the recognition of trusts or at least of trusts arising from the operation of law. From the inception of the Torrens system in Australia, this view has consistently been rejected wherever the trust is one which affects the registered proprietor directly and not merely by virtue of his having notice of its existence".

That statement of the law conclusively settles the issue and does not required any emphasis.

4. (iii) DOES THE AGREEMENT OF SALE, CONVEYANCE; CERTIFICATE OF TITLE IN RESPECTIVE OF SUIT PROPERTIES CONTAIN AN EXPRESS DECLARATION OF TRUST AND IF SO, DOES THE COURT HAVE JURISDICTION TO IMPLY A RESULTING TRUST OR DECLARE A BENAMI TRANSACTION IN FAVOUR OF THE PLAINTIFF"

This question raises a complex issue of law which does not have any ready answer.

The respective counsel did not raise the issue directly and coherently. They however, raised the issue indirectly and submitted on it.

The plaintiffs counsel embarked on a exhaustive examination of the application of ***sections 97*** and ***98*** of the Evidence Act which deal with the principle of *"best evidence"* to show that the documents of title showing P. P. Patel and R. P. Patel as co-owners of the suit properties are not conclusive and that oral evidence is admissible to show that only the plaintiff provided the purchase price. On the other hand, the defendant's counsel submitted that the intention of the parties must be found from the instruments that they executed and that the plaintiff is estopped by deed from asserting that he alone owns the suit properties and that his late brothers are not co-owners.

The plaintiff's counsel further contended that ***section 98*** of the Evidence Act does not apply to a Benami transaction.

From the treatises and case law provided by both counsel, it is clear that the Benami system is a Hindu and Muslim custom or practice practiced in India and which has acquired legislative recognition. Its nature and scope and its resemblance to English principles of presumption of a resulting trust is lucidly explained in chapter 29 of ***Maynes Hindu Law & Usage*** 14th Edition thus:

"1. A benami transaction is one where one buys property in the name of another or gratilously transfers his property to another, without indicating his intention to benefit the other. The bemidar therefore has no beneficial interest in the property or business that stands in his name, he represents in fact the real owner and so far as their relative legal position is concerned he is a mere trustee for him. In other words, a benami purchase or conveyance leads to a resulting trust in India, just as a purchase or transfer under similar circumstances leads to a resulting trust in England.

The general rule and principle of the Indian law as to resulting trusts differs but little if at all from the general rule of English law upon the same subject".

The readily discernable difference between the English and the Indian concepts is that whereas in England a presumption of advancement or gift arises where a person conveys property to his wife or son such a presumption of advancement does not arise in a benami transfer. Indeed, a contrary presumption arises that a purchase in the name of the wife or sons is a benami purchase and the burden to prove otherwise lies on the party in whose name it was purchased. This principle is clearly illustrated by the Kenya case of ***Bishan Singh Chadha Ltd v Mohinder Singh and Another*** [1956] 29 KLR 20.

The principle of law arising from a benami purchase as extracted from treatises and case law can be restated thus:

"where property is transferred to one person for a consideration paid or provided by another person and that other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing consideration".

The burden of proving that a particular sale is benami and that the apparent owner is not the real owner, which must be strictly discharged, rests with the person asserting to it to be so. It is a rebuttable presumption of fact (see ***Shah & Co. v Maryam*** [1967] EA 409.

It has been strenuously argued by the defendants counsel that the concept of a benami transaction is not part of the Kenya law and is not applicable in this case. He, may be right, at least partially; seeing that there are Indian statutes which govern the benami system such as the Indian Trusts Act and the Benami Transaction (Prohibition) Act 1988 which statutes are not part of our law.

However, it is not necessary for purposes of deciding the legal issue presently under consideration to make a definitive finding whether the benami concept (which has been applied in Kenya in the past amongst Hindus and Muslims) is infact applicable today in its purest form. This is so because a benami principle as applied in India is the counter-part of the principle of English resulting trust which is applicable in Kenya.

The plaintiff in this case is not setting up a benami transaction against a son or a wife in which case on proof of purchase in the name of son or wife a presumption of benami would be readily drawn as opposed to presumption of advancement under English law, (see ***Bishen Singh Chadha v Mohinder Singh & Another*** (supra); ***Shallov maryam*** (supra). In reality the plaintiff's cause of action is based on the equitable principle of trust whether the plaintiff categorises it as presumption of a resulting trust or a benami transaction. The nomenclature is for all intents and purposes immaterial and for the purpose of the suit I will treat a benami transaction as synonymous with a resulting trust.

Indeed, the learned counsel for the plaintiffs concedes that a conclusion that the transaction was a

benami transaction and the conclusion that the transaction was a resulting trust produces the same result.

Now turning to the presumption of resulting trust this category of trusts arise in order to give effect to the intention of the parties where the parties have not made their intention clear on the face of the instrument effecting the transfer of property as to where the ownership of beneficial interest lies – that is where there is a *"beneficial vacuum"*. A resulting trust arises by operation of equity. Where however, the transferor has no intention to create a trust and such an intention cannot be inferred from the circumstances of the case the resulting trust will not arise in ***Ayoub v Standard Ban of S.A.*** [1963] EA 619, the privy council said at page 623 paragraph A:

"The courts will not imply a trust save in order to give effect to the intention of parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied".

The Privy Council adopted the general rule stated in ***Cook v Fountain*** (1676) 36 ER 984 at page 987, that:

"The law never implies, the court never presumes a trust, but in a case of absolute necessity".

(See also ***Mbothu & Others v Waitimu & 11 Others*** [1986] KLR 171 page 189, 2nd paragraph where the two passages were applied).

The present case concerns purchase of land in the name of three brothers. The law on this aspect of resulting trust is clearly spelt out in paragraph 613 at page 424 *Halsburys Laws of England* – 4th Edition – Re Issue Vol. 16(2) thus:

"Joint transactions:

The principle that the property is deemed to be held on resulting trust applies where several persons purchase property in the name of one. Where, however, two or more persons purchase property in their joint names or transfer property into their joint names without making an express declaration as to their beneficial interests and contribute the purchase money or property in equal shares, they hold the property as joint tenants with benefit of survivorship both at law and in equity, unless there is evidence of a contrary intention on their part at the time of purchase or transfer or there are circumstances from which such an intention can be inferred. If they contributed purchase money or property in unequal shares, whether the property is purchased in the name of one or in their joint names, there is a tenant in common between them in equity, although even in this case the equitable tenancy in common may be rebutted by evidence or circumstances.

If there is a specific declaration in the conveyance as to the parties interests, this will prevail. Thus if a conveyance of property to X and Y contains; for instance, an express declaration that the property is to be held by them as joint tenants, the fact that X may have paid all the mortgage instalments in respect of the property is not relevant in determining how the property is held and would not give rise to a resulting or constructive trust".

The importance of the documents of conveyance or transfer of property to the co-owners in determining the vesting of the beneficial interest in the property has long been recognized. The importance of such documents is best illustrated by English cases involving disputes between husband and wife regarding property rights.

In ***Pettit v Pettit*** [1969] All ER 385, Lord UpJohn, while recognising that property rights of husband and wife must be judged by general principles of law applicable to ordinary litigants, said in part, at page 405 paragraph H – I:

"In the first place the beneficial ownership of property in question must depend on the agreement of parties determined at the time of acquisition. If the property in question is land there must be some lease or conveyance which shows how it was acquired. If that document declares not merely in whom the legal estate is to vest but in whom the beneficial interest is to vest, that necessarily concludes the question of title between spouses for all time in the absence of fraud or mistake at the time; of transaction the parties cannot go behind it at any time thereafter even on death or break up of the marriage".

In ***Wilson v Wilson*** [1963] 2 All ER 447, a dwelling house was conveyed in the joint names of husband and wife *"upon trust to sell the same … and to hold the net proceeds of sale …… upon trust for themselves as joint tenants".* The court gave effect to the express declaration of trust with Russel LJ saying in part at page 452 paragraph 1:

"suppose in those circumstances that the beneficial trust expressly declared of the proceeds of sale had been for the husband and wife in equal undivided shares, there would in my judgment have been no jurisdiction under the section *(section 17 of married women's property Act, 1882)* ***to make an order in a different sense, any more than there would have been such jurisdiction in a ordinary action by the wife claiming half the net proceeds of sale …".***

At page 453 paragraph E, his Lordship continued:

"I mention this only to stress the fact that in my judgment there is for present purposes no distinction to be drawn between a clearly declared beneficial joint tenancy and a clearly declared beneficial interest in undivided shares. Each is a clearly defined and formally agreed and declared beneficial title, which in my judgment, the court has no more right to override under the summary procedure of s. 17 than has it was in an action".

That case was followed in ***Goodman v Gallant*** [1986] 1 All ER 311 where a conveyance transferred a house to the names of two persons as beneficial joint tenants to hold the property:

"UPON TRUST to sell the same … and shall hold the net proceeds of sale – UPON TRUST for themselves as joint tenants".

There the court emphatically said at page 314 paragraph e:

"If, however, the relevant conveyance contains an express declaration of trust, which comprehensively declares the beneficial interests in the property or its proceeds of sale, there is no room for the application of the doctrine of resulting; implied or constructive trusts unless and until the conveyance is set aside or rectified; until that event the declaration contained in the document speaks for itself".

Turning to the present case, it can be readily appreciated that the circumstances pleaded by Y. P. Patel as giving rise to a resulting trust in his favour are both peculiar and unique. It is not the familiar type of cases where property is purchased in the name of another or others the purchaser providing purchase money but his name does not appear in the title. Nor is it a case where several people contribute the purchase money in equal or unequal shares the title referring to them as joint owners

without specifying their respective beneficial interest in the property. In the later case, a presumption of equitable joint tenancy or tenancy in common would arise depending on contribution to the purchase price made by each co-owner. Lastly, this is not a case like ***Wilson v Wilson*** (supra) ad ***Goodman v Gallant*** (supra) where the conveyance shows the registered proprietors as both legal joint tenants and beneficial joint tenants. To recast it, this is a case where although the three brothers are registered as proprietors of the suit lands as both legal tenants in common and beneficial tenants in common in equal shares, one brother claims that he solely contributed the purchase price; that the other two are bare trustees who hold their respective shares in resulting trust or are Benamidar for him.

The Nairobi West House – L.R. No. 37/243/2 was transferred in the names of the three brothers to *"HOLD the same …… as tenants – in – common in equal shares"*. The vendor acknowledged in the conveyance (dated 11th June, 1960) the payment of the consideration of Shs.18,500/= by the three brothers. The mortgage dated 20th July, 1960 to secure the loan Shs.90,000/= for construction of the house was executed by the three brothers who *"JOINTLY AND SEVERALLY"* agreed to repay the loan.

The agreement of sale for L.R. No. 4508/2, 4884/2 (Kigwa Estate) dated 5th September, 1963 show the purchasers as the three brothers. The three brothers signed the agreement of sale. The mortgage dated 31st January, 1967 to secure Shs.55,000/= part of the purchase price of Kigwa farm was taken by the three brothers who all executed the mortgage. By the conveyance in respect of Kigwa estate dated 30th January, 1967, the vendor conveyed the land to the three purchasers:

"To HOLD the same unto and to the use of the purchasers their heirs and assigns as tenants in common in equal shares …".

By the conveyance, the vendor acknowledged receipt of payment of the consideration (Shs.200,000) by three purchasers. Subsequently after Kigwa estate was sub-divided and the original Grant surrendered to the Government, the Government made a Grant of a lease for a portion of kigwa estate – L.R. No. 12442 to Y. P. Patel, R. P. Patel and P. P. Patel *"TO HOLD as tenants in common in equal shares"*. Similarly, by the Grant dated 14th July, 1989 the Government granted a freehold title in respect of the remaining parcel of Kigwa farm (L.R. No. 2826 "YOGENDRA PURSHOTTAM PATEL in his personal capacity and as a person representative of RAJNIKANT PURSHOTTAM PATEL (deceased) and PNAHILAD PURSHOTTAM PATEL (to hold as tenants in common in equal shares)" … *"TO HOLD the same in fee simple …"*.

There can be no doubt that the conveyance of Nairobi West house contains an express declaration of trust. Both the legal title and the beneficial interest was vested in the three brothers. The three brothers were to hold the beneficial interest as tenants in common in equal shares. Similarly, the conveyance of the two parcels of land comprising Kigwa estate and the subsequent respective Grant of leasehold and freehold title contain an express declaration of trust as to the vesting of the beneficial interest. Both the legal title and the beneficial interest were conveyed to the three brothers. The brothers were to hold the beneficial interest as tenants in common in equal shares.

As we have seen, in ***Wilson v Wilson*** (supra) Russel L.J. could not see any distinction between a clearly declared beneficial joint tenancy and a clearly declared beneficial interest in undivided shares.

In my view, where the agreement, or the conveyance or Grant declare that the legal tenants are to hold the property, "as tenants in common in equal shares" that is a more explicit more comprehensive, and more exhaustive express declaration of trust considering the profound differences between a tenancy in common and a joint tenancy.

It is not necessary to spell out the inherent characteristics of a joint proprietorship and proprietorship in common as they are statutorily defined in section 102 and section 103 respectively of the Registered Land Act (Cap 300 Laws of Kenya) (RLA). I only emphasize that in a joint tenancy, there is a unity of title (that is, one title) and that each joint tenant has a right of survivorship (that is, on the death of a joint tenant, his interest in the land vests in the surviving joint tenant or tenants). In contrast, in a tenancy in common, in equal shares there are several titles depending on the number of tenants and each tenant, among other things, holds a fixed, distinct, but undivided share in the whole which upon his death is transmitted to the administrators or executors of his estate and administered as part of his estate.

It is noteworthy that under ***section 22 (4)*** of RTA one certificate of title is issued to tenants in common for the entirety although the Registrar of Titles has a discretion to issue a separate certificate to each such person for his undivided share without requiring a partition. ***Section 22 (4)*** provides:

"22 (4) (a) when two or more persons are entitled as tenants in common, the Registrar shall issue to those persons one certificate of title for the entirely discribring them as tenants in common.

22 (4) (b) Notwithstanding the provisions of paragraph 9, the registrar may, in his discretion and on payment of the prescribed fees issue a separate certificate to each such person for his undivided share".

The statement of Russel L.J. in ***Wilson's*** case (supra) that a declaration of beneficial trust in form of *"equal undivided shares"* is conclusive and denies the court jurisdiction to make a different order was of course an *obiter dictum* as court in that case was there construing the expression to hold *"upon trust for themselves as joint tenants"*. But the decision in that case and in other similar cases more particularly the ***Goodman*** case lay a general principle of universal application. By parity of reasoning a hold in the present case that the expression to hold *"as tenants in common in equal shares"* contained in the respective agreement of sale, transfer; certificate of title and Grants of Nairobi West house and Kigwa farm is an express declaration of trust which conclusively determined the beneficial ownership of the three properties among the three brothers at the time of the acquisition and there is no room for the application of the doctrine of the resulting trust or Benami transaction until the conveyance, certificates of title and Grants are set aside or rectified in a manner prescribed by the law. That express declaration of trust denies the court jurisdiction to hold both that the properties in dispute solely belong to the plaintiff and that P. P. Patel and Y. P. Patel hold their respective equal shares as bare trustees for the plaintiff.

It follows that the plaintiff's suit is inherently incompetent and has to be dismissed. That decision effectively determines the plaintiff suit.

4. (V) There is subsidiary legal issue, namely, whether extrinsic evidence is admissible to show that Y. P. Patel alone purchased the suit properties without any contribution from P. P. Patel and R. P. Patel.

By ***section 97*** of the Evidence Act, extrinsic evidence is not admissible to proof the term of a contract or a Grant or any other disposition of property which has been reduced into writing. The terms of such documents can only be proved by the document itself or secondary evidence of contents of such document where secondary evidence is admissible.

Secondly, by ***section 98*** of the Evidence Act; upon proof of the terms of the document, evidence of any oral agreement or statement is inadmissible *"between the parties to such a document"* for purpose of contradicting, varying, adding or subtracting from its terms except in the limited cases specified in that

section.

In this case, the relevant terms are contained in two classes of documents. First, there are the terms of the contract of sale as contained in the agreements of sale of Kigwa farm and the mortgages showing that the purchasers in both cases were the three brothers. The second class of documents containing the terms are the conveyances, Grant and certificate of title showing that the properties in dispute were conveyed to the three brothers and registered in their names as tenants in common in equal shares. It is noteworthy that a *"grant"* as defined in ***section 2*** of the RTA means:

"any conveyance agreement for sale lease or licence for a period exceeding three years made by and on behalf of the Government and includes a certificate of title issued pursuant to the provisions of this Act".

By ***section 22 (1)*** of RTA a certificate of title is issued whenever land comprised in a grant has been transmitted but as provided by ***section 22 (3),*** such fresh certificate of title has the same legal effect as if it was the original grant. By ***section 23 (1)*** such certificate of title is conclusive evidence of ownership.

The plaintiff's counsel relying on several local decisions and many Indian authorities contended that ***section 98*** of the Evidence Act does not apply to fictitious documents which were never intended to be relied upon by the parties. The defendant's counsel on the other hand contended that estoppel by deal arises in this case and relied on paragraph 954 of the *Halsbury's Laws of England* – 4th Edition Re-Issue Vol. 16 (2) which provides:

"*Estoppel by deed* ***where there is a statement fact in a deed made between parties an estopped results and is called "estoppel by deed. If upon true construction of the deed the statement is that of both or all parties the estoppel is binding on each. If otherwise, it is binding only on the party making it. It seems that an estoppel also arises upon a deed executed by one party only, the mode of execution being equally solemn with that of a deed made inter partes. Moreover, when a legal estate is created by deed, the parties to that deed are estopped from denying the existence of that estate (typically a lease or mortgage) and from denying the consequent status of the other party, for example as his landlord or the tenant".***

In this case, the terms of the contracts of sale and terms of grant, or certificate of title in respect of both properties are not in dispute. The construction of ***section 97*** of the Evidence Act does not therefore arise. Most of the authorities relied on by the plaintiffs counsel relate to the construction of ***section 92*** of the Indian Evidence Act – which is in *pari materia* with our ***section 98***.

The subject matter of those decisions is either the meaning of the phrase *"as between the parties to any such instrument or their representatives"* in ***section 98*** or whether the extrinsic evidence has the effect of contradicting, varying, adding or subtracting from the terms of the document under consideration. It seems to me that the meaning of the italicised words is not in doubt. According to both local and India authorities they refer to both contradicting parties and not to third parties or parties on one side of the contract *inter se*. ***Section 105*** of the Evidence Act, indeed, allows third parties to a document to give evidence of contemporaneous agreement varying the terms of the contract. The case of ***Mulchand & Another v Madho Ram,*** ILR 10 All 421 cited by the plaintiff's counsel deserves special consideration because of its apparent similarity with the present case.

The facts in that case were as follows: The vendor executed a deed of sale of a certain houses and other premises in favour of two brothers Ganga Prasad and Mulchand jointly at Rs.1000. The deed was registered and one of the endorsements made at the time of registration stated that the vendor

acknowledged that Rs 200 had been previously paid and that the balance of Rs800 had now been paid to him before the sub-Registrar by both Ganga and Mulchand. Ganga subsequently sued Mulchand praying in substance for a declaration that he alone was the real purchaser and for the ejectment of Mulchand and his son from a portion of the premises which they had occupied for several years but to which they asserted proprietary title. The plaintiff alleged, among other things, that although Mulchand's name was also entered in the deed, he provided the whole of the purchase money. The defendants pleaded that Mulchand was in fact and not merely nominally purchaser under the deed; that he had paid Rs500 of the purchase money from his own pocket and that he had been in proprietary possession of the premises. The court of first instance found that the plaintiff's allegations were established by evidence and allowed the claim. On appeal, the District judge found that plaintiff had established as a fact that he had paid the whole of the consideration for sale and affirmed the decision of the court of first instance. On appeal to the High Court the High Court heard the appeal on the merit and decided to remand some issues or questions of fact to the lower appellate court when a legal plea in bar of the action was raised for the defendant under ***section 92*** of the India Evidence Act (similar to our ***section 98***). It was contended that the inquiries which the High Court proposed to make could involve the consideration of oral evidence, which may have the effect of varying the terms of the sale-deed under which the plaintiff and the defendants jointly acquired the premises in the suit. That objection involved the proper interpretation of the phrase *"as between the parties to any such instrument"* used in ***section 92***.

The High Court overruled the objection and held that ***section 92*** does not preclude plaintiff from showing by oral evidence that he alone was the real purchaser notwithstanding that the defendant was described in the sale – deed as one of the two purchasers. The High Court stated at page 423 (last line) to 424 (1st paragraph):

"But on the other hand, we think that this section would not apply to questions, like that of the present case raised by the parties on one side *inter se,* ***and not affecting the other party to the contact touching their relations to each other in the transaction. The evidence in this respect would be offered not to vary contradict add to or subtract from the terms of the Vendees joint liability under the contract of purchase and sale from their vendor, but only to show as*** *between themselves* ***the two Vendees to wit, which was the real purchaser, or rather whether Mulchand was not the trustee only of his brother Ganga Prasad".***

The Indian case is distinguishable from the present case. There, the registered deed of sale conveyed the premises in dispute to the two brothers "jointly", apparently without making an express declaration as to their beneficial interest. The dispute was about the beneficial interest of each. That was a typical case for the application of the presumption of resulting trust for equity presumes a trust in favour of the person who contributes the whole of the purchase price when the property is conveyed into the joint names of himself and another.

The equitable presumptions which arise when purchase price is contributed by one person or by two or several persons are succinctly restated in the Australian case of ***CALVERLEY V GREEN*** 56 ALR 483 thus:

"(i) where a person pays the purchase price of a property and causes it to be transferred to another and himself jointly the property is presumed to be held by the transferees upon trust for the person who provided the purchase price.

(ii) Where two or more persons advance the purchase price of property in difference shares, it is presumed that the person or persons to whom the legal title is transferred holds or hold the

property upon a resulting trust in favour of those who provided the purchase price in the shares in which they provided it".

Those are rebuttable presumption. Parol evidence is admissible to show who provided the purchase price and if provided by several people to show theeir proportionate share of contribution. Parol evidence is also admissible to rebut the presumptions whenever they arise.

The application of ***section 98*** of the Evidence Act is also illustrated by the ***BILOUS*** case (supra) a Kenyan case. In that case the parties who were husband and wife agreed to buy a farm jointly. Each contributed equally to the payment of the deposit and the balance of the purchase price was to be secured by a mortgage which they jointly executed. However, the conveyance was executed in favour of the wife at the instigation of the wife and without approval of the husband. The husband made substantial improvements on the farm at his own expense with the consent of the wife. At the trial of the suit by the wife for a declaration that the farm was her sole property, the husband sought to call an advocate as a witness to give evidence of the circumstances under which the conveyance was executed in the name of the wife only. The trial judge refused to admit oral evidence holding that no oral evidence was admissible to vary or explain the contract conveyance or mortgage such evidence being excluded by ***section 91*** and ***92*** of the Indian Evidence Act (which applied in Kenya at that time). On appeal, the Court of Appeal held that since the husband was not a party to the conveyance, ***section 92*** could not prevent him from showing how it came to be executed saying at page 99 paragraph H:

"It was submitted that section 92 precluded him from giving evidence to support his claim. But his evidence did not contradict or vary the conveyance or the mortgage. He claims an equitable interest which is entirely apart from the legal estate. It is an equity of redemption; but that is quite immaterial and cannot affect the position of the cestui – que – trust. He claims something which the conveyance and mortgage do not in any way refer either positively or negatively ".

Again the ***Bilous*** case is a typical case for the application of the presumption of resulting trust. Parol evidence admissible to support that presumption as well as to rebut it.

If the only documents available to show the intention of the parties in this case were the documents in the first class – that is, the mortgage in respect of Nairobi West house, agreement of sale in respect of Kigwa estate and the mortgage in respect of Kigwa estate which merely show the three brothers as co-purchasers without identifying the beneficial interest – each in the two properties, then extrinsic evidence would undoubtedly be admissible to show that plaintiff solely contributed the purchase price to support a presumption of resulting trust.

However, those documents were superseded and subsumed in the second class of documents, that is the conveyance in respect of Nairobi West house, conveyance in respect of Kigwa estate and the subsequent Grants which not only bestowed the legal title to the three brothers but also conferred the beneficial interest to the three brothers *"as tenants in common in equal shares"* distinguishes this case from the rest. As I have said before, the conveyances and Grants not only bestow legal title to three brothers, but also create an express trust in their favour, thereby exhausting both the legal estate and the beneficial interest thereby leaving no beneficial vacuum.

Extrinsic evidence, if allowed will have the effect of contradicting or subtracting from the terms of the express trust *"tenants – in – common in equal shares"* contained in the conveyance and in the Grants. Such evidence is futile as logically a presumed resulting trust cannot be super – imposed on an express trust.

The plaintiff is a party to the conveyance and Grants, which create both legal estate and beneficial estate in favour of the three brothers. The title of the three brothers is sanctified by section 23 of RTA. The plaintiff is estopped from asserting and proving by extrinsic evidence that the contents of the conveyance showing that the three brothers own the beneficial interest as tenants in common in equal shares, does not correctly express the intention of the three brothers at the time the suit properties were conveyed to them. That is a second reason why the plaintiff suit should fail in its entirely.

5 (1) MERITS OF THE PLAINTIFF'S CASE:

I have already found that as a matter of law the presumption of resulting trust or benami transaction has no application in this case; that parol evidence to prove a resulting trust is inadmissible and that the plaintiff is estopped by conveyance and Grants from asserting that the beneficial interest is owned by the three brothers otherwise than as tenants in common in equal shares.

Although those findings completely dispose of the suit, I am required to consider the evidence. I will do so very briefly.

The doctrine of resulting trust is said to be based on the unexpressed but presumed intention of the true purchaser or purchasers of the property. So the purpose of the parol evidence is to show the intention of the purchasers that they intended to create a trust. The existence of the trust is established once and for all and crystallises on the date on which the property is acquired.

As for the rebuttal of the presumption of resulting trust the authors of SNELL'S EQUITY 29th Edition state at page 180 thus:

"The act and the declarations of the parties before or at the time of the purchase or so immediately after it as to constitute a part of the transaction are admissible in evidence either for or against the party who did the act or made the declaration; subsequent acts and declarations are only admissible as evidence against the party who made them, and not in his favour".

That passage was cited with approval as by the House of Lords in ***Shephard v Cartwright*** [1955] AC 431. The ***Shephard's*** case was cited with approval in ***Mutiso v Mutiso*** [1988] KLR 846.

If the property is bought through a mortgage executed by all the purchasers, each purchaser is thereby considered to have contributed to the purchase price and the fact that the mortgage instalments are paid by one party only may be immaterial, depending on the circumstances of each case. Such payment of mortgage instalments may, however, be considered when taking accounts between the parties – ***Calverley v Green*** (supra). In that case Gibbs CJ expressed himself at page 488 last paragraph thus:

"where a person alone has provided the purchase money, it is his or her intention alone that has to be ascertained. In the present case however, both purchasers contributed the purchase money. The amount of $18,000 borrowed under the mortgage was provided equally by parties for it was lent to them jointly, on terms which made them jointly and severally liable for its payment, and having thus been borrowed was applied by them in part payment of the purchase price".

On the other hand Mason and Brennan JJ reasoned in the same case at page 493 thus:

"It is understandable but erroneous to regard the payment of mortgage instalments as payment of purchase price of a home. The purchase price is what is paid in order to acquire the

property; the mortgage instalments are paid to the lender from which the money to pay some or all of the purchase price is borrowed …

……..

…….

They mortgaged that property to secure the performance of their joint and several obligations to repay the principal and to pay interest. The payment of instalments under the mortgage was not a payment of the purchase price but a payment towards securing the release of the charge which parties created over the property purchased".

5 (ii) PURCHASE OF NAIROBI WEST HOUSE:

Plaintiff testified that he negotiated the price with the vendor of the plot, V. V. Patel on 28th July, 1955 and paid the price of Shs.18,500 as follows:

28-7-1966 - 2,500

2-11-1959 - 8,000

15-11-1959 - 4,000

6-12-1960 - 4,000

He produced counter-foils of three cheques to show that Shs.8,000, Shs.4,000 and Shs.4,000 were paid from his account.

From that evidence, the court is supposed to establish the intention of the parties in 1959/1960 – over 40 years ago. As R. P. Patel and P. P. Patel are long deceased, their intentions at the time of the purchase of the property cannot be established. The court can only consider the surrounding circumstances to find out what their intentions were.

The three counter-foils do not have the name of the plaintiff. They are not supported by respective bank statements to show that the payments were infact made from the plaintiff's account and if so the identity of the account.

The three counter-foils cannot be said to be books of account. They are not shown to have been in proper custody. They are not acknowledgments for receipt of payment by the vendor. There is no concrete evidence of the source of money. There is no evidence of the payment of the balance of Shs.2,500.

The loan Shs.90,000 taken subsequently for the construction of the house is not part of the purchase price of the plot. The mortgage was executed by the three brothers thereby indicating that all the three brothers contributed to the development of the plot.

The bank statements produced by the plaintiff show that the paid the loan through a standing order at Shs.809/95 per month from February, 1961 to July, 1973. That evidence is not decisive. There was evidence that this was a close-knit Hindu family. The family lived in one rented house at Park Road sharing family expenses before the Nairobi West Plot was built and developed. There was evidence that

R. P. Patel was paying school fees for his sister Urmillaben D. Patel (DW4).

P. P. Patel was also making monthly contributions to Y. P. Patel Shs.500-600 per month and later Shs.800 per month from 1960 – 1968. R. P. Patel was supporting his mother. There was also evidence that Y. P. Patel was paying for his father's expenses and that his father was saving all his salary which he earned from his employment with the then East African Railways and Harbours. There was evidence from Urmillaben – sister to the three brothers, that the purchase of the Nairobi West house and Kigwa farm was a joint venture by the three brothers. There was also evidence from Shardaben (DW6) – widow of P. P. Patel, that the three brothers jointly bought the Nairobi West plot and developed. The fact that the loan for development of the plot was advanced to the three brothers and the fact that the plot was conveyed to three brothers as tenants in common in equal shares is inconsistent will the evidence of the plaintiff.

There are also other attendant circumstances, which are inconsistent with the plaintiff's evidence. When the Nairobi West house was built all the family members moved there in about 1962. They lived in the house up to about 1967 sharing family expenses. The plaintiff was not being paid rent for the occupation of the house. When Mireille Rota (DW2) – R. P. Patel's wife and R. P. Patel came from Canada in 1962 they lived in the same house with the rest of the family. According to Mireille Rota – her husband told her that he designed the house and contributed the purchase price. She described the family as a traditional joint Hindu family and said that the three brothers shared everything. Y. P. Patel admitted that R. P. Patel did the architectural designs for the house which he produced as exhibit (Ex.11).

A drawing produced as defence exhibit indicated that it was a family house of *"P. Y. R. FAMILY"*. The plaintiff admitted that in the tax returns, he filed on behalf of R. P. Patel and P. P. Patel for 1992, 1993, 1994, 1995, 1996 he declared their respective share of rental income from Nairobi West house.

The share of rental income of R. P. Patel and P. P. Patel is admittedly shown in some of the balance sheets produced by the plaintiff – e.g. the balance sheet for year ending 31st December, 1983 (Ex. 5B page 213 XXIV (Shs.195,804/07) in respect of R. P. Patel). It is the plaintiff who filed High Court Succession case No. 424 of 1986 in respect of the estate of R. P. Patel. In paragraph 6 of his affidavit sworn on 6th June, 1986 to support the petition, he gave the inventory of R. P. Patel's estate thus:

"ASSETS:

Credit balance atBarclays Bank Of Kenya Limited Moi Avenue

NAIROBI - Shs. 10,190.00

Credit balance In the partnership

Firm Kigwa Estate - Shs.412,440.00

1/3 share in L.R. No. 37/243/2

Nairobi West …….

Shs.150,000.00".

That was a solemn admission that R. P. Patel was entitled to 1/3 share of the Nairobi West house.

The second defendant (Nilesh Patel) testified that it is the plaintiff who also instructed the firm of Susan Munyi & Co. Advocates to file High Court Succession Cause No. 251 of 1994 in respect of the estate of P. P. Patel although Nilesh Patel is shown as the petitioner. In the petition P. P. Patel is shown as proprietor of :

1. L.R. No. 12442 (1/3 share).

2. L.R. No. 12826 (1/3 share).

3. L.R. No. 37/243/ (1/3 share).

The first two items are the two pieces of land comprising Kigwa estate. The third asset in the – Nairobi West house. Plaintiff denied giving the lawyers the inventory of P. P. Patel estate. The evidence of Nilesh Patel is credible and I believe it because Y. P. Patel gave a guarantee dated 31st December, 1993 for the due administration of that estate to the extent of the value of the estate shown therein. The Grant was given to the 2nd defendant on 28th April, 1994.

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

5 (iii) PURCHASE OF KIGWA FARM

According to the agreement of sale dated 5th September 1963 the purchase price of shs.200,000 was to be paid in two lots. The deposit of Shs.60,000 was to be paid before the signing of the agreement. The balance of Shs.140,000 was to be paid in lumpsum on or before 30th September, 1963 if the purchasers obtained a loan, or by annual instalments of shs.20,000 or one-half of the proceeds of coffee crop, whichever was greater, first instalment falling due on 31st December, 1964.

Plaintiff testified that the deposit of Shs.60,000 was paid through debits of Shs.20,000, Shs.38,000 and Shs.2,000 in his personal account as shown at page 13 of the Vol.1 of his documents (Ex.5A). He testified that he paid the balance of the purchase price through his account as follows:

(i) Shs.20,000 - on 29/12/1964 (Ex.5A page 12V)

(ii) Shs.13,000/75 - (interest) – on 19/10/1965 – Ex.5A–page 12Z

(iii) Shs.28,400 – on 27/1/1966 – Ex 5A page 12BB

(iv) Shs.45,000 – on 31/3/1966 (Ex. 5A page12 DD)

(v) Shs.5,637/50 – (interest) on 28/1/1967 (Ex 5A) page 12 ii

(vi) Shs.15,000 – on 15/1/1968 – Ex. 5A – paage 1200

(vii) Shs.17,000 – on 12/2/1969 – Ex. 5A page 12 xx

(viii) Shs.27,569/75 which was the last instalment, on 21/3/1969 –

Ex. 5A page 12 yy.

It seems from the evidence of the plaintiff that the purchasers did not manage to get a loan and that the balance of the purchase price was paid partly through annual instalments and partly from a loan from the vendor. The plaintiffs bank statement relating to the payment of deposit (page 13 of Ex. 5A) shows partly as follows:

DEBIT – SHS.	CREDIT – SHS.
9/8/1963 – 20,000	
20/8/1963 – 20,000	17/8/1963 – 11,950
30/8/1963 – 2,000	
31/8/1963 – 5,000	
2/9/1963 – 5,000	
4/9/1963 – 38,000	4/9/1963 – 11,000
5/9/1963 – 2,000	

The plaintiff explained that he raised the deposit for Shs.60,000 as follows:

Shs.30,000	-	Personal loan from his sister Urmillaben
Shs. 3,000	-	borrowed from his wife.
Shs. 5,000	-	borrowed from N. K. Patel.
Shs. 2, 000	-	borrowed from J. D. Patel.
Shs.11,000	-	from Paramount Steel Wares
Balance	-	overdraft from the bank.

When cross-examined by Mr. Havelock who at first appeared for the first defendant, plaintiff explained the entries at page 13 of Ex. 5A thus: First credit of Shs.20,000 was a loan from his sister. The second credit of Shs.111,950 was from Paramount Steel Wares – that is his own deposit. Shs.5,000 from the wife, Shs.3,000 – may be from Nagara Stores. That the deposit of shs.11,000 was a composite deposit from a number of resources. He denied that the Shs.11,000 was contribution from R. P. Patel.

He continued:

"Regarding deposit of Shs.11,950, I now remember that I took Shs.10,000 from my sister but do not remember the source of Shs.1,950 to make a total of Shs.11,950. I now remember that the Shs.11,000 was transfer from Paramount Steel Wares. I confirm that none of those credits were paid by any of my two brothers".

The evidence show that to meet the eight payments of the balance of purchase price tabulated

above, each payment was preceded by a credit – deposit in the plaintiff's account to meet the payment as hereunder:

In Ex. 5A page"

12V - 18/12/1964 deposit of Shs.19,300

12Z - 19/10/1964 deposit 22,095/75

12BB - 26/1/1966 deposit 23,808/10

12DD - 22/2/1966 deposit 25,118/85

12ii - 25/1/1967 deposit 18,431/75

11200 - 2/1/1968 deposit 13,325/60

Plaintiff explained that all those credits either came from Paramount Steel Wares or from proceeds of coffee. He specially stated that the Shs.19,300, Shs.11,692/60 and Shs.22,095/75 came from Paramount Steel Wares.

The plaintiff was cross-examined by Mr. Kiragu for the defendants regarding the entries at page 13 of Ex.5A. He stated that the first Shs.5,000 was his own money, which he had kept in the house. Regarding the deposit of Shs.20,000 he stated:

"I got the Shs.20,000 as a bringing loan from somebody else which I deposited into the account. I then got Shs.20,000 from Mrs. Patel (my sister) which I used to repay the bridging loan. I cannot remember who lent me the Shs.20,000 bridging loan but it was from a friend. I do not remember if it was Mr. B. J. Patel, A. J. Patel or anybody else who lent me the Shs.20,000 Mr. B. T. Patel and Mr. A. J. Patel did not lend me any money. I was a bit shot of cash between 1966 and 1971 as I was developing the farm but I used to borrow money from either K.P.C.U., bank or from friends".

The Agreement of sale executed on 5th September, 1963 acknowledges that the deposit of Shs.60,000 had already been paid to Dan Sauvage Limited.

If the agreement of sale is read together with the plaintiff's statement of account at page 13 of Ex. 5A then it seems that the deposit of Shs.60,000 was paid by three instalments of Shs.20,000 on 20th August, 1963; Shs.38,000 on 4th September, 1963 and Shs.2,000 on 5th September, 1963.

The finding contradicts the plaintiff's earlier evidence and pleadings that the deposit was paid by two instalments of Shs.20,000 and 40,000 respectively.

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

It is true that his sister Urmillaben gave admitted that she lent money for the purchase of Kigwa farm but she was categorical that she lent a total of Shs.30,000 to the three brothers to purchase the kigwa farm on the advise of her mother. The letter dated 25th May, 1974 from her bank – document No. 24 of

Ex. D5 shows that she withdrew Shs.20,000 from her account on 20th August, 1963; Shs.2,000 on 25th July, 1994 and Shs.8,000 on 3rd December, 1964.

Plaintiff admitted that the Shs.30,000 lent by Urmellaben Patel was used for the purchase of Kigwa farm. The Shs.20,000 credited on the plaintiff's account on 20th August, 1963 must be the money given by Urmillaben and cannot be a bridging loan from an unkwnown friend as explained by the plaintiff. Further, the additional shs.10,000 lent by Urmillaben was lent in two instalments in 1964 and therefore cannot be part of the Shs.11,950 credited to the plaintiff's account on 17th august, 1963.

As for the payment of the balance of the purchase price, plaintiff claimed that the annual instalments were substantially raised from his two businesses in Paramount Steel Wares and Nagara stores. According to the plaintiff the two businesses belonged to the same partners. There is evidence from defence witnesses that the two were small businesses but plaintiff refutes that evidences, saying that the two businesses were profit making and successful businesses. There is no concrete evidence that the plaintiff was earning high volumes of profits which would have met the annual instalments for payment of purchase price for Kigwa farm as plaintiff would want the court to believe. Firstly, plaintiff could not raise any substantial part of the deposit of shs.60,000. He had only a saving of about Shs.5000 in his house according to his evidence.

It is not probable that the respective deposits into his bank account preceding the payment of each annual instalment of the purchase price could have been profits from the two businesses because by plaintiff's own admission, the two businesses were cash businesses where the partners were sharing profits on daily basis. There is no evidence that the plaintiff was banking his share of his daily profits in his account No. 2497733 at Barclays Bank Queensway House which has been in existence since 1948. In any case, as I have said, the respective cash deposits preceding payment of each annual deposit were made immediately before the payment of the annual instalment. Those deposits are not an accumulation of annual savings in the account. Lastly, plaintiff did not produce any financial records relating to the two partnership businesses.

It was the defendants' case that successive annual deposits in the plaintiff's account to meet the annual instalments substantially came from proceeds of coffee credited into the plaintiff's account. This was not however supported by documentary evidence. Plaintiff denied that the annual instalments were made from proceeds of coffee and stated that the coffee farm was operating at a loss until 1977 when the farm started making profits. According to the agreement of sale, it was envisaged that Shs.20,000 annual instalments towards the balance of the purchase price could be paid from proceeds of coffee. Plaintiff admitted that coffee picking started in 1963/1964. When questioned by Mr. Havelock about the source of credits in his accounts to meet payment of annual instalment of the purchase price plaintiff answered:

"To meet the debits, money was paid to my account as credit. That money was either from paramount steel wares, proceeds coffee or Nagara stores. The balance sheet show that".

It is the plaintiff who has been in possession of all the relevant documents including documents belonging to P. P. Patel and Y. P. Patel. Plaintiff infact admitted that his brothers left all their documents at Kigwa farm. Plaintiff failed to produce the statement of account for kigwa farm from K.P.C.U. for the relevant period – that is 1963 – 1969. Those accounts could have shown the proceeds from coffee from Kigwa farm for each year and the amount, if any, credited to plaintiff's account. Plaintiff only belatedly produced the statement of account of Kigwa farm for periods January 1982 to December 1993 and from January, 1994 – January 2002.

Those statements of accounts are incidentally addressed to Patel P. P. and Y. P. Patel thereby indicating (contrary to plaintiff's evidence) that the account is in the name of P. P. Patel and Y. P. Patel. I draw the inference from failure by plaintiff to produce such vital statements of account that the relevant entries in the missing statements is adverse to his case.

Moreover, the Shs.55,000, part of the balance of purchase price of Shs.140,000 was a loan from the vendor secured by a mortgage dated 31st January, 1967 executed by the three brothers so the last three instalments of Shs.15,000; Shs.17,000 and Shs.27,569/75 made after that date are deemed to be contributions to purchase by the three brothers who executed the mortgage.

Plaintiff produced the bank statements of R. P. Patel personal account at Barclays Bank from February 1967 to 7th March, 1986. He also produced 34 selected counter foils allegedly of his cheque books for the period from 24th October, 1979 to 28th September, 1983. Those documents were produced as proof that R. P. Patel was living beyond his means, that he had no means to contribute to the purchase price and that he did not contribute any. As admitted by the plaintiff, R. P. Patel left all those documents in the house at Kigwa. This is a rare case where a plaintiff in adversarial proceedings is using the documents of the defendant to advance his case without the consent of the defendant or of his legal representatives.

Secondly, those statements do not wholly refer to the relevant period. One statement is for the period from February 1967 to December 1967. The second statement contains one entry for 1969, then uncompleted entry for 1970. The third and last statement contains entries for 1971. The counter-foils do not have the name of R. P. Patel or the account number. Those documents are not books of accounts. They are not shown to have been produced from proper custody. In my view, the are not only ex facie inadmissible in evidence but also, in my view, have no evidentiary value. There is oral evidence from R. P. Patel's wife – Mireille Rota (DW2) – that R. P. Patel was an external examiner for several Universities abroad and that he used to earn additional income from these sources. There is also evidence that his wife was working most of the time she was living in Kenya. There is documentary evidence that he was in full employment of the University of Nairobi from 1st October, 1955 to 31st August, 1979 when his contract expired. Indeed, plaintiff admitted that the salary of R. P. Patel at the relevant period double the salary that plaintiff was earning.

Similarly plaintiff produced the savings Bank Pass Book for P. P. Patel for the period from November – December 1961; January – December 1962 and January – July 1963. He also produced numerous cheque counter foils allegedly for his bank account with Bank of Baroda from 1959 to 1969. They were produced to show that he had no means to contribute to the purchase price of both Nairobi West house and Kigwa farm and that he did not make any contributions. All those documents were left by P. P. Patel in the house at Kigwa farm when he migrated to UK in 1969. Plaintiff have used them to advance his case without his consent or that of his legal representative.

The counter foils do not have the name of P. P. Patel or his account number. I would place them in the same category as the bank statements and cheque counter-foils of R. P. Patel. They are not ex facie admissible and have not evidentiary value in a case of this nature where the court is engaged in discovering the presumed intention of the parties at the time the properties in dispute were purchased. In any case, such evidence in the absence of the evidence of P. P. Patel about his income and expenditure, is totally abstract.

There is oral evidence particularly from Nilesh Patel (2nd defendant) Mireille Rota (DW2) Urmillaben D. Patel (DW4) and Shardaben Patel (DW6) that Kigwa farm was bought by the three brothers and that each contributed to the purchase price. According to Urmillaben, she lent Shs.30,000 to the three

brothers for the purchase of Kigwa farm and that before the arm was purchased P. P. Patel, Y. P. Patel and N. K. Patel visited their uncle I. B. Patel in Arusha. The evidence that Urmillaben lent Shs.30,000 for the purchase of the farm is admitted by the plaintiff. However, plaintiff stated that the money was lent to him and not to the three brothers. I found urmillaben to be a credible witness. I believe her evidence that she lent the money to the three brothers on the advice of her mother. According to Mireille Rota the buying of the Kigwa farm was a big event for the whole family.

It is also not in dispute that after the Kigwa farm was bought R. P. Patel and his wife moved to the main house and started living there. The plaintiff and the rest of the family later in 1967/1968 moved to Kigwa farm and leased the Nairobi West house. The evidence shows that the family continued to live in one house as before and shared expenses. That all the three brothers worked in the farm in the evenings and weekends is not disputed.

The evidence of the plaintiff that his brothers abandoned the farm and that he was in sole possession is not credible and is not supported by evidence. Nilesh Patel (2nd defendant) testified that the migration of P. P. Patel to UK was a matter discussed in the family and a consesus reached that he should move to UK for wider interests of the family. It is noteworthy that P. P. Patel was a British citizen. Even after P. P. Patel moved to UK he donated a General power of Attorney dated 7th June, 1974 to the plaintiff and continued to visit Kigwa farm regularly. Nilesh Patel produced a table of his visits to Kenya (Ex. D6) extracted from his passport. Plaintiff also admitted that P. P. Patel corresponded with him on several occasions inquiring about the progress of the farm and coffee.

Further Nilesh Patel – has always worked and lived in Kigwa farm from 1969 until 1994 when he moved out following the dispute about his father's share of the farm. Jaykumar Patel (DW5) – another son of p. P. Patel and a civil engineer was called by plaintiff from UK to work on a development project in the farm. He lived and worked in Kigwa farm from 1978 – 1991. There were also correspondence exchanged between plaintiff and the family of P. P. Patel living in UK (part of Ex. D5).

According to the plaintiff Kigwa, farm had no separate bank account and the proceeds of coffee and milk from Kigwa farm were being banked in his personal current account No. 2497733. This was confirmed by Nilesh Patel who testified, and it is admitted by plaintiff, that plaintiff authorised him to operate that account from 1972 to 1993.

One of the houses in Kigwa farm was rented to Peter Dann (PW3) from March 1983 to October 1988. The rent for that period was paid in foreign currency (DM) into a UK account in the name of Nilesh Patel and his brother Ranjendra. There was evidence that plaintiff was also a signatory to this foreign account.

There is no evidence that R. P. Patel had relinquished possession of Kigwa farm until he died in 1983. On the contrary, the evidence shows that after he retired as Dean of the faculty of Engineering he settled on kigwa farm and only left the Kigwa farm when he went to UK for treatment. Upon his death, plaintiff applied for and obtained a Grant of letters of Administration to his estate on 22nd October, 1986.

Earlier, on 1st December, 1973, plaintiff and R. P. Patel had incorporated a company – Housing Trust Company Limited (Memo & Artcles – Ex. 8) purposely for sub-division and sale of part of the kigwa estate. According to the plaintiff the company was to sub-divide and sell plots (2½ acres) each to members of public for construction of dwelling houses. But according to Nilesh Patel, the company was to sub-divide the farm and develop a housing scheme and sell houses to members of public. Jay Kumar Patel was infact called by plaintiff from UK for that project. The sub-division scheme was approved by Nairobi City Council. As the Valuation Report of Kigwa farm by W. D. Armstrong shows, L.R. 12442

(part of Kigwa farm) was sub-divided in 24 – 2½ acre plots. One plot was L.R. No. 12442/24 was infact transferred to Mr. & Mrs. Gethenji on 21st April, 1983 but although the transferred was stamped, it was not registered. The transfer was executed by plaintiff, R. P. Patel and plaintiff as attorney of P. P. Patel. The plaintiff, after some hesitation, ultimately admitted that he authorised the sub-division of the farm. According to Nilesh Patel the project was later abandoned because it was not financially viable. The company was ultimately deregistered in January 1984.

That a sub-division scheme was a major alteration of the ownership of the Kigwa farm. By approving the sub-division scheme the plaintiff affirmed that his two brothers were the co-owners of the land. The sub-division resulted in a new Grant of lease for L.R. 12442 in 1976 to the three brothers as tenants in common in equal shares. That was the right moment for plaintiff to have claimed that land if he was the sole owner. Subsequently, in 1989, a Grant of freehold title was made to the three brothers in respect of L.R. No. 12826 to hold as tenants in common in equal shares. Again, that was the opportune time for plaintiff to have obtained a Grant in his own name if he was the sole owner. He did not.

The plaintiff produced balance sheets and accounts for Kigwa Estate for several years. They were prepared by M/s. G. C. Patel, accountants and auditors on the instructions of plaintiff. Plaintiff infact signed most of them. The balance sheets upto 1991 show the three brothers as partners in Kigwa farm. I will refer to only a few as an illustration. The Balance sheet for period from 1st September, 1963 to 31st December, 1964, the first one, has an entry as follows:

"PARTNERS' ACCOUNT:

1. Rajni P. Patel

Balance on 31st December 1964 – 1998 98,256/05

2. Yogendra P. Patel

& Pralhad P. Patel (Partners)

Balance on 31st December 1964 38,958/62".

The balance sheet as 10th August 1983 (when R. P. Patel died) has the following entry:

"YOGENDRA P. PATEL (PARTNER)

Share of accumulate profit Ltd 250,407.15

PRACHAD P. PATEL (PARTNER)

Share of accumulated profit Ltd 250,407.15

RAJNI P. PATEL (PARTNER)

(Died on 10/8/1983)

as per last B/S 102,033.35

Add share of accumulated profit

L/d 250,407.23 412,440.58

LESS-DIVIDED AS UNDER:

Yogendra P. Patel - 250,407.15

Pralhad P. Patel - 250,407.15

Rajni P. Patel - 250,407.23".

Plaintiff produced in all 56 balance sheets. R. P. Patel signed one, P. P. Patel signed three and the rest are signed by plaintiff. Plaintiff stated that he accepted responsibility for all those accounts. According to the plaintiff the profits were being accumulated with the consent of his brothers until 1983 when he instructed the accountants to share the profits. However, it is a common ground that the shared profits was not infact paid out to the partners. Two of the balance sheets for 1995 and 1976 have an entry:

"1. Salary to partner (Y. P. Patel)"

showing that plaintiff was paid of salary as a partner of Shs.30,000 and Shs.42,000 respectively. The balance sheet for 1979 also show that plaintiff was paid Shs.72,000 as *"supervision & technical advice charges"*.

The evidence show that different balance sheets were prepared for Kigwa estate and plaintiff's personal accounts until 1991 when plaintiff claimed to be the sole proprietor of Kigwa farm and instructed the accountants to prepare separate balance sheets. Thus, the accounts for 1992, 1993, 1994 and 1995 (last accounts) do not show Kigwa farm as a partnership property but as sole property of the plaintiff.

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

Lastly, plaintiff in paragraph 6 of the affidavit to support the petition for Grant of letters of administration in respect of estate of R. P. Patel in Succession Cause No. 424 of 1986 deposed that the assets of the estate included *"credit balance (of Shs.412,440) in the partnership firm Kigwa farm".* Similarly, in Succession Cause No. 251 of 1994 in respect of the estate of P. P. Patel in which plaintiff was a surety and in which a grant has been issued, the estate is owns 1/3 share of L.R. No. 12442 and 1/3 share of L.R. No. 12826 (Kigwa estate). Those are further admissions by plaintiff that each of his two brothers owned an equal share of Kigwa estate.

Plaintiff claimed that the cattle at Kigwa farm belonged to him. Nilesh Patel disputed this and asserted that the cows belong to the Kigwa farm and were paid for on account of Kigwa estate. The balance sheets, as have shown, state that Kigwa estate is a partnership farm where each of the three brothers owns shares, contributed further capital and earned profts. I believe the evidence that the cattle were purchased from income from the farm and belong to the three brothers equally.

From the foregoing, I have come to the conclusion that plaintiff has not proved his case, even on the merits, on a balance of probabilities.

Plaintiff has made an alternative claim for Shs.88,166,667 which is the value of the 2/3 share of the first and second defendants. Since the plaintiff has not proved that he solely owns the Nairobi West house and the Kigwa estate he is not entitled to the value of the 2/3 share owned by the defendants.

6. LIMITATION OF ACTIONS ACT:

It was submitted by counsel for the defendants that the plaintiff's claim is time-barred by limitation of Actions Act. Plaintiff's counsel however contended that the claim is not time barred for three reasons, viz; It is a claim for declaratory judgment; plaintiff has been in possession of all through and defendants made a claim to the land for the first time in 1993.

The suit properties are not registered in the name of the plaintiff alone. They are registered in the names of the plaintiff and his two brothers to hold as tenants in common in equal shares. The titles do not show that plaintiff's brothers are registered as trustee for the plaintiff. Rather, they show that plaintiff's brothers are registered in their own right as co-owners in common.

It is clear from the plaint that plaintiff is claiming one-third share of the land from each of his two brothers. Plaintiff's claim is in essence is a claim to recover land from each of his two brothers. Whether the defendants laid claim to the land in 1993 is immaterial because plaintiff could not have recovered the share of each of his two brothers unless the two brothers voluntarily transferred the land to him or alternatively the court awarded him the share of the land registered in the name of his two brothers. His brothers could not voluntarily transfer their respective shares of land to him since they are deceased. Therefore, it was imperative that the plaintiff had to file a suit. In my view, the suit to recover the share of land belonging to each of his two brothers should have been filed within 12 years from the time the three brothers were registered as proprietors in common in equal shares. The claim is in respect of Nairobi West house has been made over 35 years since the transfer in the name of the three brothers was registered on 4th July, 1960. The claim in respect of Kigwa farm was filed after 30 years from the date of conveyance of the property in 1967. The suit is time barred.

If I am wrong in that finding then, I am convinced that the plaintiff's claim is defeated by equitable doctrine of lashes. There has been very long and substantial delay in filing the suit. Because of the long delay both R. P. Patel and P. P. Patel died as result of which the evidence in defence of the plaintiff's claim has been lost or destroyed causing prejudice to the defendants. Indeed, the documentary evidence produced has been one-sided because plaintiff even took possession of the documents that his deceased brothers could have used. It is inequitable in the circumstances to allow the claim.

7. COSTS:

Regarding the costs of the suit, this has been a protracted and expensive litigation. The plaintiff has been in control of suit properties and has never distributed income from rent in respect of Nairobi West house and profits earned from coffee and dairy farming in Kigwa estate. The plaintiff's suit has not succeeded. In the circumstances, it is only just that the costs should follow the event.

8. COUNTER – CLAIM:

The first defendant's counter-claimed for a declaration that the estate of R. P. Patel is entitled to the income and proceeds with interest of the suit properties; and an order that the suit properties be sold and

the net proceeds be shared equally between the plaintiff, estate of R. P. Patel and estate of P. P. Patel and costs.

The first defendant as a tenant in common in equal shares has a right to deal with her share of the Nairobi West house and Kigwa estate without the permission of the court.

She can sell her undivided share without the authority of the court. However, it is not easy for her to sell her undivided shares particularly to third parties seeing that the other co-owners are her relatives. I can see a lot of problems particularly in selling her 1/3 share of Kigwa estate to strangers.

In my view, it is just that the first defendant should offer her share for sale. In the disputed properties to one or both co-owners as first priority and if they decline to buy or fail to offer acceptable price then offer her shares for sale to other close family members. If that fails then she can sell her shares to any interested purchaser. The second defendant is entitled to accounts and income from the suit properties.

The second defendant counter-claims for a declaration that the estate for P. P. Patel is entitled to income, an order for accounts since 1991, payment of sum found due and costs.

The accounts from 1991 have been prepared in the name of the plaintiff only. The second plaintiff is entitled to the orders sought in the counter-claim.

For the foregoing reasons, I dismiss the plaintiff's suit with costs to the first and second defendants. There will be no order as to the costs of the application for appointment of receivers which have been overtaken by events. I allow the counter-claim of the first defendant to the extent that:

(i) I grant the declaration in prayer 2 of the counter-claim.

(ii) An order for accounts since 1991.

(iii) An order that plaintiff do pay any sum found due to the estate of R. P. Patel with interest at court rates.

(iv) An order that the first defendant has liberty to sell her 1/3 undivided share of L.R. Nos. 12826 and 12442 and L.R. Nos. 37/243/2 first to both or one of the co-owners as first priority and if that fails to any close family member and if that fails then to any interested person on terms and conditions mutually agreed.

(v) Liberty to apply in respect of Order No. IV above.

(vi) Costs of the counter claim to 1st defendant.

Simlarly, I allow the second defendants counter-claim in terms of prayers 2, 3, 4 and 5 of the counter-claim with costs.

In respect of prayer No. 4 of the counter-claim, plaintiff will provide accounts from 1991.

Those are the orders of the court.

Dated and delivered at Nairobi this 13th .day of March, 2006.

E. M. GITHINJI

JUDGE OF APPEAL