



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)

PETITION NO. 18 (E020) OF 2022

—BETWEEN—

ARVIND SHAH 1ST APPELLANT
HARSHABEN SHAH 2ND APPELLANT
GOSHRANI HOLDINGS LTD 3RD APPELLANT
COAST PROPERTIES LTD..... 4TH APPELLANT
COAST CLAY WORKS LTD.....5TH APPELLANT
COAST MAIZE MILLERS LTD.....6TH APPELLANT
SPA MILLERS NAIROBI LTD..... 7TH APPELLANT
HIGHWAY CENTRE LTD 8TH APPELLANT

—AND—

MOMBASA BRICKS & TILES LIMITED 1ST RESPONDENT
DINESH KUMAR ZAVERCHAND JETHA..... 2ND RESPONDENT
ATEET DINESH JETHA..... 3RD RESPONDENT
ZAVERCHAND SOJPAL JETHA HOLDINGS LTD..... 4TH RESPONDENT
EXON INVESTMENTS LTD 5TH RESPONDENT
EXON PLASTICS LTD 6TH RESPONDENT

Representation:

Francis Wasuna & Hannington Amol for the Appellants
(ALP Kenya Advocates)

Mohammed Nyaoga SC for the 1st & 2nd Respondents
(Mohammed Muigai Advocates LLP)

Wamuti Ndegwa for the 3rd & 4th Respondents
(Ndegwa & Sitonik Advocates)

Ambrose Weda for the 5th & 6th Respondents
(Weda & Co. Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This Petition of Appeal dated 28th July, 2022 challenges the decision of the Court of Appeal in *Civil Appeal No. 117 of 2018* delivered on 4th April, 2019. It is filed pursuant to the Court's Ruling dated 8th July, 2022. In the said Ruling, we granted the appellants leave to appeal to the Supreme Court, limited to the following issues certified as being of general public importance:

- i. *Whether a constructive trust can be imported into a land sale agreement to defeat a registered title therefrom; and*
- ii. *Whether a constructive trust can be imported into a shareholding of a company as to disentitle a registered holder of shares in a company obtained for valuable consideration.*

B. BACKGROUND

[2] Sometime in May, 2005, the respondents experienced financial challenges as a result of debts incurred by the 1st respondent, and secured by Plot No.500/VI/Mainland North (Title No. C.R. 4226) (suit property) registered in the name of the 1st respondent. The suit property housed a brick factory, a maize mill factory, a coconut extracting factory, a go-down, office blocks, a workshop, a

residential house, ancillary buildings and included various machines and equipment. The brick making machinery and equipment, other movable and immovable assets were not part of the security but were attached to the suit property. The suit property was however threatened with sale by the financier, Standard Chartered Bank Ltd, to recover the monies secured by it.

[3] In an effort to save the suit property, Dinesh and Ateet Jetha, the 2nd and 3rd respondents, at the time tasked with the running of the 1st respondent, sought the assistance of the 1st appellant, Arvind Shah, a close and trusted friend perceived to be an experienced and successful businessman running numerous profitable companies. The 1st appellant recommended the restructuring of the 1st respondent. This involved the incorporation of two holding companies, Zaverchand Sojpal Jetha Holdings Ltd, the 6th respondent, to be owned 100% by the respondents and Goshrani Holdings Ltd, the 3rd appellant, to be owned by the 1st appellant or his agents. These two companies would then incorporate four other companies to hold various assets of the 1st respondent. The four incorporated companies are: Coast Properties Ltd; Coast Maize Millers Ltd; Coast Clay Works Ltd; and Spa Millers Nairobi Ltd, which are the 4th, 5th, 6th and 7th appellants, respectively. At incorporation, the companies did not own any assets. The companies were to hold the 1st respondents' assets for the sole benefit of the respondents during the process of repayment of the facility and redeeming the assets from the charge held by Standard Chartered Bank Kenya Ltd.

[4] The respondents acted upon the 1st appellant's recommendations. Before the incorporation of the companies was complete, the 1st respondent passed a resolution dated 2nd June, 2005 to sell the suit property. Subsequently, a sale agreement between the 1st respondent and the 8th appellant was entered into for the sale of the suit property for the sum of Kshs. 27,000,000/- equivalent to the outstanding loan amount owed to Standard Chartered Bank Kenya Ltd.

[5] To forestall the looming auction, the 1st appellant approached Standard Chartered Bank Kenya Ltd with the resolution, the sale agreement and a proposed settlement of the outstanding debt upon registration of title to the suit property in favour of the 8th appellant or its nominee. Standard Chartered Bank accepted the

proposal on condition that 10% of the purchase price, being Kshs. 2,700,000/-, be paid upfront as a non-refundable deposit and a guarantee for payment of the balance thereof be given by a reputable bank. Concurrently, the 1st appellant sought financing from Giro Commercial Bank Limited who had agreed to offer a loan facility secured by the suit property.

[6] As a consequence, the 10% deposit and a bank guarantee by Giro Commercial Bank were released to Standard Chartered Bank who in turn released the title of the suit property to the Advocates acting for both the 8th appellant and Giro Commercial Bank. A discharge of the charge in favour of Standard Chartered Bank was subsequently registered.

[7] In the meantime, the incorporations of the 4th to the 7th appellants were concluded with the shareholding comprising the 1st appellant, 4th respondent and the 3rd appellant each holding 20, 490 and 490 shares, respectively. The directors of the 4th to the 7th appellants were the 3rd respondent and 1st appellant. Subsequently, the 8th appellant nominated the 4th appellant to be registered as proprietor of the suit property. The brick making plant and maize milling factory on the suit property were assigned to the 5th, 6th and 7th appellants.

[8] Thereafter, the 4th appellant applied for a loan and an overdraft facility of Kshs.50,000,000/- from Giro Commercial Bank to finance the purchase of the suit property and its working capital. The financing was approved on 11th August 2005. A fresh charge over the suit property was registered in favour of Giro Commercial Bank and the balance of the outstanding loan released to offset the loan at Standard Chartered Bank.

[9] Seemingly, underlying issues concerning the shareholding and controlling interest of the companies therein surfaced in the year 2009 resulting in the institution of numerous suits by the parties.

C. LITIGATION HISTORY

i. High Court

[10] Several suits were filed at the High Court being, *HCCC No. 2, 21, 22, 23, 24 all of 2009, Misc. No. 4 of 2009* and *HCCC. No.9 of 2011*. Pursuant to the trial court's

directions on 26th July 2012, all the cases were stayed pending determination of HCCC No. 9 of 2011 whose outcome would guide the related cases.

[11] In *Mombasa High Court Civil Case No. 9 of 2011* against the appellants, the respondents sought the following orders:

- a. *A declaration that the 4th, 5th, 6th and 7th appellants held and continue to hold the piece of land known as 500/VI/MN and all the attachments thereto in trust for the respondents.*
- b. *A mandatory injunction compelling the defendants herein to unconditionally transfer the title and interest on plot No. 500/VI/MN back to the 1st respondent or the respondents and or their nominee.*
- c. *In the alternative, a setting aside or nullifying the purported agreement of the sale dated 31/8/2005 in respect of the transfer of the land from the 1st respondent to the 4th appellant.*

In the alternative and without prejudice to the above,

- a. *A declaration that the shares held by the 1st and 3rd appellants in the 4th, 5th, 6th and 7th appellant companies are held by the said 1st and 3rd appellants in trust for the respondents.*

In a further alternative,

- i. *As against the 1st, 3rd and 4th, 5th, 6th and 7th appellants, the said appellants be ordered to pay the respondents through the 1st respondent 50% of the market value of the suit plot No.500/VI/MN, brick manufacturing machinery and every asset of the respondent as at the date of valuation actual payment.*

In a further alternative,

- a. *As against the 4th, 5th, 6th and 7th appellants, the Honourable court be pleased to order that the respective contributions into the past and present assets of the 4th, 5th, 6th and 7th appellants as between the respondents and the 1st, 2nd, and 3rd appellants be assessed by an auditor appointed jointly by the parties hereto or by the court.*
- b. *The value of the assets and in particular plot No. 500/VI/MN and the brick manufacturing machinery over and above the nominal value of the shares be declared to be share premium and be transferred to the share premium account.*
- c. *The 4th, 5th, 6th and 7th appellant companies be directed to increase their authorised capital and issue such bonus shares as the court will direct from the*

said share premium and the said share premium capital be deemed as allotted and issued to the shareholders according to their actual proportionate contribution to the assets of the company and the memorandum and Articles of Association and or share register be deemed as amended accordingly and share certificates issued.

d. Any other relief as the Honourable Court may deem fit.

[12] The appellants filed a defence and counterclaim seeking *inter alia* the following orders:

- a. Mombasa High Court Civil Suit Nos. 2, 21, 22, 23 and 24 of 2009 be dismissed with costs to the 1st, 2nd and 3rd appellants.*
- b. The 1st, 2nd and 3rd respondents jointly and severally be ordered to pay mesne profit to the 3rd appellant in the sum of Kshs. 1,200,000/- per month from 1st May 2013 until the 2nd and 3rd respondents vacate the suit premises.*
- c. The 1st respondent be restrained from running the affairs of the 3rd and 4th appellants without the involvement of the 1st and 2nd appellants.*
- d. A perpetual injunction be issued against the 2nd, 3rd and 4th respondents from engaging in any business, trade or manufacture of any item in the suit premises.*
- e. An order of eviction to evict the 2nd and 3rd respondents from the suit premises.*
- f. A declaration that the 1st and 2nd appellants are entitled to the shares they hold in the 4th-7th appellants.*
- g. Punitive and aggravated damages against 3rd respondent for trespass/conversion.*

[13] The respondents alleged that the 1st appellant, Arvind Shah, had misrepresented his true intention in offering his advice to the 1st respondent, took advantage of the 1st respondent's vulnerable situation and Ateet Jetha's inexperience to induce the 1st respondent to enter into the arrangement it did. Furthermore, the respondents contended that the sale of the suit property to the 8th appellant was unconscionable since the amount of Kshs. 27,000,000/- allegedly

paid as consideration was nowhere near the value of the land which at the time was estimated at Kshs. 150,000,000/-.

[14] On the other hand, the appellants denied the allegations and averred that the 1st respondent's resolution, sale agreement and transfer of the suit property spoke for themselves. According to Arvind, when he set out to offer his assistance and or advice he did not do so on a philanthropic or charitable basis. He did so as a business venture expecting returns and benefits for his effort. It is on that basis that he mobilized not only his resources but those of his family members and companies associated with them to salvage the assets in question. That he went to great lengths to halt the auction and obtain the requisite financing from Giro Bank to pay off the outstanding debt to Standard Chartered Bank. That it was agreed that in exchange for his assistance he and the 3rd appellant would hold a controlling interest in the 4th to 7th appellant. Thus, the 1st appellant denied exerting any undue influence or making any misrepresentation with respect to his intention of getting involved with the respondents.

[15] The parties consented to the determination of the following issues at the High Court : *whether the document dated 2/06/05 described as a resolution by the 1st respondent Company to sell land known as Subdivision Number No. 500 section VI Mainland North, is a lawful document or a document obtained by unlawful means; whether the document dated 31/08/05 is a lawful Agreement of Sale of Subdivision Number No. 500 section VI Mainland North by the 1st respondent to the 8th appellant/nominee or whether it was obtained by unlawful means; whether the document described as a Transfer of Subdivision Number No. 500 section VI Mainland North from the 1st appellant to the 4th appellant is a lawful Transfer, whether the consideration was paid and whether it was obtained by unlawful means; and whether the shareholding structure in the Memorandum and Articles of Association of the 4th, 5th, 6th and 7th appellant embody a lawful Shareholders Agreement between the respondents and the 1st, 2nd and 3rd appellants or whether that structure was procured by unlawful means.* All other issues in the suit and counterclaim would abide the determination of these 4 (four) issues.

[16] In its judgment dated 22nd December, 2017, the High Court determined that; the resolution dated 2/6/2005 by the 1st respondent was valid and not amenable to disturbance by the court; the respondents voluntarily made a resolution to sell the suit property and received an agreement for sale, had it executed properly in accordance with the law; there was no coercion or undue influence in the signing of the sale agreement; and that the Memoranda and Articles of Associations of the companies incorporated for the purpose of salvaging the suit property were freely negotiated, agreed and executed. The court further held that, the sale agreement dated 31st August, 2005 was valid, lawful and binding and it did convey and confer to the purchaser a valid and good title to the land purchased.

[17] The trial court also found that the parties executed the agreement for sale as well as the transfer for a consideration of Kshs. 27,000,000/-, a sum which was paid to Standard Chartered Bank as a chargee who had moved to exercise its statutory power of sale. It found that the shareholding structure exhibited in the Memorandum and Articles of Association had not undergone any alterations but remained as they were at incorporation, and the respondents did not prove the accusations of undue influence or coercion. It observed that once a Memorandum and Articles of Association is registered, it binds the members, and the members cannot unilaterally denounce any provision thereto or just renege therefrom. As to the counterclaim, the court stated that by virtue of the ownership of the suit property, the 4th appellant is entitled to the benefits flowing from such proprietorship. The court also upheld the 4th appellant's rights as fundamental under Article 40 of the Constitution

ii. Court of Appeal

[18] Aggrieved by the decision of the High Court, the respondents filed *Civil Appeal No. 117 of 2018* premised on 30 grounds of appeal while the appellants filed a cross appeal. The Court of Appeal framed the issues for determination as: *whether the parties were proper parties to the suit; whether the shares held by the 1st and 3rd appellants are held in trust for the 1st respondent or its nominees; whether the 4th appellant holds the suit land in trust for the 1st respondent or its nominees; whether the sale agreement and transfer of the suit land should be nullified; whether the*

circumstances surrounding the dispute called for lifting of the corporate veil of the concerned companies; whether the imposition of payment of mesne profits on the 5th and 6th respondents was proper; whether there was legal basis for directing the audit of the accounts held by the 5th and 6th respondents; whether an inspector should have been appointed under Section 165 of the Companies Act to inspect the 5th respondent's affairs; and whether the learned judge erred in not granting costs to the appellants or imposing interest on the mesne profits and misappropriated funds.

[19] In its judgment delivered on 4th April, 2019, the Court of Appeal allowed the appeal and dismissed the cross appeal. It held that; the parties before the court were well suited for purposes of the determination of the dispute as each party played a role in the dispute; there was a relationship of trust between the respondents and the 1st appellant, who offered to reorganize and restructure the respondents' business in order to salvage the suit property; instead of using his position as a trustee, the 1st appellant set out a scheme to purchase the property at Kshs.27,000,000/- unjustly enriching himself and he was conflicted between his duties as a trustee and his scheme to purchase the property. It further held that, there was a presumption of undue influence on the part of the 1st appellant as the net effect of the documents giving rise to the arrangement the parties found themselves in did not reflect the true and independent consent of the 1st to 4th respondents. The transactions thus met the criteria of being regarded as unconscionable bargains. The court lifted the corporate veil of the 3rd and 8th appellants holding that the companies were used to cover the 1st appellant's improper conduct. The court in that regard deemed the said appellants to be one and the same with respect to the transaction in issue.

[20] The Court of Appeal further found that the 1st and 3rd appellants hold the shareholding in the 4th to the 7th appellant companies in trust for the 1st respondent or its nominees, and the 4th appellant holds the suit land in trust for the 1st respondent. Whereas the 4th appellant's title is registered under Section 23 of the repealed Registration of Titles Act, the Court of Appeal found it impeachable. Thus, it nullified the sale agreement dated 31st August, 2005 and the transfer of the suit property to the 4th appellant.

C. PROCEEDINGS BEFORE THE SUPREME COURT

a. Appellants' Case

[21] Dissatisfied with the decision of the Court of Appeal, the appellants have preferred the instant appeal. They seek the following orders:

- a. The Petition of Appeal be allowed.*
- b. The Judgment of the Court of Appeal in Mombasa Civil Appeal No. 117 of 2018 dated 4th April 2019 be quashed and set aside.*
- c. The Honourable Court reinstates and upholds in entirety the Judgment of the High Court in Mombasa Civil Case No. 9 of 2011 and delivered on 26th February, 2015 be upheld. (sic)*
- d. Alternative to (c) above, having set aside the Court of Appeal decision, the Honourable Court does substitute it with the Honourable Court's own decision.*
- e. Any other remedy the Honourable Court may deem just in the circumstances.*
- f. Costs of the Appeal and the suits in the courts below be met by the respondents jointly and severally.*

[22] The appeal is premised on 28 grounds, reframed for precision as follows: that the Learned Judges erred in law and in fact in;

- i. Finding that the agreement dated 31st August 2005 between the 8th appellant and the 1st respondent did not represent the will of the parties and that the same was entered through undue influence, and unconscionable bargain.*
- ii. Finding that the 1st appellant was at all material times in a fiduciary relationship of a trustee to the respondents when no such relationship or expectation existed and misconstruing that the suit property in the agreement of sale dated 31st August 2005 was being held in trust for the 1st respondent.*
- iii. Failing to interpret and apply the provisions of the Law of Contract Act and laws relating to the disposal of rights in land hence varied material*

- provisions of a written contract for sale of land duly executed by parties thereto and duly registered.*
- iv. Reaching a judgment that erroneously overrode established principles of contract and the provisions of Section 3 Law of Contract Act, Sections 36, 41, 43 and 44 of the Land Registration Act.*
 - v. Relying on contested and unproven facts to conclude that the actual value of the suit land was Kshs. 150 million and attempting to write a new contract when on the face of the said consideration, the consideration was sufficient.*
 - vi. Finding that the shares held by the 1st, 2nd, and 3rd appellants in the 4th, 5th, 6th and 7th appellants were wholly held in trust for the 1st and 3rd respondents and declaring that a trust existed between the parties in the entire arrangement when no elements of trust were present thereby depriving the 1st and 3rd appellants of their property as well as shares in 4th - 7th appellants.*
 - vii. Introducing a non-existent unwritten shareholders agreement to vary the terms of the Memorandum and Articles of Association of a company hence overriding the provisions of Sections 30, 93, 104 and 105 of the Companies Act.*
 - viii. Finding that the 1st, 2nd and 3rd appellants had not demonstrated that they paid consideration to acquire the shares in the 4th, 5th, 6th and 7th appellants.*
 - ix. By ordering the appellants to continue servicing obligations towards the credit facilities obtained by the 4th - 7th appellants when the court found that they had no claim or equitable interest in the said companies.*
 - x. Lifting the corporate veil to find that the 1st appellant was the figure behind the 8th and 3rd appellants.*

[23] In support of their petition, the appellants filed submissions dated 8th May, 2023 and rejoinder submissions dated 23rd May, 2023. In addition, they filed a rejoinder dated 24th November, 2023 in response to the 1st and 2nd respondents' Replying Affidavit and Grounds of Objection separately filed by the 3rd and 4th respondents, and the 5th and 6th respondents.

[24] On the jurisdiction of the Court, the appellants submit that Sections 3A, 21 and 27 of the Supreme Court Act, 2011 grant the Court wide powers to make such orders as may be necessary for the administration of justice, and its decisions are not mere interpretations to render the appeal an academic exercise. Further, the appellants aver that Section 20 of the Supreme Court Act and Rule 26(3) of the Supreme Court Rules 2020 give the Court powers to consider facts, re-appraise evidence and draw inferences of facts, and the Court is not bound by the findings of fact and so the Court can go beyond any framed issue in administering justice. In support of this averment, the appellants rely on this Court's decision in ***Moi University v Zaippeline & another*** Petition 43 of 2018 [2022] KESC 29 (KLR)(Civ), (17 June 2022) (Judgment) ***Dhanjal Investments Limited v Kenindia Assurance Company Limited*** SC Petition No. 7 of 2016 [2018] eKLR and ***Attorney-General for Northern Ireland v Gallagher*** [1963]AC 349.

[25] On whether a constructive trust can be imported into a land sale agreement to defeat a registered title resulting therefrom, they submit that the Court of Appeal erred in holding that the agreement for sale dated 31st August 2005 between the 8th appellant and the 1st respondent did not represent the will of the parties and that the same had been procured through undue influence and unconscionable bargains. It is their case that this finding is contrary to the facts pleaded by the respondents that the agreement was a product of negotiations.

[26] The appellants urge that the impugned judgment overrode established principles of contract and the provisions of sections 3 of the Law of Contract Act, 97 (1) of the Evidence Act, 36, 41, /43 and 44 of the Land Registration Act that a written contract for disposing interest in land or a written contract cannot be unilaterally amended by parole evidence as was affirmed by this Court in ***Moi University v Zaippeline & another*** (Petition 43 of 2018) [2022] KESC 29 (KLR) (Civ) (17 June 2022) (Judgment).

[27] The appellants contend that the Court of Appeal erred in attempting to rewrite the agreement as regards the consideration. They submit that the 3rd respondent testified that the forced sale value of the suit property was Kshs. 60 million which

was consistent with the valuation by Tysons and Houthi Valuers. In addition, they submit that the government valuation for purposes of stamp duty placed the value at Kshs. 40 million. They contend that the values pleaded did not place the value at more than Kshs.70 million, therefore, the Court of Appeal fished the amount of Kshs. 150 million from a letter the 1st appellant had written to Giro Commercial Bank estimating the value of the suit property at Kshs.150 million which was a statement to entice the bank to agree to provide a loan but not based on any formal valuation. They submit that the Court of Appeal disregarded an elementary principle of contract law that a contract consideration needs only to be sufficient but not adequate. They rely on ***Thomas v Thomas*** [1842] 2QB 851 and ***Chappell & Co Ltd v Nestley Co. Ltd*** [1959] All ER 701 to buttress this argument.

[28] On *whether a constructive trust can be imported into a shareholding of a company as to disentitle a registered holder of shares in a company obtained for a valuable consideration*, they fault the Court of Appeal for declaring that the shares held by the 1st to 3rd appellants in the 4th -7th appellants were being held wholly in trust for the 1st and 3rd respondents. They contend that shareholding as spelt out in the Memorandum and Articles of Association was a product of negotiations and a trust did not therefore arise.

[29] They posit that the 2nd and 3rd respondents conceded, by their testimonies, that they had negotiated extensively with the 1st appellant regarding shareholding and agreed at 50:50 beneficial ownership. In this context, they aver that the respondents had, in *Mombasa High Court in Civil Case No. 22 of 2019*, sought to compel the 1st appellant and his associates to meet their part of the bargain by paying Kshs. 35 million for the 51% shares they had been allotted in the companies at incorporation. It is their case that the Court of Appeal ought to have compelled the respondents to be bound by their own pleadings that confirmed that there was an agreement to acquire the shares by the 1st appellant. Further, they submit that the 1st appellant provided Kshs. 35 million to the 4th to the 7th appellants towards achieving optimum working capital to enable the companies access credit facilities to bankroll the businesses, which contribution is admitted by the respondents. They therefore faulted the Court of Appeal's findings that the 1st, 2nd and 3rd appellants

had not demonstrated that they paid for consideration to acquire shares in the 4th - 7th appellants.

[30] On the existence of a *fiduciary relationship that could lead to constructive trust*, they rely on the Court of Appeal decision in ***Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri*** [2014] eKLR where the court described constructive trust as an equitable concept that acts on the conscience of a fiduciary to prevent a person from acting unconscionably to defeat the common intention. In this context, they submit that the court defied its own precedents and failed to properly assess the two critical ingredients of constructive trust, guilty conscience and common intention. They contend that the dispute that the Court of Appeal ought to have determined was whether the appellants had met their commitment to contribute to 51% shares of the business and if not, what remedy would be available. Further, that at the outset of the negotiation the 1st appellant made his proposal to the respondents to acquire 51% stake and that he would pay off the Standard Chartered Bank loan using his money as his contribution to the partnership, a fact that was admitted by the 2nd respondent. They, therefore, submit that the relationship was an investment relationship and not that of trusteeship.

[31] As for *lack of an unconscionable bargain*, they disagree with the Court of Appeal's conclusion in that regard, adding that the court failed to pay attention to the ingredients of such a bargain. They argue that what constitutes an unconscionable bargain was discussed in ***Euromec International Limited v Shandong Taikai Power Engineering Company Ltd*** [2021] KEHC 93 KLR. They submit in that regard that the Court of Appeal ought to have considered whether as at 2005, when the respondents were deep in debt and facing imminent and destructive action, the 1st appellant's action led to the respondents salvaging 49% of what they would have lost, entirely reviving a business that had been dead for nearly 10 years.

[32] The appellants urge that equity aids the vigilant and not the indolent because the respondents alleged that by 2006, they were already aware that the 1st appellant had behaved inequitably yet they only filed a suit in 2009, and thereby are guilty of

laches. In addition, they urge that there was no threat, undue influence or coercion on the respondents to make any payments.

[33] They argue that the respondents had ample opportunity to seek independent legal advice on each of the agreements and that the 3rd respondent admitted that despite this opportunity, they nevertheless did not see the need to seek such legal advice. They added that the respondents were represented in the sale transaction by their own advocates, James Gitau Singh Advocates, and that the Advocate who drafted the Memorandum and Articles of Association was working with the said Gitau Singh Advocates.

[34] Moreover, the appellants submit that a constructive trust is not a tool for rebalancing a relationship to aid a supposedly weaker party in obtaining a bargain or improved terms, as the Court of Appeal purported to do. They rely on ***Westdeutsche Landerbank Girozentrale v Islington LBC*** [1968] 2 AC 669 where the court held that constructive trust only exists where the defendant has knowledge of some factors that affect his conscience and that the 1st appellant did not in this case have a guilty conscience.

They thus seek that the Court do allow the appeal, set aside the impugned decision of the Court of Appeal and reinstate the High Court decision.

b. Respondents' Case

i. The 1st and 2nd respondents

[35] In response to the petition, the 1st and 2nd respondents filed a replying affidavit sworn on 17th November, 2022 by Ateet Dinesh Jetha, the 3rd respondent. They also filed submissions and supplementary submissions all dated 26th May, 2023.

[36] The 1st and 2nd respondents, as a preliminary point, submit that the Court's jurisdiction can only be exercised with regard to the two issues that were determined to have met the set standards under Article 163(4)(b) of the Constitution. They aver that this being a second appeal, it should be confined to points of law and that the Court should not interfere with the factual findings by the Court of Appeal. They further argue that the instant appeal raises 7 grounds of appeal for determination by this Court, 5 of which raise matters of fact contrary to

the jurisdiction of the Court. They posit that the Court ought not to be compelled to evaluate the factual evidence but only cardinal issues of law or jurisprudence.

[37] On the first issue of *importing a constructive into a land sale agreement to defeat a registered title* resulting therefrom, they submit that the question before this Court is not whether the 1st appellant held the suit property in constructive trust for the respondents as this question had been answered in the affirmative by the Court of Appeal and to open this question would lead the Court to delve into matters of fact which the Court does not have jurisdiction to address.

[38] To them, three key facts were established by the Court of Appeal, that; there existed a relationship of trust between the respondents and the 1st appellant; instead of using the fiduciary duty strictly as a trustee, the 1st appellant unjustly enriched himself through the agreement entered into between the appellants and the respondents; and that the 1st respondent remains the true and beneficial owner and as such, the suit property and shares in the 4th -7th respondents were held in trust for the 1st respondent.

[39] They argue that a constructive trust overrides the registered title where a party has exerted undue influence when obtaining and retaining the property transferred to him, as is the circumstances in the instant case. Furthermore, Section 25 (2) of the Land Registration Act provides that overriding interests such as a trust, can be imposed to defeat the title of a registered proprietor.

[40] On *whether shares acquired on the basis of a fiduciary duty can be enforced by the letter of the law defeating the interests of the equitable owner*, they submit that the Court of Appeal established as a matter of fact that the shareholding held by the 1st and 3rd appellants in the 4th - 7th appellants was in trust for the respondents. They rely on the Court of Appeal's decision in ***Salesio M'tonga v M'ithara & 3others*** [2015] eKLR to support this assertion. In conclusion, they urge the Court to give effect to the principles of equity and in particular the doctrine of constructive trusts and dismiss the appeal for want of merit.

b. The 3rd and 4th respondents

[41] The 3rd and 4th respondents filed Grounds of Objection dated 17th November, 2022 contending that the petition raises questions of facts outside the scope of the two questions restricted by the certification given on 8th July 2022. They also filed a Notice of Preliminary Objection dated 24th November, 2022 challenging the Court's jurisdiction to entertain the Petition of appeal as it is fatally defective and invalid for, it does not set out the summary of the grounds for the petition and that the record of appeal does not comply with Rule 40 (1) (d) of the Supreme Court Rules.

[42] In support of their case, the 3rd and 4th respondents filed submissions dated 16th May, 2023 2022. On jurisdiction, they submit that this Court does not have jurisdiction to revisit the factual findings of the superior court. To buttress this assertion, they rely on this Court's decision in ***Dina Management Limited v County Government of Mombasa & 5 others*** (SC Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) and ***Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa*** (Amicus Curiae) (SC Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment).

[43] On the identity of parties, they argue that the 3rd to 8th appellant companies are mere corporate veils of the 1st and 2nd appellants. Therefore, the 3rd to 8th appellants are crucial to this dispute since they stood in a fiduciary relationship with the 1st, 2nd, and the 3rd respondents as financial advisors.

[44] *On whether a constructive trust can be imported into a land sale agreement to defeat a registered title* resulting therefrom, they urge that equity will impose a constructive trust in an agreement for the sale of land and the resultant registration, whenever it is shown that the claimant obtained the agreement and title while standing as a fiduciary irrespective of whether he breached the fiduciary duties or not. In addition, they contend that equity absolutely prohibits fiduciaries from becoming purchasers and that the principle dictates that a trustee may not place himself in a position where his duty and his interest may conflict. They further argue

that equity goes beyond the agreement of sale/conveyance to investigate whether the fiduciary used unlawful means such as undue influence to create the intention/consent on the part of the advisee to enter into the agreement. They cite the decision in **Royal Bank of Scotland vs Etridge** (No.2) (2002) AC 773 and **MacDonald v Creelman** (1988), 83 N.S.R (2d) 415 to support this contention.

[45] On the *importation of a constructive trust into a shareholding of a company so as to disentitle a registered holder of shares in a company obtained for valuable consideration*, they submit that shares in a company are property like any other. Therefore, a constructive trust applies against persons who acquire title by breach of fiduciary duties, undue influence and other wrong doings. This would apply equally to shareholding agreements and the registration as holder of shares in a company. They cite **Kane v Radley** [1999] CH 274 and **Neville v Wilson** [1996] 3 All E.R 171 (CA) to support this assertion.

c. The 5th & 6th Respondents' case

[46] Similarly, the 5th and 6th respondents filed Grounds of Objection dated 17th November, 2022 reiterating the 1st to the 4th respondents' contention, adding that the petition neither discloses nor establishes any special circumstances or basis to justify a departure from the established principles of constructive trust.

[47] The 5th and 6th respondents reiterate the 1st to the 4th respondents' submission on the issue of undue influence and the jurisdiction of the Court and submit that the petition as framed renders it difficult for the Court to grant the prayers sought and urge the Court to dismiss it.

D. ISSUES FOR DETERMINATION

[48] In our ruling of 8th July, 2022, we certified the appeal as one involving matters of general public importance under Article 164(4)(b) of the Constitution. In the said ruling, we agreed with the appellants that the issue whether it is open to the court to imply and import the doctrine of trust into land sale transactions and into shareholding of a company as to disentitle a registered holder of land or shares obtained for valuable consideration, without offending the constitutional right to property under Article 40 of the Constitution and other statutory provisions, is an

issue that required the input of this Court. We thus certified the appeal as one deserving our attention but limited to the two issues only.

[49] The jurisdiction of the Court has, however, been put to question. The 3rd and 4th respondents filed a preliminary objection dated 24th November, 2022 on the grounds that this Court lacks jurisdiction to entertain the petition of appeal as it is fatally defective, for the reason that it does not comply with Rule 10 of the Court of Appeal Rules, Rule 39(1)(b) and (e), 40(1)(d) and Form G of the Supreme Court Rules and Rule 11 of the Supreme Court (General) Practice Directions, 2020. They also object to the Court's jurisdiction, just like the 1st and 2nd respondents, for the appeal raising questions of fact beyond that which was certified as involving general public importance.

[50] We have held in several of our decisions that jurisdiction is a preliminary issue and ought to be dealt with *in limine*. Where a court finds that it does not have jurisdiction, it ought to down its tools. Therefore, with the jurisdictional challenge raised by the respondents as against the appeal, it is imperative that the same be determined upfront. Taking this into consideration, our Ruling of 8th July 2022, the parties' respective cases, submissions, and the remedies sought, the issues that arise for determination before this Court are:

- i. *Whether the Petition satisfies the jurisdictional threshold under Article 163(4)(b) as read with Section 15 of the Supreme Court Act;*
- ii. *Whether a constructive trust can be imported into a land sale agreement to defeat a registered title therefrom; and*
- iii. *Whether a constructive trust can be imported into a shareholding of a company as to disentitle a registered holder of shares in a company obtained for valuable consideration.*

E. ANALYSIS AND DETERMINATION

- i. Whether the Petition satisfies the jurisdictional threshold under Article 163(4)(b) as read with Section 15 of the Supreme Court Act***

[51] There is a two-fold challenge on the Court's jurisdiction. The first angle of the challenge is on non-conformity of the petition with the rules and the second angle is on the contents of the petition.

[52] The 3rd and 4th respondents' Preliminary Objection is premised on the grounds that the Notice of Appeal; is not in compliance with Rule 10 of the Court of Appeal Rules as the same is not signed and endorsed with the stamp of the Deputy Registrar; it does not relate to the judgment delivered on 4th April 2019 but is filed in the application for certification and leave to appeal to the Supreme Court; is contrary to Rule 39(1)(b), (c) and Form G of the Supreme Court Rules and does not set out the concise presentation of arguments supporting each of the grounds of the petition of appeal, thus it occasions prejudice to the respondents' rights to a fair trial. The 3rd and 4th Respondents further posit that the Record of Appeal does not comply with Rule 40(1)(d) of the Supreme Court Rules as it has not included the relevant pleadings and documents required to determine the appeal, in omitting some documents from the Record; and it does not comply with Rule 11 of the Supreme Court (General) Practice Directions, 2020 of 16th November, 2020 as the 10th line of each document is not numbered.

[53] We note that in the 3rd and 4th respondents' Notice of Motion Application dated 2nd December, 2022 is raised similar grounds in urging this Court to strike out the Record of Appeal. In our ruling of 21st April, 2023 we addressed these grounds conclusively and we were satisfied, as we still are, that the Notice of Appeal was properly filed before the Court of Appeal. Our perusal of the said Notice of Appeal reveals that whereas the heading of the Notice of Appeal indicates that it is filed in regard to an application for grant of certification and leave to appeal to the Supreme Court, its contents specify the intent to appeal against the decision of the Court of Appeal rendered on 4th April 2019. The parties having engaged in the certification and leave to appeal proceedings both at the Court of Appeal and before us, there was little doubt left as to the appellants' intention to appeal against the judgment of the Court of Appeal.

[54] In addressing the 3rd and 4th respondents' argument on non-compliance with Rule 10 of the Court of Appeal Rules, we reiterate, as we stated in our ruling, that it is not for this Court to entangle itself in the filing and administrative processes of

the Court of Appeal. We affirmed that the failure to have it stamped or endorsed by the Court of Appeal was not fatal, as the Notice of Appeal was duly lodged in the Court of Appeal.

[55] On the lack of compliance with Rule 40(1)(d) of the Supreme Court Rules, this being a matter of determination of specific framed questions of general public importance, the documents stated as missing from the record would be useful for the interrogation of findings of facts which falls outside the purview of this Court.

[56] Concerning the failure by the appellants to mark every tenth line of the document, we find, without condoning the same, that this is also not fatal. Article 159 (2) (d) of the Constitution obliges this Court to administer justice without undue regard to procedural technicalities. We therefore find that the 3rd and 4th respondents' Preliminary Objection dated 24th November, 2022 has no merit and is dismissed.

[57] The second limb of the respondents' objection is that the Petition of Appeal as framed goes beyond the scope of the questions certified as matters of general public importance. The 1st and 2nd respondents urge that the Court's jurisdiction can only be exercised with regard to the two framed issues. They submit that, while the appellants raise seven grounds of appeal, five of them raise matters of fact contrary to the jurisdiction of the Court. Similarly, the 3rd and 4th respondents urge the Court to decline the invitation to consider and find alleged errors of fact by the Court of Appeal, as that falls outside the scope of the two framed questions. The 5th and 6th respondents also urge that by virtue of this Court having a limited scope and jurisdiction as set out in the ruling of 8th July 2022, it cannot grant reliefs (b), (c), (d), and (e) of the Petition of appeal as they are *ultra vires*.

[58] In response, the appellants underscore that the Court can choose which set of facts to address, where the facts as summarized by the High Court differ from those of the Court of Appeal. Moreover, that Section 20 of the Supreme Court Act and Rule 26(3) of the Supreme Court Rules, 2020 empower the Court to consider facts including taking new evidence not previously available, re-appraise evidence and draw inferences of facts. They also cite Section 3A of the Supreme Court Act to urge that the Court has wide powers to make such orders as may be necessary for the administration of justice.

[59] In ***Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*** SC Appl. No. 2 of 2011 [2012] eKLR we held that an appeal is granted in specific terms by the Constitution or statute. An appeal thus typically lies to a higher court and entails a reconsideration of a decision by the higher court with a view to reversing it either in part or *in toto*.

[60] The appellate jurisdiction of this Court derives from Article 163(4) of the Constitution. This involves an appeal as of right or an appeal on certification. As held in ***Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others*** SC Civil Appl. No.35 of 2014 [2015] eKLR, the Court cannot exercise both jurisdictions concurrently. The litigant chooses the best path upon which the matter is considered within the established threshold. Unlike an appeal as of right where the Court exercises its appellate jurisdiction on the application and interpretation of the constitution by the superior courts below, the jurisdiction on certification is narrower as the Court is only called upon to express its position on matters that transcend the litigants before Court among other parameters set out in ***Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone*** SC Application No.4 of 2012 [2103] eKLR without necessarily sitting on appeal between the parties before it. This stems from the holding in ***Daniel Kimani Njihia v Francis Mwangi Kimani & another*** SC Appl. No. 3 of 2014 [2015] eKLR that the Supreme Court is not just another appellate layer of courts to offer remedy to parties dissatisfied with the decisions of the Court of Appeal.

[61] Further, in ***Dhanjal Investments Limited v Kenindia Assurance Company Limited*** Sup Ct. Petition No.7 of 2016 [2018] eKLR, we appreciated that the Court may allow parties to submit on an issue not previously framed as one for determination but which, even if unconnected to any of the framed issue, is nonetheless important in resolving a dispute before it. The ‘public importance’ criteria should in any event never be lost. We stated as follows in that regard:

“ [67] Having so stated, we must at this point remind parties that it is only the issues that are certified as being of great public importance that must form the basis for submissions and ultimately the decision of this Court. To frame certain issues as being of great public importance at the point of certification under Article 163(4)(b) of the Constitution and then submit on

issues that are specific to the parties at hand with no public element exhibited is an abuse of Court process and may lead to the dismissal of an appeal.”

[62] As noted in the above cited case, it will always be a matter for the exercise of discretion whether to allow a point in no way connected with the certified point of law to be argued on the appeal, and it is not to be assumed that an appellant can as a matter of right raise any such point. In framing the two questions that we certified as being of great public importance, we observed as follows:

*“13. ... We think that the dispute did not end with the vitiation of contracts or the law on the circumstances of resulting or constructive trusts and the lifting of the corporate veil which we agree are settled issues. The crux of the applicants’ case in their fifteen grounds, as we understand it, **is the ultimate recourse granted by the courts under such instances in view of the existing constitutional and statutory provisions. ...**”*

(Emphasis ours)

We are therefore mindful of our exercise of discretion and find no merit in the objection to our jurisdiction as sought in the objection and the application to strike out the appeal. None of the issues raised to challenge our jurisdiction suffices. We disallow the preliminary objection and the application by the respondents and now turn to determine the issues as framed.

ii. Whether a constructive trust can be imported into a land sale agreement to defeat a registered title therefrom

[63] The appellant faults the Court of Appeal for holding that the agreement for sale dated 31st August, 2005 between the 8th appellant and the 1st respondent did not represent the will of the parties. They state that this overrode the established principles of Section 3 of the Law of Contract Act; Section 97(1) of the Evidence Act; and Sections 36,41,43 and 44 of the Land Registration Act as a written contract for disposing interest in land or a written contract cannot be unilaterally amended by parole evidence. They dispute the importation of constructive trust and maintain that parties had a common intention, which was not to establish the 1st appellant or

any of the appellants as a fiduciary. We however note that the appellants failed to address us on the specific issue framed for determination, save to regurgitate the factual background and litigation history before the superior courts.

[64] On the other hand, the respondents submit that a constructive trust overrides the registered title where a party has exerted undue influence when obtaining and retaining the property transferred to him, as was in the instant case. Furthermore, Section 25 (2) of the Land Registration Act provides for overriding interests, which include trusts, which can be imposed to defeat the title of a registered proprietor. The respondents further urge that, equity will impose a constructive trust in an agreement for the sale of land and the resultant registration whenever it is shown that the claimant obtained the agreement and title while standing as a fiduciary, irrespective of whether he breached the fiduciary duties. They add that the petition neither discloses nor establishes any special circumstances or basis to justify a departure from the established principles of constructive trust.

[65] The Court of Appeal having considered the pleadings, and appraised itself of the evidence within the confines of its jurisdiction, established that the respondents had placed their trust in the 1st appellant to salvage the suit properties. In examining the transactions, it found that the circumstances gave rise to a presumption of undue influence on the part of the 1st respondent and met the criteria of being regarded as unconscionable bargains. It therefore found that the 1st and 3rd appellants hold the shareholding of the 4th -7th appellant companies in trust for the 1st respondent, and the 4th appellant holds the suit land in trust for the 1st respondent.

[66] The Trustee Act, Cap 167 Laws of Kenya defines a “trust” and “trustee” as extending to implied and constructive trusts. The ***Black’s Law Dictionary, 9th Edition*** defines a trust as:

“The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

[67] It further defines a constructive trust at pg. 1649 as:

“An equitable remedy that a court imposes against one who has obtained property by wrong doing.

[68] **Halsbury’s Laws of England, 4th Edition, Volume 48 at paragraph 690** states as follows on constructive trusts:

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party’s words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.

The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive.

Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.

Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement.

The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property.”

[69] A constructive trust is thus an equitable instrument which serves the purpose of preventing unjust enrichment. The Canadian Supreme Court in **Soulos v. Korkontzilas**, [1997] 2 S.C.R. 217, a case which involved a land dispute stated as follows, as to the purpose of constructive trust:

“The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.”

[70] Similarly, although in a matrimonial property dispute, the Canadian Supreme Court in **Murdoch v. Murdoch** [1975] 1 SCR 423 stated as follows:

“As is pointed out by Scott, Law of Trusts, 3rd ed., 1967, vol. 5, at p. 3215, “a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it ... The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property”; and, again, at p. 3413, quoting Judge Cardozo “a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.”

[71] The United States Supreme Court in **Harris Tr. & Sav. Bank v. Salomon Smith Barney Inc.**, 530 U.S. 238, 250–51 (2000) citing Moore v. Crawford, 130 U.S. 122, 128 (1889) stated thus:

“Whenever the legal title to property is obtained through means or under circumstances ‘which render it unconscientious for the holder of legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same..”

[72] As has been established therefore, trusts are created either expressly, where the trust property, its purpose and the beneficiaries are clearly stated, or established by the operation of the law. Like in the instant case, where it is not expressly stated, the trust may be established by operation of the law.

[73] From the definitions above, we establish that a constructive trust is a right traceable from the doctrines of equity. It arises in connection with the legal title to property when a party conducts himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit.

[74] Vide Section 3(1) of the Judicature Act, Cap 8 Laws of Kenya, the doctrines of equity are applicable in Kenya and form part of our laws. It states that common law, doctrines of equity and statutes of general application shall apply in so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

[75] In addition, we also note that the concept of trust is not new in our jurisdiction. In **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another** Petition 10 of 2015 [2018] eKLR, we observed that the courts, vide Section 163 of the Registered Land Act (repealed by the Land Registration Act No.3 of 2012) have been more willing to import the doctrines of implied, resulting and constructive trust as known in English law, into Section 28 of the Act.

[76] The concept of constructive trust has also been inferred in a number of decisions of the superior courts. The Court of Appeal in **Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & 5 others**, Civil Appeal No. 51 of 2014 [2015] eKLR held that:

“A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury’s Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.”

[77] In **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri** Civil Appeal No. 6 of 2011, consolidated with No.26 & 27 of 2011 [2014] eKLR and in **Willy Kimutai Kitilit v Michael Kibet**, Civil Appeal No. 51 of 2015 [2018] eKLR, the Court of Appeal, in matters involving the sale of land, held that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land, subject to the circumstances of the case.

[78] The applicability of the doctrine of constructive trust is therefore now settled within our jurisdiction and is applied to land sale transactions. In our ruling

reviewing the Court of Appeal decision on certification, we underscored the fact that the constructive trust is already settled. We stated thus:

“13. We think that the dispute did not end with the vitiation of contracts or the law on the circumstances of resulting or constructive trusts and the lifting of the corporate veil which we agree are settled issues. The crux of the applicants’ case in their fifteen grounds, as we understand it, is the ultimate recourse granted by the courts under such instances in view of the existing constitutional and statutory provisions. ...” (Emphasis ours)

The first question before us therefore is not whether the Court of Appeal was correct in imputing a constructive trust but rather, whether such trust can be imported into a land sale agreement to defeat a registered title therefrom obtained for valuable consideration without offending the constitutional right to property under Article 40 of the Constitution and other statutory provisions.

[79] By virtue of Article 40 of the Constitution, every person either individually or in association with others, has the right to acquire and own property of any description, and in any part of Kenya. This right to property is however not absolute. Under Article 40(3) the State may deprive a person of property through a process of acquisition of land for a public purpose or in public interest in accordance with the Constitution. Further, under Article 40(6) the rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

[80] While Article 40 has an internal limitation on the right to property, the general limitation of rights provision at Article 24 of the Constitution provides that any limitation on a right shall be by law, and only to the extent that the limitation is reasonable and justifiable, in an open and democratic society based on human dignity, equality and freedom. Other relevant factors to be taken into account include the nature of the right, the importance and purpose of the limitation, and relation between the limitation and the purpose of such limitation. It further, provides that the person seeking to justify a particular limitation has the obligation to justify the limitation.

[81] As prescribed, a limitation of a fundamental right or freedom, must be provided under law. It is therefore imperative for us to examine legislation making provision for the registration of titles and the limitations on the right to property set out.

[82] The Land Registration Act, No.3 of 2012, is the law that governs registration of titles. Section 25 of the Land Registration Act provides that the rights of a proprietor shall not be liable to be defeated except as provided under the Act, subject to encumbrances and conditions in the register; and to such liabilities, rights and interests declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register. Additionally, as is stipulated under Section 25(2) nothing in this provision shall be taken to relieve a proprietor from any duty or obligation to which the person is subject as a trustee.

[83] Under Section 26 of the Land Registration Act, No. 3 of 2012, a Certificate of Title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner. However, this is subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. Further, the title of the proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation and where the certificate of title was acquired illegally, un-procedurally or through a corrupt scheme.

[84] Section 28 provides that unless the contrary is expressed in the register, all registered land shall be subject to overriding interests as may for the time being subsist and affect the same, without being noted in the register. These overriding interests include, trusts.

[85] While Sections 25, 26 and 28 of the Land Registration Act recognize that the rights of a registered proprietor of land are absolute and indefeasible, these are only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests include trusts. In our view, and in the absence of any limitation as to the trusts, this includes constructive trusts. Applying the provisions

of Article 24 of the Constitution therefore, the limitation of the right to property is provided under law, and includes a constructive trust.

[86] We have found that the doctrines of equity are part of our laws by virtue of Section 3 of the Judicature Act. And while the Constitution entitles every person to the right to property at Article 40, this right is not absolute. Article 24 provides that a right cannot be limited except by law. We have also established that, while Sections 25 and 26 of the Land Registration Act provide for the rights of a proprietor and that the certificate of title is conclusive evidence of proprietorship, Section 28 provides that the registration is subject to overriding interests. One of these overriding interests is trust, which includes constructive trust.

[87] We have also established that constructive trusts can arise in various circumstances, including in land sale agreements. Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title.

iii. Whether a constructive trust can be imported into a shareholding of a company as to disentitle a registered holder of shares in a company obtained for valuable consideration.

[88] The appellants urge that a constructive trust cannot be declared against a shareholder for valuable consideration, and that in any event, the remedy against a shareholder who has not fully paid a valuable consideration for his shares is a call-up for payment by the innocent shareholders. They posit that the appropriate remedies for non-payment of share value by a shareholder was set out in the Companies Act and within the Articles of Association of the various companies. They further contend that shareholding itself, being a contractual matter between shareholders, a declaration of trust in the circumstances amounted to deprivation of the 1st, 2nd and 3rd appellants' right to property under Article 40 of the

Constitution. They maintain that a trust did not arise as the shareholding was a product of negotiations and was spelt out in the Memorandum and Articles.

[89] The respondents on the other hand submit that shares in a company are property like any other. Constructive trust therefore applies to shareholding agreements and the registration as holders of shares in a company, against persons who acquire title by breach of fiduciary duties, undue influence and other wrong doings. They submit that it is not in dispute that the 4th to 7th appellants were special purpose vehicles created to salvage the 1st respondent from financial distress. The constructive trust therefore stepped in as an equitable concept to prevent the appellants from acting in an unconscionable manner defeating the common intention.

[90] The respondents further urge that the appellants never paid any consideration for the shares they seek to enforce. They cannot therefore rely on the letter of the law to enforce the ownership of shares when at all material times, the intention of the parties was to create a trust to aid in the restructuring of the 1st respondent. They thus submit that the issue at hand must be answered affirmatively, as the global stance is that a constructive trust can be imported into a shareholding agreement to disentitle a registered shareholder.

[91] The Companies Act, No. 17 of 2015, makes provision to govern all types of companies. Section 20 of the Act provides for the Articles of Association as the Constitution of the company. Pursuant to Section 26 of the Act, for existing companies before the commencement of the Act, such as the companies in the instant suit, the Memorandum of Association is treated as provisions of the articles. Companies therefore have a free hand in managing their own affairs through these constitutive documents. As provided under Section 30(1) of the Act, the company's constitution binds the company and its members to the same extent as if the company and its members had covenanted, agreed with each other to observe the constitution. Further, within our jurisdiction and outside, it has been held that a court cannot interfere with the internal affairs of a company except for limited circumstances. In *Martin Lemaiyan Mokoosio & another v Reshma*

Praful Chandra Vadera & 3 others [2021] eKLR, Odunga J (as he then was) held as follows:

“13. Whereas disputes regarding internal affairs of a company ought to be resolved in accordance with the constitution of the company, where it was alleged that the company was not acting in accordance with its own constitution, the court had the power to intervene. In the instant case the allegations were that the respondents had violated the constitution of the company and therefore the court was entitled to intervene.”

In ***Tanui & 4 others v Birech & 11 others [1991] KLR***, the Court of Appeal expressed itself in the following terms:

“...We would agree that while it is not the business of the High Court or this Court to involve itself in the day to day running of institutions such as the Church, colleges, clubs and so on, yet where it is shown that such an organization is conducting its affairs in a manner contrary to its constitution and to the detriment of its members, then the High Court and this Court would not only be entitled to but under a duty to compel it, either, by injunction or otherwise, to obey its constitution.”

[92] It is important to note that Section 93 of the Act requires the company to keep a register of its members including information relating to beneficial owners of the company, if any. Section 104 however provides that:

104. Trusts not to be entered on register

(1) A company shall not accept, and shall not enter in its register of members, notice of any trust, expressed, implied or constructive.

(2) If a company contravenes subsection (1), the company, and each officer of the company who is in default, commit an offence and on conviction are each liable to a fine not exceeding five hundred thousand shillings.

Section 104(1) was similarly contained in Section 119 of the repealed Companies Act Cap 486 which provided that: *“No notice of any trust, expressed, implied or constructive, shall be entered on the register, or be receivable by the registrar”*.

[93] Further, Section 105 of the Act states that until the contrary is proved, the register of the members of a company is evidence of the matters required or authorised to be included in it. It is therefore evident from the statutory provision that the Act expressly provides that there can be no entry of a trust on the company register.

[94] We have found that a constructive trust can arise and be imported into a land sale agreement to defeat a registered title, and established that the constructive trust is imposed on property in the hands of a wrongdoer to prevent him or her from benefitting unjustly from the wrongful conduct. Constructive trust is therefore an appropriate remedy for a wronged party and has a right to the proceeds.

[95] We however note that Section 104(1) of the Companies Act, and Section 119 of the repealed Companies Act Cap 486, which is similar to Section 126 of the Companies Act 2006 of the United Kingdom provides that:

126. Trusts not to be entered on register

No notice of any trust, expressed, implied or constructive, shall be entered on the register of members of a company registered in England and Wales or Northern Ireland, or be receivable by the registrar.

[96] In commenting on this provision, ***Palmer's Company Law Manual*** observes as follows:

“There is nothing to prevent trustees from becoming members of a company but the CA 1985, S.360 provides that no notice of any trust – express, implied or constructive – may be entered on the register of any company registered in England and Wales. The rationale behind the rule (which does not apply in Scotland) is that the relationship between trustee and beneficiary is of no concern to the company which should be entitled to assume that it can deal solely with the registered holders.”

[97] In ***Farouk Ravate & another v Eric Agbeko & 2 others; Ravasam Development Company Limited (Interested Parties)*** HCCC. No. 450 of 2011 (Consolidated with No. 476 of 2015 and No. 637 of 2015) [2020] eKLR, *Tuiyott*

J. (as he then was) stated as follows while noting the observations made in commentaries on the effect of Section 119 of the repealed Companies Act:

“40...Nothing in the three passages I have set out suggests that the effect of this provision is to outlaw or bar trust arrangements in regard to shares in a company. Quite to the contrary, it recognizes that they may exist but that rights of the beneficiaries as against the Company (and perhaps against third parties as I shall be proposing) are circumscribed because no notice of such Trust is to be entered in the register of members.

In all these cases (in English law, but not in Scots Law) the trustee as registered holder will be personally responsible for all matters and liabilities arising in respect of the shares although he will in turn be entitled to an indemnity from the beneficiaries. An English company’s rights as against the trustee are not therefore limited to the trust property”.

[98] We do agree that whereas Section 104 of the Companies Act proscribes the entry of trusts on the register of members, the intention of this provision was not to bar any trust arrangements, and we add, including constructive trusts. There is therefore no bar to the holding of share(s) upon a trust. As the court stated in the case above, which we agree with:

“The fact that a company does not recognize a person holding a share upon a trust and treats a registered shareholder as the absolute owner of his shares does not mean that it does not allow its members to enter trust relationships. As a corollary it does not mean that a trust arrangement is not enforceable as between the contracting parties.”

[99] In the present case, the Court of Appeal having established that there was unconscionable or inequitable behaviour, trust was imposed as the most appropriate remedy, and we are in total agreement thereto. In answering the question before us and taking into account the cited provisions of the Companies Act, whether a constructive trust can be imported into a shareholding of a company, our answer is in the affirmative. We have established that, Section 104 does not outlaw or bar importation of trust into the shareholding of a company. Further, the ***Black’s Law Dictionary, 11th Edition*** at page 1654 defines a shareholder as an

individual who owns or holds a share or shares in a company. A shareholding therefore signifies proprietorship in a company to the extent of the share(s) held. Consequently, in this regard, company shares constitute property under Article 260 of the Constitution and therefore, where it is found that there was a wrong doing, then a constructive trust may be inferred, and we find that the Court of Appeal, after considering the totality of the circumstances in the case, was right in finding that a constructive trust had clearly been created.

iv) What reliefs should this Court grant?

[100] The appellants have urged that we allow the petition of appeal, set aside the order of the Court of Appeal and reinstate the decision of the High Court in *Mombasa Civil Case No. 9 of 2011*, and in the alternative substitute it with the Court's own decision. The Respondents submitted that by virtue of this Court having a limited scope and jurisdiction as set out in the Ruling of 8th July 2022, it cannot grant reliefs (b), (c), (d), and (e) of the Petition as they are *ultra vires* the Court's powers.

[101] The Court of Appeal determined that the shares held by the 1st and the 3rd respondents in the 4th to the 7th appellants are held in trust for the 1st respondent or its nominees having determined that the 1st appellant had set out in a scheme to purchase the property at a paltry Kshs.27,000,000/- thus unjustly enriching himself; he was conflicted between his duties as a trustee and his scheme to purchase the property; and notwithstanding the trust relationship, the 1st appellant did not utilize any of his personal funds to purchase the property. It found that the actions of the 1st appellant were irregular, deceitful, in breach of his trust obligations and resulted in his unjust enrichment. We uphold these findings.

[102] A party was wronged, another has benefitted as a result of the wrongdoing. It clings on Section 104 of the Companies Act to state that there can be no entry of a trust on the company register. To rectify the unjust enrichment, breach of fiduciary duty and right the wrong doing committed against the respondents, the Court of Appeal found that there was a constructive trust to remedy the wrong. We have noted that the Companies Act, however, bars the registration of any trust, expressed, implied or constructive in its register of members. It further provides for

a hefty fine for any person who contravenes this provision. In our view, this statutory provision needs to be relooked at noting that there are circumstances that may give rise to a constructive trust, or other kind of trust in companies, and which require that trusts related to companies be disclosed for reasons of rule of law, accountability and good sense of justice.

[103] Having set out our parameters in this appeal, and noting that our focus is on the recourse, rather than the applicability of the doctrine of trust, we are not persuaded to re-open the merits of the Court of Appeal decision in concluding the applicability of the trust. Litigation has to come to an end and the Court of Appeal, having satisfied itself of the facts, came to one conclusion and made its orders. As expected, a decision arising out of adversarial litigation is not bound to be satisfactory to both parties and undoubtedly, different courts would come to different conclusions on the same facts. Re-opening the facts in our view is not appropriate under circumstances, and would be going beyond our constitutional remit if we so did. At any rate nothing has been shown to take that unconventional route.

[104] A trend towards promotion of legal certainty, safeguarding of property rights, and equitable access to justice undoubtedly emphasizes the necessity for a revision of the legislation governing the registration of trusts (including constructive) in relation to shares held in a company. These changes would be indicative of a growing recognition of the importance of constructive trust as a means of addressing unjust enrichment and ensuring equitable outcomes in disputes. Legislation that is in line with international developments and prevailing standards can enhance the strength and adaptability of the legal system, enabling it to more effectively tackle present day issues pertaining to shareholding, property rights and fair redress. It provides an opportunity for courts to shape the legal landscape concerning providing clarity particularly on enforcing remedies when breaches or unfairness occur.

[105] We reiterate that a constructive trust is imposed to address situations where it would be unjust for one party to retain legal ownership of property under the unequitable circumstances. The court recognizes that a claimant has a better right

to certain property than the person who holds legal title to it, it therefore declares a constructive trust in favour of the victim of the wrong, who is then given a right to the property.

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

v) Costs

[107] On costs, taking all the above into consideration and the nature of this matter as one involving general public importance, our finding transcends beyond the parties before the court, and therefore we order that each party bear their own costs.

[108] In the end and in answering the two questions posed for our determination, we do find that:

- i. A constructive trust can be imported into a land sale agreement to defeat a registered title therefrom; and***
- ii. A constructive trust can be imported into a shareholding of a company as to disentitle a registered holder of shares in a company obtained for valuable consideration.***

We are also not mindful of exercising our discretion towards disturbing the findings of fact made by the Court of Appeal. We however, note that there may be legal uncertainty over the recourse that parties have upon declaration of trust by the Courts and how to actualise the same especially concerning shareholding. While it is open to each court to have regard to the specific circumstances, we think this is an issue that the Kenya Law Reform Commission, the Attorney General, Parliament and all the stakeholders should give consideration whether there is need for legislative intervention.

