



**Wanyama (Suing on behalf of the Estate of Henry Wanyama Khaemba (Deceased) & another v Mulaya & 2 others (Environment & Land Case 120 & 119 of 2014 (Consolidated)) [2023] KEELC 22006 (KLR) (5 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22006 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 120 & 119 OF 2014 (CONSOLIDATED)  
FO NYAGAKA, J  
DECEMBER 5, 2023**

**BETWEEN**

**EDGAR CHILANDE WANYAMA (SUING ON BEHALF OF THE ESTATE OF HENRY WANYAMA KHAEMBA (DECEASED)) ..... PLAINTIFF**

**AND**

**EMILY KIVALI MULAYA ..... 1<sup>ST</sup> DEFENDANT**

**DAVID SIFUNA ..... 2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR TRANS NZOIA COUNTY .... 3<sup>RD</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT & LAND CASE 119 OF 2014**

**BETWEEN**

**EDGAR CHILANDE WANYAMA (SUING ON BEHALF OF THE ESTATE OF HENRY WANYAMA KHAEMBA (DECEASED)) ..... PLAINTIFF**

**AND**

**EMILY KIVALI MULAYA ..... 1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR TRANS NZOIA COUNTY .... 2<sup>ND</sup> DEFENDANT**



## JUDGMENT

### The Pleadings

1. Vide his Further Amended Plaintiff dated 25/07/2017 and filed on 31/07/2017, the Plaintiff instituted Kitale ELC No. 119 of 2014 seeking the following reliefs:
  - a. A permanent injunction be issued restraining the Defendant or any other person acting on her behalf or claiming under her from trespassing, tilling, wasting, occupying, transferring, or in any other way dealing with the parcel of land known as title number Trans Nzoia/Liyavo/36;
  - b. A declaration that the Plaintiff HENRY WANYAMA KHAEMBA (deceased) is/was the legal and bona fide proprietor of title number Trans Nzoia/Liyavo/36;
  - c. A declaration that the transfer and registration of the Defendant as the proprietor of title number Trans Nzoia/Liyavo/36 is illegal, fraudulent and void for all purposes;
  - d. An order be issued directing the 2<sup>nd</sup> Defendant, the District Land Registrar Trans Nzoia to cancel the transfer and registration of the Defendant as the proprietor of title number Trans Nzoia/Liyavo/36 and cancel such other entries that may have been unlawfully registered with the intention of defeating the Plaintiff's HENRY WANYAMA KHAEMBA (deceased)'s interest in the parcel of land known as title number Trans Nzoia/Liyavo/36;
  - e. Costs and interest of the suit.
2. In response to the Plaintiff, the 1<sup>st</sup> Defendant filed her Amended Defence and Counterclaim dated 08/03/2017 on 13/03/2017. She denied the contents of the Plaintiff urging this court to allow her Counterclaim as follows:
  - a. An order lifting the caution registered on L.R. No. Trans Nzoia/Liyavo/36;
  - b. General, aggravated and exemplary damages for malicious injurious falsehoods and defamation;
  - c. Costs of the counterclaim;
  - d. Interest on damages and costs;
  - e. Any other or further relief that this Honorable Court may deem fit and just to grant.
3. The Plaintiff filed a Reply to Defence and Counterclaim dated 29/09/2014 and filed on 30/09/2014. The Plaintiff joined issue with the contents set out in its Plaintiff. It further denied the contents of the Counterclaim urging this court to dismiss the same with costs.
4. In his Further Amended Plaintiff dated 25/07/2017 and filed on 31/07/2017 in Kitale ELC No. 120 of 2014, the Plaintiff prays for:
  - a. A permanent injunction be issued restraining the Defendants or any other person acting on their behalf or claiming under them from trespassing, tilling, wasting, occupying, transferring, or in any other way dealing with the parcel of land known as title number Trans Nzoia/Kapomboi/193;
  - b. A declaration that the Plaintiff HENRY WANYAMA KHAEMBA (deceased) is/was the legal and bona fide proprietor of title number Trans Nzoia/Kapomboi/193;



- c. A declaration that the transfer and registration of the 2<sup>nd</sup> Defendant acting in concert with the 1<sup>st</sup> Defendant, as the proprietor of title number Trans Nzoia/Kapomboi/193 is illegal, fraudulent and void for all purposes;
  - d. An order be issued directing the 3<sup>rd</sup> Defendant, the District Land Registrar Trans Nzoia to cancel the transfer and registration of the 2<sup>nd</sup> Defendant as the proprietor of title number Trans Nzoia/Kapomboi/193 and cancel such other entries that may have been unlawfully registered with the intention of defeating the Plaintiff's HENRY WANYAMA KHAEMBA (deceased)'s interest in the parcel of land known as title number Trans Nzoia/Kapomboi/193;
  - e. Mesne profits;
  - f. Costs and interest of the suit.
5. In response to the Plaintiff, the 1<sup>st</sup> Defendant filed her Amended Defence and Counterclaim dated 08/03/2017 on 13/03/2017. She denied the contents of the Plaintiff's pleading urging this court to allow her Counterclaim as follows:
- a. An order lifting the caution registered on L.R. No. Trans Nzoia/Kapomboi/193;
  - b. General, aggravated and exemplary damages for malicious injurious falsehoods and defamation;
  - c. Costs of the counterclaim;
  - d. Interest on damages and costs;
  - e. Any other or further relief that this Honorable Court may deem fit and just to grant.
6. The Plaintiff filed an undated Reply to Defence and Counterclaim on 30/09/2014. The Plaintiff joined issue with the contents set out in its Plaintiff. It further denied the contents of the Counterclaim urging this court to dismiss the same with costs.
7. The 1<sup>st</sup> Defendant filed a Reply to Defence to Counterclaim dated 03/11/2014 on 07/11/2014. She prayed that the same be dismissed with costs.
8. The 2<sup>nd</sup> Defendant's Statement of Defence was dated and filed on 16/09/2014. He averred that the suit land was properly transferred to him after following due process. In that regard, he urged this court to dismiss the Plaintiff's suit with costs.
9. The 3<sup>rd</sup> Defendant filed its Statement of Defence dated 21/02/2018 on 28/02/2018. It averred that its actions were lawful after proper due process was confirmed to have been followed. It thus effected transfer in favor of the 2<sup>nd</sup> Defendant. It maintained that no reasonable cause of action could be maintained against it and urged this court to dismiss the suit with costs.

### **The Plaintiff's Case**

10. The Plaintiff PW1 is the Legal Administrator of the estate of the late HENRY KHAEMBA WANYAMA who passed away on 17/03/2016 [Grant of letter of Administration ad litem issued in Kitale High Court Succession Cause No. 29 of 2015 on 09/05/2016 marked PExh.1]. His death certificate dated 15/04/2016 was produced and marked PExh.2.
11. According to PW1, the deceased was the father to the Plaintiff and his brother CHARLES WANYAMA having married his mother ABIGAIL STANDA. The Plaintiff and his brother were born in the years 1976 and 1979 respectively.



12. The deceased acquired ownership of all that parcel of land namely L.R. No. Trans Nzoia/Liyavo/36 by way of a sale agreement from the vendor, one JAMES K. TIREN. According to the said agreement marked PExh.13, the vendor acknowledged to have received Kshs. 400,000.00 from the purchaser on 10/04/1998.
13. The Plaintiff contended that the deceased remains the bona fide proprietor of all that parcel of land namely L.R. No. Trans Nzoia/Liyavo/36 measuring approximately 8.1 hectares. He obtained title to the same property on 16/07/2008 where he was buried on 24/03/2016.
14. Later on, and until 2014, the deceased one HENRY KHAEMBA WANYAMA cohabited with the 1<sup>st</sup> Defendant at Ongata Rongai in Kajiado County. During their union, they sired two (2) issues namely SHEILA WANYAMA and SHARON WANYAMA. PW1 thus disputed the contents of the 1<sup>st</sup> Defendant's statutory declaration sworn on 27/02/2013 marked PExh.3. It was in this home, according to PW1, that the deceased retained all his crucial documents. These included but was not limited to his two (2) title documents in respect to the subject parcels of land.
15. In February 2014, PW1's evidence was that the 1<sup>st</sup> Defendant abandoned the deceased from his home when he fell sick. The deceased was dropped by PW1 at the Ongata Rongai home one (1) night only to be asked by his step sister to come and collect the deceased the following morning. He had slept in an empty house as the 1<sup>st</sup> Defendant had deserted.
16. During the period of abandonment, the deceased lived with the Plaintiff at his home in Athi River. His evidence was that it was during this time that the 1<sup>st</sup> Defendant unlawfully and without authority, took with her all personal and professional documents belonging to the deceased. This included but were not limited to title deeds in respect to the suit properties. She continually remained in possession of those documents to date. In the meantime, the deceased remained unwell and unable to perform any duties; thereby delegating his activities to PW1.
17. Unaware of the 1<sup>st</sup> Defendant's actions, the deceased reported on 05/09/2012 at Central Police Station that his National Identity Card No. 6879462 and Standard Chartered Bank's ATM card were missing. He was issued with a police abstract dated 06/09/2012 marked as PExh.8. According to PW4, he was issued with the same and surrendered it to the deceased.
18. When conducting a search on 19/09/2013, the search results [PExh.5] indeed revealed that the deceased remained the registered proprietor of the suit land. PW1 insisted that it was never the deceased's intention to sell Trans Nzoia/Liyavo/36. Amongst the documents illegally obtained by the 1<sup>st</sup> Defendant is this title.
19. Sometime in 2014, the 1<sup>st</sup> Defendant fraudulently and maliciously procured the transfer and registration of the suit property into her name covertly and without the consent, knowledge, authority or approval of the Plaintiff and/or the deceased. She was ultimately issued with a title deed by the District Land Registrar, Trans Nzoia County of all that parcel of land namely L.R. no. Trans Nzoia/Liyavo/36 upon registering the transfer in her favor.
20. In so doing, the 1<sup>st</sup> Defendant procured the deceased's identity card and PIN certificate without his consent, failed to obtain the necessary consent from the Land Control Board, forged the deceased's signature as captured in the Power of Attorney dated 25/03/2013, drawn under the repealed Registered *Land Act*, registered at the Central Lands Registry on 24/04/2013, produced as PExh.9, held herself out as having the consent and authority of the deceased to enter into an agreement for sale dated 11/12/2013, forged the deceased's signatures on the Land Control Board Application form dated 14/10/2013 produced as PExh.21 and that captured in the transfers dated 13/04/2013 and



25/02/2014, the stamp duty declaration form dated 07/02/2014 and failed to pay stamp duty on the transfer. All these documents were furthermore never attested to by an Advocate.

21. The above transfers occasioned by the 1<sup>st</sup> Defendant were the subject of criminal proceedings in Kitale Chief Magistrate's Court Criminal Case No. 3836 of 2014; Republic vs. Emily Kivali Mulaya. The 1<sup>st</sup> Defendant was charged with two (2) counts of conspiracy to defraud contrary to Section 317 of the Penal Code, stealing contrary to Section 275 of the Penal Code, four (4) counts of making a document without authority contrary to Section 347 (d) of the Penal Code and five (5) counts of uttering a false document contrary to Section 353 of the Penal Code. The charge sheet was produced and marked PExh.12.
22. It was confirmed that ultimately, the 1<sup>st</sup> Defendant was acquitted of the said charges after full trial. The Prosecution has however filed a Petition of Appeal on 06/06/2019 challenging the impugned decision in Criminal Appeal No. 56 of 2019. He further affirmed that the sale agreement dated 16/09/2013 was not the substance of the charges leveled against the 1<sup>st</sup> Defendant.
23. Speaking to the forgeries on the deceased's signature, the Plaintiff called PW2 C.I. MICHIRA NDEGE forensic document examiner of over thirteen (13) years standing. He examined the specimens on 16/07/2014 which were submitted to him on 02/07/2014 via exhibit memo marked PExh.22b. They were presented to him by Corporal DANIEL NJOROGI. The specimens, with separate and distinct dates between 2013 and 2014, were:
  1. A1 - certified copy of a general Power of Attorney
  2. A2 - statutory declaration
  3. A3 - application for LCB consent
  4. A4 - a transfer
  5. A5 - KRA stamp duty form declaration serial number 170944
  6. A6 - transfer of land
  7. C1 & C2 - specimen handwritings of the deceased - taken thirteen (13) months after A1 - A6.
  8. B1 & B2 - known handwritings of the deceased [not produced before the court]
24. PW2 was tasked to ascertain whether the signatures indicated on A1 - A5 were made by the same author in comparison to those marked C1, C2 and B1, B2. His professional opinion was that they were not made by the same author. His report dated 16/07/2017 was produced and marked PExh.22a.
25. In making those findings, PW2 considered the character initialization and terminal strokes, character construction and arrangements, natural pen lifts, movement of pen from the start to end of the signatures, ink distributions in character writings, baseline alignment and general resemblance. He used a computer system by relying on a videospectia comparator 5000 machine in arriving at the said conclusion.
26. PW2 said in cross-examination that poor eyesight and writing as well as time lapse were factors to consider. However, they were not included as factors to consider in his final report. He confirmed that at the trial in Criminal Case No. 3836 of 2014, he testified that health, age, length of time and a stroke can affect one's writing. He stated that during the exercise, he had no prior knowledge that the deceased had suffered a stroke in 1993. He maintained however that the duration of when the time the documents were made herein were not of significant value.



27. Testifying to the transfer of L.R. No. Trans Nzoia/Kapomboi/193 from the 1<sup>st</sup> Defendant to DAVID KINISU SIFUNA (the 2<sup>nd</sup> Defendant in ELC No. 120 of 2014), Advocate AGGREY KIDIAVAI wrote a statement at the DCI dated 14/05/2015 [PEXh.18]. He explained that he drafted an executed a sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants upon confirming that the Power of Attorney presented by the 1<sup>st</sup> Defendant was valid. He stated that he only witnessed the down payment of the purchase price and did not participate in the entire conveyance process.
28. Speaking to the attestation of the transfer forms PW5 DAVID O. TETI an Advocate of the High Court of Kenya testified that on 25/02/2014, he witnesses the execution of the transfer forms executed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. He was at the time working under the nature and style of Kidiavai & Company Advocates based in Kitale. His evidence was that at the time of execution, the forms had not been filled. He executed the same regardless upon the promise from the parties that they would duly fill the forms in a law firm situated in Nairobi. He also caught a glimpse of the Power of Attorney donated by the deceased to the favor of the 1<sup>st</sup> Defendant. He confirmed that during this process, the deceased was absent. PW5 wrote a written statement dated 03/08/2015 capturing this information before the DCI that was produced and marked PEXh.27.
29. The Plaintiff also relied on the statement of Advocate NELSON MUTURI DUMBEIYA HARUN [PEXh.19] dated 29/05/2014 recorded by the DCI. The salient features of his statement were that he had known the deceased and 1<sup>st</sup> Defendant as a couple since 2006. He recalled that he was visited by the couple one night in October 2006. Concerned that their prime property situated in Industrial Area would be sold by way of public auction following their failure to stop the sale in HCCC No. 45 of 2005 against the creditors Standard Chartered Bank, they approached the Advocate for counsel. That they had sold a portion of their land in Kapomboi Settlement Scheme to ACK Kitale to set off the debt leaving a balance.
30. The Advocate successfully filed HCCC No. 560 of 2006 stopping the sale by public auction. In spite collecting millions in rent, the deceased never paid the Advocate for his litigious efforts. Other suits, more than ten (10) in number and spanning millions, in which he safeguarded the deceased also did not have his fees paid.
31. Come mid July 2012, the deceased sought legal services from the Advocate for sale of a property to finance the tertiary education of his daughter to London School of Economics. He subsequently registered a charge in favor of Standard Chartered Bank for the sum of Kshs. 3,000,000.00. Later on, the Advocate advanced several sums of money totaling Kshs. 1,493,740.00 to the couple in settlement of their daughter's fees with the expectation that he would be paid at a later date.
32. In binding the couple to settle the sums disbursed to their favor, the Advocate drew a Power of Attorney dated 25/03/2013. It was given to the 1<sup>st</sup> Defendant. It was further premised on the 1<sup>st</sup> Defendant's instructions that the deceased had authorized the preparation of the instrument. She executed the same in his presence and in the presence of his literate brother one GEORGE WAFULA. It was returned by the couple to the Advocate after the deceased had executed the same. It was attested by Counsel and subsequently registered at the Land's Registry on 24/04/2013.
33. In respect to title number L.R. No. Trans Nzoia/Kapomboi/193, the Advocate stated that the same was voluntarily presented to him by the couple for purposes of sale. It also served as lien for his legal fees and security for payment of a sum of Kshs. 1,500,00.00 towards its purchase. In line with this sale, the Advocate had the transfer, spousal consent and Land Control Board Application forms executed in his favor in his possession. He also retained the deceased's PIN, identity card and passport photographs.



34. Ultimately, after agreeing on the modalities of his legal fees, which he never sued the deceased for recovery, the Advocate surrendered the said title namely L.R. No. Trans Nzoia/Kapomboi/193 to the 2<sup>nd</sup> Defendant within the knowledge of the 1<sup>st</sup> Defendant. That the said title together with L.R. No. 18990 were brought by the couple to his offices willingly and on their own volition. It was therefore untrue that they had been stolen.
35. PW1 continued that the 1<sup>st</sup> Defendant, upon taking possession of the suit land, continued to trespass and waste upon it. He added that she has further, through threats of violence, evicted the Plaintiff's servants and agents from the property.
36. Before his death, the deceased sold his parcel of land namely L.R. No. Trans Nzoia/Kapomboi/97 to the Catholic Diocese of Kitale during his lifetime. This was due to the fact that a debtor he had guaranteed had failed to pay his debt with Standard Chartered Bank. The Plaintiff thus denied that L.R. No. Trans Nzoia/Kapomboi/193 was sold to pay off his debts. A copy of this title deed issued to the deceased on 16/02/2009 was produced and marked PExh.20. The Search Certificate dated 19/09/2013 disclosing the deceased as the proprietor was produced and marked PExh.4 (Pexh.14). It was PW1's evidence that the deceased never intended to dispose of the property.
37. Maintaining that L.R. No. Trans Nzoia/Kapomboi/193 was never sold under the deceased's behest, the Plaintiff produced a lease agreement between the deceased and one SAMUEL LOSEM leasing fifty (50) acres of the land for purposes of crop growing between January 2012 and December 2012. The lease, dated 04/01/2012, was produced and marked PExh.17. PW1 testified that the deceased entered into a lease agreement because his crop planting projects never materially capitalized financially.
38. It was later discovered on 22/09/2016, the property had been transferred to the 2<sup>nd</sup> Defendant on 25/02/2014. A copy of the search certificate was produced and marked PExh.15. Following this revelation, a notice of restriction dated 14/03/2014 [PExh.16] was registered against the suit property namely L.R. No. Trans Nzoia/Kapomboi/193 by the deceased.
39. Speaking to the sale of L.R. No. Trans Nzoia/Kapomboi/193, the Plaintiff called PW3 ROBERT MALOMBA NAMWARAMBA a property agent working for RANES ENTERPRISES LIMITED at all material times to the suit to the stand. He adopted his witness statement dated 29/05/2017 to state that he met the 1<sup>st</sup> Defendant at her hospital/home after being notified that she was intent on disposing of the property measuring fifty (50) acres. He had been commissioned by KTDA to scout for land for purchase as the company was intent on planting blue gums.
40. Demonstrating authority and ownership, the 1<sup>st</sup> Defendant furnished PW3 with a copy of the title deed [PExh.20], the Power of Attorney [PExh.9] and proof of marriage [PExh.3]. The 1<sup>st</sup> Defendant demonstrated desperation by informing him that she wanted a quick sale since was intent on raising school fees for her daughter studying in the UK. For that reason, PW3 advised her not to sell the property to KTDA owing to their lengthy internal process mechanisms.
41. PW3 scouted for another buyer in the 2<sup>nd</sup> Defendant. He was interested in the purchase of the suit land. Desirous of obtaining the suit land, PW3 made arrangements for a meeting with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The outcome was affirmative since the 2<sup>nd</sup> Defendant opted to purchase the same. They thus approached the firm of Kidiavai & Company Advocates who drafted a sale agreement dated 11/12/2013 marked PExh.23.
42. Upon execution of the sale agreement, witnessed by PW3, the 2<sup>nd</sup> Defendant paid a deposit of Kshs. 2,000,000.00. The deceased, according to the 1<sup>st</sup> Defendant, was away as he was bedridden at the Aga Khan Hospital. Owing to the fact that PW3 had executed two (2) agency agreements, one (1)



- dated 28/11/2013, marked PExh.24a and PExh.24b respectively for the sale of the suit land to initially KTDA and subsequently the 2<sup>nd</sup> Defendant, PW3 sought an enhanced commission fee. PW3 testified that he was never paid his commission fees owing to financial difficulties. He was however paid Kshs. 500.00 in January 2014 by the 1<sup>st</sup> Defendant to conduct a search on the property to establish the position as to proprietorship. The search certificate dated 24/02/2014 and marked PExh.6 revealed that the suit title was transferred in the name of the 2<sup>nd</sup> Defendant.
43. PW3 testified that he only met the deceased when criminal proceedings were preferred against the 1<sup>st</sup> Defendant. He recorded a statement with the police. He stated that the 2<sup>nd</sup> Defendant once threatened him at Nakumatt Mall Kitale for selling him a fraudulent parcel of land. He also produced the letter of consent dated 30/10/2013 marked PExh.25.
  44. PW3 maintained that he had no grudge against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. He added that as at the time of executing the letter of consent, the 1<sup>st</sup> Defendant did not know the 2<sup>nd</sup> Defendant. She thus could not have placed his name on the consent even if fraudulently. She had done nothing wrong; thus that the document was erred or fraudulent. PW3 confirmed that during registration of the title by the Registrar, there was no caution or restriction against the title.
  45. On discovery of the above, the deceased was upset. This led him to confront PW1's uncle GEORGE WAFULA residing in Kitale. He was escorted by PW1. However, that confrontation bore no fruit. Thereafter, PW1 was instructed and duly registered a restriction against title number L.R. no. Trans Nzoia/Liyavo/36 on 17/03/2014. The notice of restriction dated 17/03/2014 was produced and marked PExh.7.
  46. Denying that the deceased donated a Power of Attorney in favor of the 1<sup>st</sup> Defendant, PW1 further stated that in addition, the 1<sup>st</sup> Defendant was not authorized to sell any specified property. As such, it was ineffective as to purport to transfer the property in her name under the repealed Registered Land Act for failing to conform to the prescribed forms.
  47. Noting the fraudulent activities occasioned on the strength of the existence of the Power of Attorney, the deceased approached DR. JOHN KHAMINWA Advocate for advice. He was introduced to PW6 AYEKHA SHAKWILA Advocate of the High Court of Kenya who was working in the firm of Khaminwa & Khaminwa Advocates. He relied on his witness statement dated 16/07/2019.
  48. PW6 was informed by the deceased that the Power of Attorney was used to fraudulently transfer a parcel of land. He was further informed that the Power of Attorney was not authorized by him as he refuted that the signature embedded thereof belonged to him. He further stated that he never issued the Power of Attorney and furthermore never received proceeds of the sale of land.
  49. PW6 advised him to revoke the said Power of Attorney and challenge the land transfer. That a Power of Attorney needed not be challenged by a court order to. To this end, PW6 drafted a standard format deed of revocation of a Power of Attorney dated 04/06/2014 on behalf of the deceased which was produced and marked PExh.10. It did not validate anything that was wrong. He advised that there would be no need for the deceased to execute the transfer if he had signed the Power of Attorney.
  50. According to the deed of revocation registered at the Central Lands Registry on 13/06/2014, the same acknowledged that it had appointed the 1<sup>st</sup> Defendant by Power of Attorney/deed. It stated that the 1<sup>st</sup> Defendant was appointed as the deceased's attorney to do certain things connected with all acts, deeds, matters and things whatsoever over his estate's property and its affairs which the deceased would have done had the deed not been made.



51. It thereafter revoked the deed disclaiming that the said revocation did not affect the validity of any act or thing done by the 1<sup>st</sup> Defendant by virtue of the powers conferred on her by the said deed in good faith before receiving the notice of revocation hereof. PW1 alleged that he was present when the deceased executed this deed.
52. Evidence of the deceased's deteriorating health was expensed in Dr. Nadeem Sheikh's Medical Report issued by Aga Khan Hospital dated 18/10/2016 and marked PExh.11a. The medical report was in respect to the deceased's admission at the Hospital in its Nairobi branch between 04/02/2014 and 07/02/2014. From the same hospital, the deceased was also seen by neurosurgeon Dr. M. M. Qureshi in 2012. He compiled a Medical Report dated 05/09/2012 marked PExh.11. b.
53. In summary from the reports, the deceased suffered a stroke in 1993 that led him to an impairment of memory, irritability and hemiparesis. In January 2012, the deceased developed visual impairment and persistent slurring of speech. He also suffered hypertension during his lifetime. The doctor observed that resultantly, the deceased suffered a tendency to lose direction to his office where he had worked since 1997, short term memory loss including forgetting what meal he ate a day or so earlier and less motivated. During his visit with Dr. M. M. QURESHI, the deceased was accompanied by his first cousin. His prognosis was that the deceased suffered early stages of dementia that was responsible for his cognitive impairment.
54. The doctor consequently advised that the deceased does maintain his medication on a regular basis. He further advised that arrangements be placed to enable decisions affecting his business dealings to be carried out jointly with his family members to avoid entering into unfair deals.
55. PW1 contended that it was during the period that he lived with the deceased that the 1<sup>st</sup> Defendant fraudulently transferred the suit property in her name. Since he was indisposed, it was not possible for him to authorize, by appending his signature, of any transactional documents in favor of the 1<sup>st</sup> Defendant. He further could not attend any of the Land Control Board meetings in Kitale as alleged.
56. PW1 continued that should the Power of Attorney be found to be with merit, which fact was denied, then it did not authorize the 1<sup>st</sup> Defendant to have the suit registered in her name since it would not have achieved its purpose of settling the deceased's debts due.
57. During his lifetime, the deceased was a professional valuer and managing director of City Valuers Limited. He had employed PW4 KENNETH ERIC SYAMBA as an accountant, maternal cousin and personal assistant. He adopted his witness statement dated 19/05/2017 recalling the purchase of L.R. Trans Nzoia/Liyavo/36. He testified that the deceased financed the purchase by way of a mortgage over his old racecourse house over L.R. No. 209/8124 with Transnational Bank (subsequently sold owing to his default in payment), trading his motor vehicle registration number KZS 934 BMW, valued at Kshs. 500,000.00, to MR. JAMES TIREN, the vendor, proceeds from the delivery and supply of computers to KPA headquarters as the successful bidder and proceeds from the sale of a plot in Bungoma town. Out of the proceeds of the tender, the deceased paid a balance of Kshs. 400,000.00 to the vendor.
58. In respect to the purchase of L. R. No. Trans Nzoia/Kapomboi/93, PW4's evidence was that the deceased purchased the same from the late HON. ERIC KHASAKHALA, adjacent to the deceased's property namely Trans Nzoia/Kapomboi/197. The property was initially leased to the deceased for crop growing purposes to the deceased for two (2) years.
59. The consideration sum of Kshs. 2,000,000.00 was paid as follows; Kshs. 500,000.00 settled the previous owner's outstanding liabilities with Settlement Fund Trustees and the balance of Kshs. 600,000.00 was paid by way of trade in of a parcel of land he owned in prison area to the vendor and



- settlement of travel ticket expenses of the vendor and his wife when they traveled to the USA. All this time, the 1<sup>st</sup> Defendant was not in the picture.
60. In the early years of 2012, the deceased advised his sons to develop a parcel of land namely L.R. No. Mavoko Municipality 18890. It was around that time that he was sick on and off.
  61. Between April and May 2012, the 1<sup>st</sup> Defendant approached the deceased requesting for funds to educate their daughter in UK. The 1<sup>st</sup> Defendant informed the deceased that she had found a buyer for the said property namely L.R. No. Mavoko Municipality 18890. Though the deceased never met the purchaser, he gave the 1<sup>st</sup> Defendant his ID, PIN certificate and photos to effect transfer.
  62. PW4 continued that later on, the deceased went to the offices of NELSON HARUN Advocate to execute the transfer forms. PW4 wasn't present during this process. It was at this time that he had lost his identity card and ATM card to which he sent PW4 to report on his behalf on the loss at Central Police Station. It was only after the 2013 General Elections that his identity card was replaced.
  63. In that same year, the deceased informed PW4 that his title documents in respect to L.R. Trans Nzoia/Liyavo/36 and L. R. No. Trans Nzoia/Kapomboi/93 were not in his possession; he could not trace them even in Ongata Rongai. When PW4 was instructed to report the matter, he was advised by the police that the said report could only be reported by the deceased. That he was required to furnish copies of the original missing documents. Since he lacked copies and was unwell, the deceased never reported the matter. The deceased did not register a caution or restriction on the properties however.
  64. In his examination in chief evidence, PW4 testified that he reported the loss of the deceased's ID card and title deeds and was issued with a waiting card produced and marked PExh.26. PW4's evidence was that it was never the deceased's intention to dispose of the suit lands.
  65. In June 2013, PW1 and his brother, on the express authority of their deceased father, began to farm the land in Kapomboi awaiting planting season in 2014. He had just returned to Kenya from the USA. Later, their deceased father asked them to farm in 2015 to allow their step-sister SHEILA to farm in 2014. In December 2013 thus, the deceased traveled with his daughter in readiness for planting. PW4 would later learn that the missing title documents were transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in early 2014.
  66. PW1 accused the 1<sup>st</sup> Defendant of threatening to take the suit properties. On one instance, PW1 testified that the 1<sup>st</sup> Defendant said: "Serikali imebadilika." He was advised to leave L.R. No. Trans Nzoia/Liyavo/36.
  67. PW1 recalled that during his stay in the USA, he invited the 1<sup>st</sup> Defendant to stay with her. During that time, the 1<sup>st</sup> Defendant visited her daughter that was impeded from traveling to Kenya. He was surprised that she only visited two (2) years later.
  68. PW1 then stated that the signatures on the Power of Attorney appeared different in his view in comparison to those embedded in the statement of Nelson Harun Advocate as belonging to the said Advocate. Speaking to the Power of Attorney, PW1's evidence was that had it been valid, there would have been no need for the deceased to execute the transfer document when the suit land was transferred to the name of the 1<sup>st</sup> Defendant.
  69. The Plaintiff was emphatic that the actions of the 1<sup>st</sup> Defendant were unauthorized. Since all children of the deceased had completed their education, no reason could have sufficiently justified the sale of the suit properties. Furthermore, the deceased never derived benefit from those illegal dealings. The actions of depriving the deceased of the property has caused the estate to suffer untoward loss and



damage which the Plaintiff sought compensation. The Plaintiff thus urged this court to grant the reliefs as prayed.

### **1<sup>st</sup> Defendant's Case**

70. The 1<sup>st</sup> Defendant and DW1, a professional nurse, testified that she had been married to the deceased for thirty-four (34) years until early 2014. She relied on her witness statements in the consolidated files dated 26/08/2014 and 08/03/2017 to continue that they wed on 15/03/1978 under Luhya Customary Law at Chesamis in Bungoma. They were blessed with two (2) children namely SHEILA SIFUMA WANYAMA and ANNSHARON NJAVINYA WANYAMA.
71. DW1's witness statement was that during the pendency of their union, the deceased stepped out of their marriage where he sired two (2) children with a lady called ABIGAIL; the Plaintiff herein and his brother CHARLES WANYAMA. In her evidence at trial, she testified that he met the deceased when the Plaintiff was six (6) years old and his brother. He was at that time under the deceased's mother's care.
72. In the deceased and DW1's joint statutory declaration dated 27/02/2013 marked DExh.1, it was disclosed that they were blessed with four children; the Plaintiff 36 years, his brother 31 years, Sheila 27 years and Ann-Sharon 23 years of age at that time. It also stated that there was no other marriage statutory, customary or otherwise that had subsisted between any of them and any other person prior to or during their customary marriage.
73. DW1 and the deceased lived in several estates including Ongata Rongai. It was on 20/10/2013 that they were served with a notice to vacate the said matrimonial premises dated 19/10/2013 marked DExh.8. This prompted them to relocate to Hardy Estate Karen effective 01/01/2014. She produced the lease agreement dated 15/11/2013 together with the tenant information form dated 15/11/2013 marked DExh.9.
74. During the moving out process, DW1's evidence was that the Plaintiff sent a driver to collect the deceased with instructions that he be taken to their matrimonial home in Kitale. She thus denied that she kicked and/or abandoned the deceased from their matrimonial home. She testified that she carried the deceased's personal belongings and title documents with her from that home in Ongata Rongai.
75. She further pointed the Plaintiff's dishonesty since he caused the deceased's eulogy to state that he moved to Kitale when he realized that his properties had been transferred.
76. During the subsistence of their union, DW1's testimony was that she took care of the Plaintiff and his brother. She lived with them when they were children. She recalled that their relationship was cordial. She for instance secured his admission to Mt. Kenya Academy and subsequently at Alliance High School where he attended his school functions as his mother. She later facilitated his travel to Spain where he pursued his tertiary education. In spite of her valiant efforts, her co-wife never attended any of the family members' burials.
77. In fact, in 2011, DW1 applied for a visitor's visa to visit the Plaintiff who was working as an Aircraft Structures Engineer in the USA. The Plaintiff's letter dated 31/01/2011 [DExh.2] to the embassy disclosed that DW1 was his mother and was inviting her to visit him for three (3) months. She would successfully obtain the visa where she stayed with him for one (1) week before moving to see her daughter. The Plaintiff and his daughter also occasionally spent time together when they were both living in the USA.
78. Testifying as to the nature of her union with her husband being monogamous, DW1 erected a house at the deceased's ancestral home situated in Chesamis. She stated that it was only permitted because the deceased had only one (1) wife.



79. The first time DW1 had interactions with the Plaintiff's mother was in 2013 when she sent her an email admitting that she had been away from the family for too long. Forming part of DExh.21, the salient features of the email dated 22/10/2013 stated that she was intent on resolving the growing conflict between DW1 and the Plaintiff stating that she was the Plaintiff's mother.
80. The author further made several accusations against DW1 to suggest what may have caused the strife. It was the author's view that DW1 was initially supposed to be a business partner and not a wife since she was promised that she would be the deceased's wife.
81. It was around this time of the email that the deceased had just been discharged from Hospital after a long illness. She admitted that the medical reports marked PExh.11a and PExh.11b were a true reflection of the deceased's health and doctor's advice. She recalled that the deceased suffered multiple strokes including one that led to his brain bleeding; the cause of his dementia and mental degeneration.
82. She would later see the Plaintiff's mother in court testifying in the criminal proceedings. She thus refuted claims that she was a second wife accusing the Plaintiff of imploring sympathizers to take DW1's place in the family. She further recalled that had the Plaintiff's mother been the first wife, then she would have been copied in a trail of emails amongst the Plaintiff, his brother, DW1, the Plaintiff's uncle as well as DW1's daughters marked DExh.20 and DExh.21.
83. During the subsistence of their union, DW1's testimony was that they acquired several matrimonial properties with varied contributions from each of them. She testified that L.R. No. Trans Nzoia/Liyavo/36 measuring approximately 8.1 hectares was obtained in 1993 and successfully acquired in 1998 from the vendor one JAMES TERREN located in Kitale. The consideration sum was Kshs. 600,000.00.
84. The property then registered in the name of the deceased. The purchase price was paid in the form of trade in of DW1's BMW318 car valued at Kshs. 400,000.00, the deceased's contribution and Kshs. 600,000.00 borrowed by DW1 from Barclays Bank. The said loan was secured by way of mortgage over the deceased's title deed namely L.R. No. 209/9861. It was her evidence that she paid the loan amount to the last coin. It was here that they set up their matrimonial home. The charge dated 14/05/1998 by the deceased to Barclays Bank of Kenya was produced and marked DExh.19.
85. Further establishing contribution, DW1 testified that she single-handedly paid her daughters' school fees. That Sharon schooled in Brook-house School while Sheila went to Laiser Hill Academy, Keel University and William Woods Universities. At no point were any of their acquired properties disposed of in paying for the children's education.
86. That on 01/11/2002, the deceased guaranteed the repayment of a sum of Kshs. 4,500,00.00 to an entity known as DOSA ENTERPRISES to secure the loan charged to Standard Chartered Bank Kenya Limited secured by their matrimonial property of all that parcel of land namely L.R. NO. 209/3890, a Go-down situated in Nanyuki road Industrial area Nairobi. The borrower, who was a longtime friend called MR. OMUDING, defaulted in the loan. Consequently, the said property was set to be sold by auction.
87. Desirous of avoiding the sale, the deceased filed Nairobi HCCC No. 45 of 2005 seeking an injunction to stop the sale. That application was unsuccessful thereby paving way for sale of the property.
88. Come 26/07/2005, the deceased entered into a sale agreement for the sale of their matrimonial property namely L.R. No. Trans Nzoia/Kapomboi/197 at a considered sum of Kshs. 11,000,000.00. This prompted FRANK MANAGEMENT CONSULTANTS LIMITED to sue the deceased in



Nairobi HCCC No. 3 of 2007. She would be notified that the purpose of this sale was to settle the claim by Standard Chartered Bank Limited and safeguard L.R. NO. 209/3890.

89. Following, the deceased on 26/05/2006 entered into a memorandum of understanding duly witnessed by PW4 marked DExh.24. Under its terms, an entity known as FRANK MANAGEMENT CONSULTANT LIMITED was to advance to the favor of the deceased and PW4 Kshs. 7,626,226.00. In that regard, the deceased acknowledged that he was in possession of the sum of Kshs. 5,000,000.00. The allegation that the balance of Kshs. 2,626,226.00 was paid to the deceased's bank account was, in DW1's view, marred with falsehoods.
90. On that same day, a sale agreement [DExh.25] was prepared between the deceased and FRANK MANAGEMENT CONSULTANT LIMITED for the sale of L.R. No. 209/3890 at a sum of Kshs. 13,000,000.00.
91. DW1 discovered that in 2006, the deceased and PW4 were dealing with the properties irrationally thereby losing their value and risking them to loss. For instance, in 2011, they sold two (2) acres excised from L.R. No. Trans Nzoia/Liyavo/36 without DW1's consent under the pretext that they were raising funds for their children's education. She was emphatic that at that time, none of the children were in school.
92. DW1 advised the deceased to seek counsel from her lawyer DW2 NELSON MUTURI NDUMBEIYA. It was on the strength of his intervention that the couple managed to save the property from the forced sale. Following his success, the deceased retained DW2 as his advocate and acted for him in several litigious disputes.
93. Amongst the cases filed by DW2 were one challenging the occupancy of the Kitale Anglican Church of one of the deceased's parcels of land; yet they had not fully paid the purchase price as the balance of Kshs. 4,000,000.00 remained outstanding. The sale agreement dated 26/07/2005 was produced and marked DExh.26.
94. During the pendency of the suit, the deceased, on the advice of PW4, clandestinely engaged the firm of J. M. Wafula & Company Advocates. Following the deliberations, the deceased withdrew the suit. He was then paid the balance of the purchase price by the church.
95. In 2012, the DW1 approached the deceased to discuss about paying school fees for one of their daughters who had received admission to London School of Economics. Her acceptance letter dated 31/01/2012 was marked DExh.31. She was led to point out that while the letter said that the program was to run to 30/09/2013, the sale of the property took place in December 2013. She maintained that the daughter could only graduate upon payment of school fees.
96. The deceased promised DW1 that he would sell the property in Mavoko namely L.R. No. 18990. This was done ultimately to pay the school fees. That idea was protested by ELIUD BUTALI KHAEMBA and PW4. DW1 recalled that was the beginning of a strained relationship with the Plaintiff who was advised to return to the county and defend his father's properties. He did so in 2013.
97. Later on, DW1 found out that the deceased had never met DW2's legal fees totaling Kshs. 8,416,000.00 in spite of his successful legal representation in several matters. She was shocked because the deceased received nearly Kshs. 14,000,000.00 in revenues for the last eight (8) years. It was her evidence that in spite of not having been paid the said sums of money in fees, he paid their daughter's fees in exchange for their plot in Athi River. A remittance application form for the sum of Kshs. 3,000,000.00 in support of payment of school fees was produced and marked DExh.32. A cheque in the said sum was drawn on 24/08/2012 and produced and marked DExh.33.



98. DW1 annexed a bundle of several cheques from DW2 to the DW1's daughter dated 30/04/2012, and two (2) others dated 19/04/2013 marked DExh.35. DW2 also presented a cheque to the Commissioner for Domestic Taxes dated 11/09/2012 marked DExh.36. In acknowledgment of those sums paid, DW1 stated that the money was part payment towards the sale of all that parcel of land namely L.R. No. Trans Nzoia/Kapomboi/193.
99. In settling DW2's outstanding debt, an agreement dated 16/09/2013 was then prepared, drawn and executed by the deceased, DW1 and DW2 as parties to settle the said outstanding balance. It was marked DExh.19. It also acknowledged that DW2 had settled a sum in school fees to their daughter.
100. Following this agreement, the deceased surrendered title number L.R. No. Trans Nzoia/Kapomboi/193 together with a copy of his PIN certificate, ID and photos, an executed undated transfer form marked DExh.27 together with the deceased's passport photograph as well as an undated land control board Application form, citing sale of suit land, marked DExh.28.
101. DW1 on her part executed a spousal consent, pursuant to Section 28 (a) of the [Land Registration Act](#), a letter dated 12/09/2013 [Dexh.29] agreeing to transfer the said suit land to DW2. She also swore and executed an Affidavit dated 16/09/2013 under the aforementioned provisions of the Act marked DExh.30.
102. DW2 was eventually not interested in the said parcel of land namely L.R. No. Trans Nzoia/Kapomboi/193. He thus implored the deceased and DW1 to find a purchaser which funds would offset his outstanding legal fees and other debts owed by the deceased and DW1.
103. On one occasion, DW1 wrote to MRS. KHABAKHALE seeking her indulgence to seek a solution to settle her husband's debts. In her letter dated 14/03/2013 [DExh.22], she asked for a grace period to arrive at a solution as she was not aware that the deceased had owed her money. DW1 executed the said letter.
104. DW1 explained to the said creditor that she acknowledged that the deceased was indebted to a lot of creditors. She indicated that her husband authorized her to sell some of their properties in order to settle his debts. She disclosed that in fact, it was MRS. KHABAKHALE that sold the Kapomboi land to the deceased. The sale was by way of gentleman's agreement.
105. It was at this juncture that DW1 interacted with DAVID KINISU SIFUNA, the 2<sup>nd</sup> Defendant herein who expressed interest in purchasing the said property. She was introduced by their neighbor based in Kitale. A series of deliberations led up to the preparation of a sale agreement dated 11/12/2013 between the deceased and the 2<sup>nd</sup> Defendant. It was prepared by AGGREY KIDIVAI ADVOCATE and executed by DW1 in Kitale, on behalf of the deceased who was in Nairobi, and the 2<sup>nd</sup> Defendant who similarly annexed his passport photograph, ID number and PIN number. Coupled with the same, an executed transfer by the deceased was also furnished for registration.
106. According to DW1, the consideration sum was Kshs. 12,500,000.00. She was paid a total sum of Kshs. 3,500,000.00 with the balance being paid through titles that she held. Her evidence was that the deceased was never paid the said sums. She added that though the transfer indicated that the consideration was Kshs. 6,000,000.00, that was not an accurate representation of the facts. On cross examination, she stated that the purpose of selling that parcel of land was to pay off debts to Mrs. FLORENCE KHABAKHALE in the sum of Kshs. 2,000,000.00 and school fees for Ann-Sharon totaling €8,000.
107. Once the property was transferred, DW1 testified that the deceased was coerced to raise a complaint in October 2014 as to the legality of the transaction. It was here that the Plaintiff picked the deceased



- and stayed with him until his demise. DW1 recorded her statement dated 02/07/2014 produced and marked DExh.18.
108. The outcome of the complaint gave rise to criminal proceedings against DW1 in Criminal Case no. 3836 of 2014. Though he complained, the deceased never testified in the matter. After close of the Prosecution's case, DW1 was acquitted of all the charges levelled against her as the court ruled that she had no case to answer. She produced the proceedings which were marked DExh.39.
  109. DW1 would unearth several activities commissioned by the deceased furtively including the sale of one hundred (100) acres of land to save the Go-down wherein he received Kshs. 11,000,000.00. It was however never used to offset his loans.
  110. She further discovered that the deceased covertly sold her 1<sup>st</sup> farm at Endebess estate, their matrimonial home at Kariokor Civil Services House, Kilifi plots Jimba/405, Kapomboi Settlement plot 197, Likoini Plot Mombasa title 19, five (5) acres at prison, and Nairobi Dam plot L.R. No. 209/9861 title I.R. 48671.
  111. Frustrated and discouraged, DW1 in March, 2013 sought legal advice as to how to protect further loss of the matrimonial properties. She met DW2 together with the deceased. They also carried the two (2) medical reports with them. DW2 advised them to secure a Power of Attorney for purposes of either transferring the remaining properties to herself or to other third parties upon settlement of the requisite consideration. The intention was to raise funds to settle family debts. The Power of Attorney, dated 25/03/2013 and registered on 24/04/2013 was produced and marked DExh.12.
  112. Following the donation of authority, DW1 wrote to Standard Chartered Bank Limited with a view to settling the outstanding debt on the Industrial Area property title number L.R. 20/3890 the Go-down.
  113. The agreement dated 24/04/2013 marked DExh.3. Under the terms of agreement, it was agreed a rebate sum of Kshs. 3,000,000.00 would be paid by 20/05/2013. It was further agreed that the parties would execute an out of court settlement and settle the legal fees. The failure to fulfill those obligations entitled the bank to full debt recovery. It was executed by the deceased and DW1.
  114. Unfortunately, two days later, the deceased wrote a letter dated 26/04/2013 [DExh.4] revoking that letter of 24/04/2013. Because of this, the 1<sup>st</sup> Defendant did not make any payments. Addressed to JOSEPHINE NGUNJIRI, the deceased made reference to a meeting he had with the recipient, the Plaintiff and the deceased's cousin on 25/04/2013. It prayed that the debt be assigned to the Plaintiff after clarifying the amounts paid already.
  115. Upon discovery of the said letter, DW1 wrote a letter dated 29/04/2013 marked DExh.5 referring to advice from her lawyer that according to statute, no mandatory dealings could be passed without her consent. It was her view that the letter attempting to revoke the settlement agreement was not done to secure his interest. That the Plaintiff and his uncle were taking advantage of the deceased's mental ill health.
  116. DW1 also benefitted from the transfer of L.R. No. Trans Nzoia/Liyavo/36 in her name after two (2) acres had been secretly sold. This transfer had no agreement. Her evidence was that the deceased agreed in February 2013 to transfer the same in her name because he wanted the property to be their family home.
  117. In 2013, the deceased executed the transfer for L.R. No. Trans Nzoia/Liyavo/36 in favor of DW1 early 2013. The transfer was registered in 2014 with the assistance of the deceased's referral. There was also a consent transferring the land while stamp duty was paid by the deceased. It was her evidence that the



- house erected therein was built by her. It was this parcel of land where the deceased's remains were laid to rest. She also farms on the land.
118. DW1 pointed out that the Plaintiff's removal of the deceased from their matrimonial home was incidental to their accusations against the DW1 of fraud and forgery. Furthermore, it was at this juncture that the Plaintiff's mother resurfaced claiming a stake over the assets of their properties.
  119. DW1 maintained that all actions taken were in good faith. It is for those reasons that the deceased, when revoking the Power of Attorney in July 2014, admitted to having issued the Power of Attorney whose acts were done in good faith.
  120. Desirous of removing any such authority of DW1, DW1 testified that the Plaintiff caused the deceased to execute the revocation of the Power of Attorney marked PExh.10. She also produced the same dated 04/06/2014 and registered on 13/06/2014 as DExh.16.
  121. DW1 recalled that in some instances, the dispute escalated between herself and the Plaintiff were intervened by Counsel. She annexed correspondence exchanges dated 21/08/2013, 30/08/2013, 05/11/2013, 11/11/2013, (2) letters dated 09/07/2014 and (2) two letters dated 11/07/2014 marked DExh.6, DExh.7 DExh.10, DExh.11, DExh.13, DExh.15 and DExh.14 and DExh.17 respectively.
  122. In further support of her evidence, DW1 further relied on the deceased acknowledgment note dated 16/10/2007 [DExh.34] to wit the deceased acknowledged receipt of Kshs. 120,000.00 as a friendly loan in settling the decretal sum in Kitale CMCC No. 174 of 2007. It was witnessed by DW1. She also relied on a letter from Olkejuado County Council dated 25/08/2006 [DExh.37] indicating that Plot No. 1524/business Noonkopir I Centre was transferred to DW2.
  123. DW1 testified that she lived on L.R. No. Trans Nzoia/Kapomboi/198. She was not aware that the deceased reported that this title was missing maintaining that it was not lost.
  124. DW1 recalled that in 1993, the deceased started bleeding in the large intestines. She took him to Nairobi where he underwent surgery. The following year while in Mombasa, the deceased developed brain bleeding due to a rupture of a brain vessel. He was flown to the Nairobi Hospital in Nairobi and admitted in the ICU for ten (10) days. He was later transferred to the general ward for a fortnight before he was discharged from hospital. She then took care of him by administering drugs at the times indicated by the doctor. She recalled that during his lifetime, no dispute as to ownership of land subsisted as between each other.
  125. She accused the Plaintiff, PW4 and the late ELIUD BUTALI KHAEMBA of unduly influencing the deceased to filing the present suits hence filed mala fides. This was evident from the proceedings in Kitale criminal case no. 3836 of 2014 where the Plaintiff instructed PW4 to place a restriction on the suit land. That ELIUD BUTALI KHAEMBA advised the deceased to lodge a complaint at the police station and the Land Registrar.
  126. DW1 stated that the actions of the Plaintiff have caused her mental anguish, personal indignity and character assassination. She denied any fraudulent activities as pitted out by the Plaintiff stating that at all material times to the suit, she was acting in good faith. It is for those reasons and those stated above that she urged this court to dismiss the Plaintiff's suits and allow her Counterclaims.
  127. Claiming for damages for the tort of defamation, DW1 explained that when she was arrested, apprehended and charged, she was affected mentally. She denied that the 2<sup>nd</sup> Defendant sued her together with DW2.



128. DW2 was also called to the stand. An Advocate working in the nature and style of Nelson Harun & Company Advocates in Nairobi, his evidence was that the deceased and the 1<sup>st</sup> Defendant were a couple and his clients since 2006. He relied on his evidence marked PExh.19 and his witness statement dated 26/08/2014.
129. He recalled that he was visited by the couple one night in October 2006. Concerned that their Go-down prime property situated in Industrial Area would be sold by way of public auction following their failure to stop the sale in HCCC No. 45 of 2005 against the creditors Standard Chartered Bank, they approached DW3 for counsel. They also informed him that they had sold a portion of their land in Kapomboi Settlement Scheme to ACK Kitale to set off the debt leaving a balance. DW2 was assured that his legal fees would emanate from the income obtained from the Go-down.
130. DW2 successfully filed HCCC No. 560 of 2006 stopping the sale by public auction. In spite collecting millions in rent, the deceased never paid him for his litigious efforts. Other suits, more than ten (10) in number and spanning millions, were also prosecuted and defended by DW2 without receipt of any legal fees. He also registered a charge in favor of Standard Chartered Bank for the sum of Kshs. 3,000,000.00. In fact, the deceased went under.
131. Come July, 2012, the deceased sought his legal services for the sale of a property to finance the tertiary education of his daughter to London School of Economics. The couple willfully presented the title number L.R. No. Trans Nzoia/Kapomboi/193 they sought to dispose of which DW2 retained as lien for his legal fees totaling Kshs. 1,500,00.00.
132. In line with this sale, DW2 retained the transfer, spousal consent and Land Control Board Application Forms executed in his favor in his possession which were produced and marked DExh.27, DExh.28, DExh.29 and DExh.30. He also retained the deceased's PIN, identity card and passport photographs.
133. The deceased and DW1 were unable to raise the full amount of their daughter's school fees. In the circumstances, they approached DW2 asking him to pay. He agreed to do so since the payments were converted to the purchase price of L.R. No. 18990 Mavoko.
134. DW2 secured their daughter's visa by remitting a sum of Kshs. 3,000,000.00 via RTGS to her account on 24/08/2012 marked DExh.32. Later, DW3 advanced several sums of money totaling Kshs. 1,493,740.00 to the couple in settlement of their daughter's fees. He acknowledged the veracity of DExh.19, DExh.35 and DExh.36.
135. The deceased and DW1 continued to face challenges in raising fees for their daughter. In that regard, DW2 was approached by DW1 who informed her that she found a purchaser for acquisition of L.R. No. Trans Nzoia/Kapomboi/193. She assured her that in addition, other funds from the purchase would be used to settle his legal fees which at that time stood at Kshs. 5,500,000.00, discounted from Kshs. 8,000,000.00 as claimed in DExh.19. DW1 thus requested DW2 to surrender the title deed.
136. Desirous of securing this purchase, DW1 invited DW2 to meet the purchaser, the 2<sup>nd</sup> Defendant herein, in Kitale. The deceased was also made aware of the existence of a purchaser. DW2 explained the reasons he held the title and also showed the 2<sup>nd</sup> Defendant the transfer documents that had been executed in his favor. It was agreed that on receipt of an undertaking as to payment of his legal fees, DW2 would release the title. This would take place later on 14/02/2014 at DW2's Nairobi office. He thus surrendered the title to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The property was ultimately sold for Kshs. 11,000,000.00.
137. On 25/03/2013, DW2 drew a general Power of Attorney [DExh.12]. It was duly executed by the deceased and the 1<sup>st</sup> Defendant on the 1<sup>st</sup> Defendant's instructions that the deceased had authorized the preparation of the instrument. She executed the same in the presence of his literate brother



- one GEORGE WAFULA and DW2. It was attested by DW2. It was returned by the deceased for subsequent registration at the Land's Registry on 24/04/2013.
138. In light of this evidence, DW2 was of the view that the criminal proceeding preferred against DW1 regarding this instrument were false and malicious as he was never accused similarly or sued. He then stated that the said Power of Attorney was not prepared pursuant to the repealed Registered Land Act. He testified that if one had to do a transaction requiring a Power of Attorney, it was to be done using the specific forms.
  139. DW2 stated that on the strength of that Power of Attorney, the property namely L.R No. Trans Nzoia/Kapomboi/193 was transferred to the 2<sup>nd</sup> Defendant.
  140. During his retainer as Advocate for the deceased, DW2 recalled having met the Plaintiff on several occasions. On one particular instance, he discussed with the Plaintiff as to the prospects of Nairobi HCCC No. 2127 of 2007; Henry Khaemba vs. Church Commissioners of Kenya and ACK Kitale Diocese. In brief, the deceased sold one hundred (100) acres excised from L.R No. Trans Nzoia/Kapomboi/197. However, the Defendant(s) had failed to clear the outstanding balance of Kshs. 4,000,000.00 hence the suit.
  141. During the negotiations, DW2 stated that the Defendants were required to pay the outstanding balance plus damages. When the Plaintiff herein questioned DW2's failure to accept only the outstanding balance, DW2 advised him to write a formal letter with the deceased to determine the way forward. The Plaintiff's view was to collect the outstanding balance and withdraw all matters against Standard Chartered Bank. According to DW2, since they never agreed on the way forward, the Plaintiff employed a new firm of Advocates.
  142. DW2 was thus met with great incredulity when the Plaintiff denied that he ever knew or met him. He maintained that he was purposefully a dishonest man.
  143. DW2 remembered that though the deceased was of good health between 2006 and 2012, he would come to his office accompanied by a gentleman called ERIC stating that he couldn't understand their discussions. He was surprised that the deceased was quite ill having been shown PExh.11a and PExh.11b prepared in 2012. They preceded the Power of Attorney prepared in 2013.
  144. DW2 disputed PW2's findings captured in PExh.22a and PExh.22b. He opined that under Section 50 of the Evidence Act, disputes are to writings are firstly interrogated from persons acquainted with the handwriting of the subject and not a document examiner.
  145. DW2 further accused the deceased of being deceitful. He observed that the deceased was lying when he said that he was not in right state of mind when he executed the Power of Attorney. According to DW2, the deceased purely made utterances to favor him at every opportune moment.
  146. When referred to the criminal proceedings marked DExh.39, DW2 accused the DCIO of lying when he stated that he was evasive. He, to contra those sentiments, stated that he complied with the summons by recording his witness statement marked PExh.19. He recalled that he managed to do so after traveling back to Nairobi. Though agreed to come to his offices, their MR. NJOROGE never showed up.
  147. Still on the criminal proceedings, when referred to the trial magistrate's remarks at DExh.39 stating that the transactions looked suspect, DW2 opined that they were obiter dictum marks. The ultimate findings of the trial court, he observed, were that the accused person had no case to answer.
  148. DW2 questioned why one would call the Power of Attorney fraudulent if a deed of Revocation of the same was executed. He confirmed that he witnessed the transfer dated 13/04/2013. DW2 revisited



Nairobi ELC No. 280 of 2015 stating that it was dismissed. He explained that the dispute concerned L.R. No. Trans Nzoia/Kapomboi/193. It sought to compel DW2 to surrender the said title in court pending the determination the question as to the validity of the Power of Attorney. He clarified that the signature captured in DMFI-12, PExh.19, DExh.14 and DExh.19 were his and different deliberately.

## 2<sup>nd</sup> Defendant's Case

149. The 2<sup>nd</sup> Defendant DW3, DAVID KINISU SIFUNA, an Advocate of the High Court of Kenya testified that he was at all material times to the suit the speak of Trans Nzoia County Assembly. Relying on his witness statement dated 18/09/2017, he urged this court to dismiss the Plaintiff's suit with costs.
150. He testified that he is the registered proprietor of all that parcel of land namely L.R. No. Trans Nzoia/Kapomboi/193. It all started during his tenure as the Speaker Trans Nzoia County Assembly that he befriended ELIUD WASIKE. He in turn introduced him to his brother MR. BARASA a land agent. He informed him that he wanted to dispose of his property in Mombasa and replace it with a parcel in Kitale.
151. On 11/12/2013, the land agent, accompanied by the 1<sup>st</sup> Defendant, her cousin MR. KIDULA, MR. NAMWAMBA and MR. TULIENGE visited his offices. It transpired that the 1<sup>st</sup> Defendant informed him that she was intent on disposing of the suit land namely L.R. No. Trans Nzoia/Kapomboi/193. She stated that she hurriedly wanted to sell the suit land to settle the deceased's hospital bill who was in Aga Khan Hospital as well as finish paying school fees for her daughter in the UK. Interested, DW3 accompanied DW1, her cousin, and two (2) administration police to visit the parcel of land. DW3 recalled that he was impressed by the outlook of the fifty (50) acre unoccupied piece of land.
152. DW3 then retained the services of Messrs. Kidiavai & Company Advocates to conduct due diligence and establish ownership. He was advised that the 1<sup>st</sup> Defendant was in possession of a Power of Attorney marked DExh.12 to sell property on behalf of her husband; the proprietor of the suit land. The said document was registered pursuant to the Registration of Documents Act and not the repealed Registered Land Act.
153. Subsequently, his Advocates drew an agreement dated 11/12/2013 marked PExh.23. it was witnessed by AGRREY KIDIAVAI, EDWARD KICHULA, ROBERT MALOMBA NAMWAMBA, PETER JOHNSON BARASA and ANTHONY BARASA TULIENGE. The agreement was executed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants having agreed at a consideration sum of Kshs. 12,500,000.00.
154. The said sum was agreed to be paid as follows: Kshs. 2,000,000.00 upon execution, Kshs. 6,000,000.00 by March 2014, Kshs. 4,000,000.00 by November 2014 and Kshs. 500,000.00 to be paid on 24/12/2013 upon the vendor availing the completion documents to the Advocates. He recalled that during the transaction, the deceased was unwell. He thus was unable to execute the agreement.
155. Before 24/12/2013, the 1<sup>st</sup> Defendant informed the 2<sup>nd</sup> Defendant that the original title deed was in possession of her lawyer DW2. He in turn informed him that he kept the original title deed as lien for his unpaid fees. This led to negotiations between DW2 and DW3 where it was agreed that upon payment of Kshs. 5,500,000,00 as his legal fees, he would surrender the title.
156. Pursuant to the above discussions, DW2 wrote a letter dated 14/01/2014 confirming that the title to the suit land namely L.R. No. Trans Nzoia/Kapomboi/193 was in his possession as lien for his unpaid legal fees. That he would release the same on condition that his legal fees of Kshs. 5,500,000.00 be paid.



157. Following, a meeting among DW1, DW2 and DW3 took place at DW2's office on 14/02/2014 in Nairobi. In the said meeting, DW3 gave DW1 Kshs. 1,000,000.00 which formed part of the purchase price. He then disclosed that he was desirous of selling his property in Mombasa. He thus gave DW2 an undertaking to have him retain the title to that land valued at Kshs. 4,000,000.00.
158. As a result, DW2 informed DW3 that he was in possession of an executed sale agreement between the deceased and DW2 marked DExh.19, a transfer from the deceased to DW2 marked DExh.27, an application for consent before the Land Control Board marked DExh.28, a spousal consent given by DW1 dated 12/09/2013 marked DExh.29 and DW1's Affidavit marked DExh.30. He was informed that the reason he was in possession of those documents was because the deceased had intended to give DW2 the property to settle the deceased's outstanding legal fees owed to him.
159. DW3 requested for copies of the said documents. Thereafter another agreement was created that changed the payment terms. Under the new terms, it was acknowledged that DW1 was in receipt of Kshs. 1,000,000.00. Furthermore, the property be transferred to DW3 upon handover of the title documents and the balance of the purchase price be paid by April 2014. He then undertook to secure Kshs. 5,500,000.00 through his Mombasa property.
160. DW3 confirmed that he paid Kshs. 5,500,000.00 to DW2. He also confirmed that he paid the full balance of the purchase price to DW1. DW3 was advised that since DW1 had executed the spousal consent form, it was necessary for the deceased to execute the transfer form marked 3<sup>rd</sup> DExh.10. The same was executed on 25/02/2014. He also positively identified the application for consent to the Land Control Board marked 3<sup>rd</sup> DExh.12.
161. The suit property was ultimately duly registered in his name in the early months of 2014. Based on a reading of the same, it was his understanding that the same validated the Power of Attorney and transaction he had with the 1<sup>st</sup> Defendant.
162. DW3 explained that the letter of consent by Kwanza Land Control Board dated 30/10/2013 preceded the agreement because the sale agreement dated 11/12/2013 necessitated that the same be availed at the completion date. Secondly, the 1<sup>st</sup> Defendant was supplied with a special consent from the Land Control Board. He added that his proxy was present in that meeting.
163. DW3 confirmed that he paid stamp duty as shown on 3<sup>rd</sup> DExh.13 and was issued with a receipt as captured in 3<sup>rd</sup> DExh.15.
164. DW3 was upset because in spite setting the full purchase price, DW2 refused to surrender his Mombasa title. He thus filed Nairobi ELC No. 280 of 2015 against the DW1 and DW2. His evidence was that the case was dismissed.
165. The 2<sup>nd</sup> Defendant denied that he conspired with the 1<sup>st</sup> Defendant to defraud the deceased. He maintained that he was an innocent purchaser for value without notice of any fraud whatsoever. He observed that by the time the deed of revocation of Power of Attorney marked DExh.16 was created on 04/06/2014, the property had already been transferred to the 2<sup>nd</sup> Defendant. During the transaction, the property was free from any encumbrances.
166. It was after completion of the transaction that he was sued in the present suit. He also observed that the deceased registered a restriction on his property. He was also summoned by the DCIO to record a statement where he was a prosecution witness in Kitale criminal case no. 3836 of 2014 [DExh.39].



167. DW3 opined that the present dispute was family related. In the circumstances, he ought not to have been dragged into it. He also maintained that the dispute did not concern his legal acquisition of the said suit land.
168. The 2<sup>nd</sup> Defendant was cross examined as to the contents of 3<sup>rd</sup> Dexh.10. Explaining that the consideration captured there was 6,000,000.00 and not Kshs. 12,500,000.00, the said property had initially been intended to sold to DW2 at Kshs. 5,500,000.00. In addition, the figure emanated following a valuation of the property marked 3<sup>rd</sup> Dexh.16.
169. DW3 observed the medical reports marked PExh.11a and PExh.11b that he saw at trial for the first time. He justified that it was the reason the Power of Attorney was created. He stated that the deceased's action of filing suit brought into question his mental status.

### **3<sup>rd</sup> Defendant's Case**

170. The 3<sup>rd</sup> Defendant called DW4 NAOMI ROP, Land Registrar Trans Nzoia County to the stand. She presented the two (2) files in respect to the suit lands as follows:
171. On L.R. No. Trans Nzoia/Liyavo/36 measuring 8.1 ha, DW4 produced the green card opened on 14/06/1996 marked 3<sup>rd</sup> DEXh.1. The first entry disclosed that the property was registered in the name of the SETTLEMENT FUND TRUST (SFT). The second entry was a transfer from SFT to the deceased on 16/07/2008. A title deed was issued on that date. The third entry registered a transfer from the deceased to the 1<sup>st</sup> Defendant on 07/02/2014. A title deed was issued on that day.
172. DW4 explained that a transfer of land is made when a transferor and transferee execute the same for registration. The executed transfer form in respect to the suit land from the 1<sup>st</sup> Defendant to the deceased was produced and marked 3<sup>rd</sup> DEXh.2. The parties included their ID number and attached copies of their KRA PINs and passport photos.
173. The said transfer forms were accompanied by the deceased's and 1<sup>st</sup> Defendant's ID copies marked 3<sup>rd</sup> DEXh.3 and 3<sup>rd</sup> DEXh.4 respectively, a copy of their KRA PIN certificates marked 3<sup>rd</sup> DEXh.5 and 3<sup>rd</sup> DEXh.6, a copy of the application for consent from the Land Control Board dated 13/04/2013 applied by the deceased marked 3<sup>rd</sup> DEXh.7a and the letter of consent dated 31/01/2014 marked 3<sup>rd</sup> DEXh.7b.
174. The transfer was accompanied by an Affidavit of marital spousal consent. Furthermore, the transfer form did not have any consideration indicated therein. As such, no valuation for stamp duty was prepared and no spousal consent was required.
175. DW4 testified that the meeting of the Board issuing the consent took place on 30/10/2013. They were not party to the transaction and thus did not attend. She further produced the stamp duty payment slip dated 07/02/2014 marked 3<sup>rd</sup> DEXh.8 that accompanied the transfer forms. She continued that the title deed was surrendered to their offices for cancellation. The said copy was produced and marked DEXh.9.
176. DW4 also produced a certified copy of the receipt dated 07/02/2014 for payment of Kshs. 1,000.00 marked 3<sup>rd</sup> DEXh.18. The transfer was then effected since no reason or encumbrance impeded the said process.
177. Regarding L.R. No. Trans Nzoia/Kapomboi/193 measuring 20 Ha, DW4 produced the green card in respect to the suit property opened on 20/12/2004. The original owners were SFT who transferred the same to the deceased on 16/02/2009. A title deed was issued on the same date. The fourth entry was a transfer from the deceased to the 2<sup>nd</sup> Defendant on 25/02/2014 with a title deed issued on that date.



- A restriction was subsequently entered in entry six (6) on 14/03/2014. The green card was produced and marked 3<sup>rd</sup> DExh.17.
178. The transfer dated 25/02/2014 between the deceased and the 2<sup>nd</sup> Defendant was executed by the said parties. It was produced and marked 3<sup>rd</sup> DExh.10. Accompanying the transfer was an application for consent to the Land Control Board marked 3<sup>rd</sup> DExh.11, a letter of consent dated 30/10/2013 marked 3<sup>rd</sup> DExh.12, KRA payment slip dated 25/02/2014 marked 3<sup>rd</sup> DExh.13, valuation for stamp duty dated 25/02/2014 marked 3<sup>rd</sup> DExh.16 and receipt for payment of the sum of Kshs. 1,000.00 marked 3<sup>rd</sup> DExh.16. The title deed was surrendered for cancellation. It was produced and marked 3<sup>rd</sup> DExh.14.
179. During this process, the property was free from encumbrances as the only reason to reject transfer. She added that consideration can be the same as that in the agreement. Although indicated in the sale agreement, ultimately, the valuation of the property determines the stamp duty payable. The figure could resultantly increase or decrease.
180. In terms of receipts, DW4 explained that the name on the receipt is ordinarily the person presenting the documents with name indicated. This even when an Advocate presents the documents for registration. She also recalled that the Power of Attorney PExh.9 and the spousal consent sworn on 27/01/2013 and marked DExh.1 were presented to them. Concluding, she testified that Section 14 of the [Land Registration Act](#) was not invoked as the information availed before the Registrar was sufficient.

### Submissions

181. At the close of evidence taking, the parties herein impressed me with their respective written submissions as follows:

### The Plaintiff's Submissions

182. The Plaintiff filed his submissions dated 03/01/2023 on 06/01/2023. The Plaintiff framed several issues for determination. On the first issue, the Plaintiff invited this court to determine whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were absolute and indefeasible owners of L.R. No. Trans Nzoia/Liyavo/36 and L.R. No. Trans Nzoia/Kapomboi/193 respectively. Citing the proviso to Section 26 of the [Land Registration Act](#), the Plaintiff submitted that the 1<sup>st</sup> Defendant submitted forged documents to facilitate transfer of the two (2) parcels of land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. He fortified his conclusion with reliance on the evidence of PW2 and several authorities to submit that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants could not hold an indefeasible title to the suit land.
183. The Plaintiff challenged the 1<sup>st</sup> Defendant's statutory declaration dated 27/02/2013 as having falsified information to the extent of the children the 1<sup>st</sup> Defendant sired with the Plaintiff, the dates of birth of the deceased's children and the deceased and 1<sup>st</sup> Defendant's marriage ceremony which in his view was no backed by further evidence. He thus questioned the 1<sup>st</sup> Defendant's ability to tell the truth.
184. Challenging further the general Power of Attorney dated 25/03/2023, the Plaintiff submitted that an interpretation of Section 8 of the [Registration of Documents Act](#) and Section 91 of the [Evidence Act](#) meant that the said document ought to have identified the suit properties as a non-testamentary document and was therefore irregular. Furthermore, it was not duly executed and authenticated. He accused the 1<sup>st</sup> Defendant and DW2 of acting in cahoots with a view to disposing off the deceased's assets without consulting the deceased's family members.
185. On the transfers in respect to the two (2) suit lands, the Plaintiff submitted that firstly the documents were in breach of Section 44 of the [Land Registration Act](#) and Section 71 of the [Evidence Act](#) since the deceased was admitted at Aga Khan Hospital between 04/02/2014 and 07/02/2014. That it



- was untenable for him to execute the transfers dated 07/02/2014 and 25/02/2014 only attested on 25/02/2014 but had not been executed by the parties therein. For that reason, there was no attestation.
186. The Plaintiff stated that it was farcical for the deceased to have paid stamp duty in respect to the transfer of L.R. No. Trans Nzoia/Kapomboi/193 since he was in hospital between 04/02/2014 and 07/02/2014 yet he was required to personally attend to and fill the said stamp duty declaration form.
187. The second issue as framed by the Plaintiff was whether the 1<sup>st</sup> Defendant was capacitated to act on behalf or deal with the suit properties resultantly transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff noted that the said transfers were effected on the strength of the Power of Attorney.
188. He submitted that since the Power of Attorney was in breach of Section 8 of the [Registration of Documents Act](#) and for not being in the format set out in the [Land Registration Act](#) coupled with the fact that it was not registered in Trans Nzoia land registry, the same could not generate legal authority. He cites several underpinning his conclusion.
189. The Plaintiff further argued that the said Power of Attorney was revoked thereby emphasizing that the deceased never intended to give the 1<sup>st</sup> Defendant any powers or authority to vest in his assets. The Plaintiff acknowledged that indeed the revocation of the Power of Attorney only upheld the deeds done in good faith. However, he opined that the 1<sup>st</sup> Defendant failed to establish good faith in line with Section 117 of the [Evidence Act](#) because she failed to prove that it was in furtherance of settlement of their daughter's school fees whose program ran from 04/10/2012 up to 30/09/2013, medical bills and offset debts since no receipts were produced in evidence.
190. The Plaintiff submitted that in the absence the proof, the 1<sup>st</sup> Defendant could not be held to have contributed to the purchase of all that parcel of land namely L.R. No. Trans Nzoia/Liyavo/36. In addition, he disputed that the property was transferred as a gift. In his view, the 1<sup>st</sup> Defendant was only unjustly enriching herself particularly so because the deceased was unwell. That if she was laying claim to the property described as matrimonial property, her recourse lay in filing a matrimonial cause. It was a fraudulent transfer.
191. In addition, it was the Plaintiff's evidence that his mother was a wife to the 1<sup>st</sup> Defendant. This was captured in Kitale Chief Magistrate Criminal Case no. 3836 of 2014. That she lived on the said parcel of land between 2000 and 2004 before moving to Botswana. In his view, it was necessary for the 1<sup>st</sup> Defendant to obtain consent from the Plaintiff's mother under Section 12 (2) of the [Matrimonial Property Act](#) to transfer the property to herself.
192. The next issue for determination was whether the relevant consents were obtained. Citing Section 6 and 8 of the [Land Control Act](#), the Plaintiff submitted that the said consents were obtained in the absence of the 2<sup>nd</sup> Defendant and the deceased. He also questioned the authenticity of the Land Control Board to issue a consents on the same day in respect to both properties on 30/10/2013.
193. Looking at Section 3 of the [Law of Contract Act](#), the Plaintiff continued that the agreement dated 11/12/2013 between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was preceded by the application and consent to transfer dated 30/10/2013 and was therefore bizarre, irregular and suspicious since they were in contravention of Section 8 of the [Land Control Act](#). That there was nothing like a special board consent.
194. Citing Section 109 of the [Evidence Act](#), the Plaintiff's conclusion was that the 1<sup>st</sup> Defendant failed to establish that the deceased was present when the consent to transfer was issued, the 2<sup>nd</sup> Defendant's proxy was present, failed to procure the minutes and failed to notify the family. Relying on several authorities, he stated that the consents were obtained illegally if at all.



195. The next issue as framed for determination by the Plaintiff was whether the agreement for sale in respect to L.R. No. Trans Nzoia/Kapomboi/193 was valid and lawful. He submitted in the negative on account of the unauthorized actions of the 1<sup>st</sup> Defendant, the failure to obtain consent six (6) months after the sale agreement and NOT before and the deceased's absence in the meeting granting the consent to transfer the suit land. Several authorities were cited in support of that submission.
196. The Plaintiff challenged the agreement dated 16/09/2013. In his view, the same amounted to a sale agreement that could not support the sale of two (2) properties namely L.R. No. Trans Nzoia/Kapomboi/193 and Mavoko L.R. No. 18990. This was in furtherance of some renegotiation between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant over the sale of L.R. No. Trans Nzoia/Kapomboi/193. He raised suspicion because the said suit property was offered to DW2 in May, 2013 while the Mavoko property was offered on 24/08/2012. In his view, this was irregular as those properties had already been sold on those stated dates so that by 16/09/2013, they were unavailable.
197. Furthermore, there were no bills of cost or fee notes justifying the legal fees sought by DW2. In the absence of any documents, coupled with the fact that DW2 sat duck in not claiming his legal fees all those years, the Plaintiff questioned the authenticity and veracity of DW2, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's actions particularly because DW2 was the deceased's Counsel. In his view, DW2 ought to have advised the deceased to seek independent legal advice.
198. The Plaintiff further challenged the cheques produced in evidence. In his view, they were not cashed out into any account and the beneficiary did not testify in court. Furthermore, he questioned if indeed they were school fees, why the funds were paid directly to the 1<sup>st</sup> Defendant's daughter's account. Ultimately, the Plaintiff concluded that the said transaction was not approved by the deceased and in the circumstance was void.
199. The Plaintiff then challenged whether the stamp duty in respect to the transfer between the 1<sup>st</sup> Defendant and the deceased was paid. This is because neither stamp duty forms nor valuation of stamp duty were adduced in evidence. He further denied that the deceased authorized the transfer. In his view, the 1<sup>st</sup> Defendant ought to have applied for exemption of stamp duty under Section 117 (1) (i) and clause B of the Schedule to the *Stamp Duty Act*. He cited an authority in support of his submissions.
200. The Plaintiff accused the 2<sup>nd</sup> Defendant of fraudulently and unlawfully declaring a lower value consideration sum of Kshs. 6,000,000.00 as per the stamp duty declaration from dated 25/02/2014 yet the sale agreement dated 11/12/2013 indicate that the consideration sum at Kshs. 12,500,000.00.
201. On whether the registration of the transfer of the suit properties was lawful and procedurally sound, the Plaintiff inferred from the evidence of DW4 that it was the 1<sup>st</sup> Defendant who wrongfully presented the documents for registration and not the deceased. Relying on Section 45 and 48 of the *Land Registration Act*, the Plaintiff submitted that the documents presented for registration failed to meet the requirements of those provisions. That the deceased did not consent to it. There was further no proof of payment of stamp duty.
202. On whether good titles were passed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the Plaintiff submitted that they were obtained by means of fraud. He stated so because the deceased lost his national ID and ATM card and could not find his titles. In his view, those titles were lost. He further questioned why DW2 was in possession of the title deed in respect to the suit land in 2012 when the property was purchased in 2013. In his view, the deceased had no intention of selling the suit land because he never met the 2<sup>nd</sup> Defendant and the deceased.



203. Taking into account the deceased's admission in hospital, the impugned Power of Attorney, the special consent from the Land Control Board, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's evidence DW2's evidence which in the Plaintiff's view was marred with contradictions, the absence of the deceased's authority to transfer the suit lands, the forged signatures as alleged on the several transactions and the lack of proof of payment of the said sums, the Plaintiff concluded that the said transfers were void for being unlawful and illegal. In the circumstances, no good titles could pass to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. He cited several authorities in support of that submission.
204. He further raised suspicion that transfer of the suit land only took place when the deceased and the 1<sup>st</sup> Defendant separated in February, 2014. In his view, the parties herein acted in bad faith. He urged this court to find that they were procured fraudulently by citing several authorities.
205. On whether the 2<sup>nd</sup> Defendant was an innocent purchaser for value, the Plaintiff cited Section 3 of the *Law of Contract Act*, Section 97 of the *Evidence Act*, Section 22 of the *Land Control Act*, Section 98 and Section 109 of the *Evidence Act* as well as several authorities to submit that the agreement dated 11/12/2013 was in breach of the aforementioned provisions of the law. Thus, he could not be said to be the lawful owner because the purchase of the suit land was done mala fides.
206. This is because no agreement was made and no consideration was paid, the LCB consent was fraudulent having preceded the sale agreement, was made on the strength of a fraudulent Power of Attorney, was done without the deceased's authority and the consideration was under declared.
207. In view of the foregoing, the Plaintiff prayed that the 1<sup>st</sup> Defendant's Counterclaim be dismissed with costs and that his Plaint be awarded with costs.

### **The 1<sup>st</sup> Defendant's Submissions**

208. On the part of the 1<sup>st</sup> Defendant, written submissions dated 03/03/2023 were filed on 06/02/2023 that framed four (4) issues for determination. The 1<sup>st</sup> Defendant noted that in light of her acquittal in Chief Magistrate's Criminal Case No. 3836 of 2014, coupled with only a police report of an ID and ATM card as missing items, the deceased willfully surrendered title number L.R. No. Trans Nzoia/Kapomboi/193 and was therefore not unlawfully taken away from the deceased. Similar conclusions were made in respect to title number L.R. No. Trans Nzoia/Liyavo/36 as from the 1<sup>st</sup> Defendant's evidence, the same was transferred on the deceased's own volition.
209. The second issue framed for determination was whether the General Power of Attorney dated 25/03/2013 was forged. Her evidence was that the same was prepared by DW2 and properly executed by herself and the deceased. In light of Section 91 of the *Evidence Act*, the same was attested to by DW2 and registered on 24/04/2013. She thus dismissed the Plaintiff's allegations as untruthful. Citing Section 97 (1) of the *Evidence Act* and case law, the 1<sup>st</sup> Defendant continued that the deed of revocation furthermore validated the Power of Attorney.
210. Further countermanding the fact that the General Power of Attorney was valid, the and not irregular as contended by the Plaintiff, the 1<sup>st</sup> Defendant cited Section 72 of the *Interpretation and General Provisions Act* to argue that even if the document was not in the standard format, that requirement did not invalidate the instrument.
211. The third issue framed for determination urged this court to determine the import of the agreement amongst the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and DW3 together with the transfer forms executed in pursuance thereto. Under clause twelve (12), DW2 confirmed willingness to withhold immediate transfer of the property in the event the couple found a buyer. The purpose of the sale was to pay of legal fees. Based on



that clause, the 1<sup>st</sup> Defendant submitted that it was clear that the deceased always intended to dispose of the suit land. His interest, according to the 1<sup>st</sup> Defendant, was extinguished as a result of the creation of the said agreement.

212. She questioned the Plaintiff's ability to tell the truth since he denied ever meeting DW2 yet it was established from the evidence that he met DW2 and discussed several issues with him concerning the deceased's cases. It was her considered view that the Plaintiff was the brainchild behind filing the present suit.
213. The last issue framed for determination was whether the instruments used to facilitate transfer of the suit lands were valid. She submitted that since the deceased never testified, evidence of forgery was purely hearsay as testified by the Plaintiff and PW4. She further challenged the evidence of PW2 as inconclusive for failure to be aware that the deceased was ill. Be that as it may, she pointed out that the said signatures were exceptionally similar on face value. Furthermore, the author of the statutory declaration was never called as a witness.
214. In view of the foregoing, the 1<sup>st</sup> Defendant urged this court to dismiss the Plaintiff's suit and allow her Counterclaim with costs.

### **The 2<sup>nd</sup> Defendant's Submissions**

215. The 2<sup>nd</sup> Defendant relied on his written submissions dated 06/02/2023 and filed on 08/02/2023. He also relied on his list and bundle of authorities similarly dated 06/02/2023 and filed on 08/02/2023.
216. Citing a decision of the court coupled with Section 22 of the *Evidence Act*, the 2<sup>nd</sup> Defendant submitted that as per the parole evidence rule, the authenticity of the Deed of Revocation of the Power of Attorney dated 04/06/2014 was not challenged by any of the parties. It thus appeared that, further taking into account the decision in Kitale Chief Magistrate's Criminal Case no. 3836 of 2014, the 1<sup>st</sup> Defendant was vested with authority that would be later on revoked.
217. According to the 2<sup>nd</sup> Defendant, the salient features of the said deed observed that on 24/04/2014, the deceased appointed the 1<sup>st</sup> Defendant as his attorney to do certain things connected with all acts, deeds, matters and things whatsoever in or about his estate's property and the affairs or concur with the person's jointly interested with himself therein in doing all acts, deeds, matters and things therein either particularly or generally described as amply and effectually for all intents and purposes as he could do in his own proper person if the deed had not been made. Furthermore, the Deed of revocation did not affect the validity of all actions done in good faith before its effectual date.
218. Based on the above, the 2<sup>nd</sup> Defendant submitted that the deceased admitted to having issued the Power of Attorney to the 1<sup>st</sup> Defendant. It was his observation that the deceased had been moved to Athi River by the Plaintiff during which time it was denied that the 1<sup>st</sup> Defendant was never authorized to deal with the deceased's property.
219. Gathered from the evidence of PW2 in Kitale Chief Magistrate's Criminal Case no. 3836 of 2014, it was the 2<sup>nd</sup> Defendant's conclusion that it was the Plaintiff who conducted the two (2) searches and entered the restriction on L.R. No. Trans Nzoia/Kapomboi/193. That his evidence conclusively established the deceased acted voluntarily having executed the Deed of revocation.
220. Citing a decision of the court, the 2<sup>nd</sup> Defendant submitted that the Plaintiff's motive was ill as he took advantage of the condition of his elderly ill father to pose lies before the trial court. He furthermore noted from DW2's evidence that the deceased executed two (2) copies of the Power of Attorney.



221. Relying on Section 26 (1) of the *Land Registration Act*, the 2<sup>nd</sup> Defendant submitted that he was a diligent purchaser and acted in good faith. He thus ought not to be deprived of his hard earned interest in the land. He observed that the dispute regarding the validity of the transaction in respect to the suit land only arose after the conclusion of the transaction. He maintained that he was not involved in any fraudulent activities having followed the law to the letter. He could not thus be faulted. Be that as it may, it was his position that no fraudulent activity had been established by the Plaintiff to the required standard.
222. In conclusion, he submitted that he was an innocent purchaser for value without notice as cited by courts and the family dispute arising ought not to defeat his title to the suit property. He thus prayed that the suit against him be dismissed.

### **The 3<sup>rd</sup> Defendant's Submissions**

223. The 3<sup>rd</sup> Defendant filed its written submissions dated 06/03/2023 on 07/03/2023. The 3<sup>rd</sup> Defendant framed two (2) issues for determination: whether it was a necessary party in these proceedings and how jurisdiction ought to be exercised in rectification and cancellation of registers.
224. On the first issue for determination, the 3<sup>rd</sup> Defendant submitted that it was wrongly enjoined in these proceedings. It pointed out that the 3<sup>rd</sup> Defendant was only cited in paragraph thirteen (13) and fourteen (14) of the Plaints in ELC no. 120 of 2014 and ELC no. 119 of 2014 respectively. It thus submitted that there was no fault in registration and issuance of titles to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants since the suit lands were unencumbered, the transfers were duly executed and attested to and accompanied with the required completion documents. Furthermore, PW1 admitted that there was no specific complaint against it. For these reasons, the 3<sup>rd</sup> Defendant submitted that it was an unnecessary party to the proceedings.
225. Acknowledging the provisions set out in Order 1, Rule 10 of the Civil Procedure Rules, the 3<sup>rd</sup> Defendant contended that the discretion was improperly exercised as the overwhelming evidence demonstrated a dispute between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Deciphering the dispute, the 3<sup>rd</sup> Defendant observed that the contention was whether the deceased secured the transfer instruments to the favor of the 1<sup>st</sup> Defendant and ultimately the 2<sup>nd</sup> Defendant. However, the 3<sup>rd</sup> Defendant was neither a party to those transactions nor participated in any alleged fraudulent activities. It cited a judicial authority in support of this assertion.
226. On the second issue for determination, the 3<sup>rd</sup> Defendant cited Section 27, 28 and 143 of the repealed Registered *Land Act* as replicated in Section 24, 25 and 26 of the *Land Registration Act* to state that a registered proprietor confers absolute ownerships of land. The same could however be canceled under two (2) circumstances.
227. The first ground was on a rectification on grounds of fraud or misrepresentation. The 3<sup>rd</sup> Defendant cited several decisions of the court to advance that each and every allegation of fraud must be strictly proved to the required standard. In its view, the Plaintiff failed to discharge that burden. He pointed out that for instance, the expert evidence of PW2 was full of so many inconsistencies to the extent that no handwritten samples were taken from the 1<sup>st</sup> Defendant for comparison and analysis. The 3<sup>rd</sup> Defendant continued that the PW2's evidence was so inconclusive that the 1<sup>st</sup> Defendant was acquitted of all forgery and other claims in Kitale Chief Magistrate's Criminal Case no. 3836 of 2014.
228. The 3<sup>rd</sup> Defendant continued that second ground for cancellation was on a rectification on grounds of fraud or misrepresentation as enshrined in Article 40 (6) of *the Constitution*. In its view, the Plaintiff did



not adduce evidence as to establish this ground either. It further upheld the consents issued in favor of the transfers since the Plaintiff failed to establish that they were procured unlawfully and improperly.

229. Further observing evidence of stamp duty assessment, the 3<sup>rd</sup> Defendant analyzed DW4's evidence who was emphatic that the failure to declare consideration on the transfer document did not invalidate the assents and payment of stamp duty since the amounts payable do not flow from the consideration but from the assessment. Finally, DW4 confirmed that once stamp duty was paid, the KRA pay slips and bank deposit slips were also adduced.
230. In the circumstances, the 3<sup>rd</sup> Defendant urged this court to dismiss the suits with costs.

### **Analysis and Determination**

231. I have considered the pleadings in this consolidated suit, examined the prolix evidence adduced at trial and analyzed the law applicable. The issue in dispute sets apart two (2) members of a family as villains towards each other in their quest to unearth the veracity of the facts herein as to ownership of the suit lands. Parties lay credence as to ownership having condensed the reliefs they are seeking in their various pleadings.
232. As I was making my considerations when I retired to write the judgment that would formulate my analysis and ultimate disposition in this matter, Counsel for the Plaintiff Mr. Nderitu wrote a letter dated 21/07/2023 that was filed on 24/07/2023.
233. It was the Plaintiff's position that Counsel discovered a judgment [Nairobi ELC No. 280 of 2015; David Kinisu Sifuna vs. Emily Kivali Mulaya & Nelson Muturi Ndumbeiya] and Ruling [Nairobi HC Petition no. 485 of 2019; Nelson Muturi Ndumbeiya vs. LSK Advocate's Disciplinary Tribunal, David Kinisu Sifuna & Emily Kivali] delivered on 18/05/2023 and 17/03/2023 respectively that in his view were relevant towards determining the issues in dispute herein.
234. The purpose of the jot was to request this court for audience to urge this court to further consider the two (2) authorities in determining the consolidated matters as necessary to meet the ends of justice. Counsel rued that the decisions were only delivered after filing his client's written submissions.
235. In the interest of justice, the court indulged Counsel for the Plaintiff. Parties were thus invited to submit on the same on 27/09/2023.
236. According to Mr. Nderitu, Counsel for the Plaintiff, the Plaintiff was within his right to choose any authorities he intended to rely on. He explained that the authorities annexed to the letter had not been delivered as at the time he was filing his clients' written submissions. He justified that the two (2) decisions are relevant on account of the parties and the subject matter which are alike as in the present suit. Resultantly, the facts and law contained in those decisions were of great persuasive value.
237. Counsel continued that he was not aware of the Nairobi ELC No. 280 of 2015 until mid that year when listening to the evidence of DW3. He observed that the Power of Attorney in that judgment was not set aside but the aspect of negligence was of paramount importance to the Plaintiff. In the circumstances, Counsel urged this court to consider the authorities.
238. In response to the sentiments of the Plaintiff's Counsel, Mr. Ongoya for the 2<sup>nd</sup> Defendant and holding brief for Ms. Kayugira for the 1<sup>st</sup> Defendant submitted that Counsel had demonstrated by way of oral submissions that the authorities ought to be disregarded. He observed that the authorities sought to be relied upon were brought to the attention of this court after the Plaintiff had filed his written submissions with no opportunity to respond to them. In his view, that was unconstitutional.



239. Counsel continued that contrary to his assertions, Mr. Nderitu had no unreserved right to rely on them. He opined that the Plaintiff's Counsel was attempting to adduce factual matters that were singled out as follows: whether the purchase price in respect to L.R. No. Trans Nzoia/Kapomboi/193 was paid in full and negligence in preparation of the Power of Attorney. He questioned whether Counsel was a competent witness to introduce those facts.
240. If the answer was in the affirmative, Counsel submitted and implored when then would he be subjected to a rigorous cross examination exercise to test the veracity of those facts. Counsel was of the view that had Counsel for the Plaintiff sought to introduce legal principles, he would have, with extricable precision, cited the relevant parts of the decisions as to justify the legal principles he sought to rely on. For those reasons, Mr. Ongoya prayed that the authorities be disregarded or in the alternative, the said Counsel be subjected to cross examination.
241. Mr. Odongo Counsel for the 3<sup>rd</sup> Defendant associated himself with the submissions of Mr. Ongoya. Withal, he observed that Counsel for the Plaintiff had failed to establish the legal matrix urging this court to be persuaded by. Antithetically, in his view, Counsel demonstrated factual matters.
242. Counsel observed that while the Plaintiff's Advocate pointed out the said issues, Counsel insolently failed to state that the said issues were resultantly *res judicata*. In his view, the matters brought by Counsel were purely factual and could only be instigated before this court by way of oral or Affidavit evidence and be subjected to cross examination. In his view, the Plaintiff was intent on reopening the matter from the back door by introducing new evidence but escaping cross examination; occasioning prejudice. He thus urged the court to reject the authorities.
243. In brief rejoinder, Mr. Nderitu explained that the legal principle stemming from the authorities was the issue of *res judicata* and the negligence in preparing the Power of Attorney. He added that the issues of evidence tendered pointed to perjury.
244. I have considered the rival submissions. The preliminary issue for determination is whether this court ought to consider the authorities annexed to the letter dated 21/07/2023. The generally accepted principle of proceedings is that once parties close their respective cases, directions are given as to the filing of written submissions or an acquiesce of the same. When filing written submissions, the duty of parties is to persuade this court, with any arsenal of the law and analysis thereof in any format, and legal principles, why the court should decide in its favor. In practice, those submissions are accompanied by a list and bundle of case law, statutes and sometimes scholarly articles as cited from those written submissions.
245. In filing written submissions, the propounder of the suit, in this case, the Plaintiff, has the right to file written submissions first. Upon serving the Defendants, they equally file their written submissions. Once all parties have complied, this court retires to write its judgment on the basis of the pleadings, the evidence and the rival submissions before it.
246. An unorthodox action has been set forth by the Plaintiff by attaching a list of authorities to its letter dated 24/07/2023. This is because those authorities were neither filed nor annexed to his written submissions in the first instance. Nonetheless, the party sought this court's indulgence to consider the submissions for the following reasons: the issue of *res judicata*, the facts and the law as established from the decisions as persuasive and negligence in drafting the Power of Attorney dated 25/03/2013 justifying that the decisions were only delivered after he had filed his written submissions.
247. Extensively, I have been convinced by the submissions of Counsel for the Defendants. The reasons advanced for this court to consider the submissions are in their nature an introduction of factual issues.



In their sense, the issues propounded by Counsel for the Plaintiff bring to play new aspects that were neither canvassed at the trial court nor averred in the Plaintiff's pleadings.

248. It would appear, as rightly stated by Mr. Ongoya and Mr. Odongo that Mr. Nderitu is attempting to steal a march on the Defendants. Evidently, these are purely issues of fact that would require cross examination before the trial court yet those issues are not even captured in the Plaintiff's pleadings! In attempt thus, the Plaintiff was seeking to amend its Plaint by introducing the issues without going through the formalities for amendment of pleadings; yet rules of procedure are not made in vain. Counsel for the Plaintiff placed himself as a litigant and a judge in seeking to have those authorities adopted.
249. To adopt those authorities to be relied upon, as evidence of the Plaintiff would amount to accepting evidence from the bar and in an unprocedural manner, if that is what Mr. Nderitu wished this Court to do and take the two decisions for, and that would go against the audi alteram partem rule where the court in Rex vs. Deferral (1937) AD 370 and 373 observed as follows:
- “The audi alteram partem principles literary means, ‘hear the other side’. This means that no ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity of expressing their views. The audi alteram partem principle is followed in judicial proceedings, in our country, along with the rights such as legal representation, the right to adduce and challenge evidence in cross examination and the right to present one’s evidence to the dispute or claim”.
250. It is in view of those reasons cited above that this court finds that the said authorities shall not be considered in determining the evidentiary issues before me.
251. Their evidentiary weight having been dispensed with, this Court nevertheless proceeds to find that to the extent that they were determinations of courts of equal status they are merely persuasive. Persuasive in what sense or issue? In regard to Petition No. 485 of 2019, it was submitted that since the learned judge found that the power of attorney was prepared negligently but was not set aside. This court finds that that has nothing to do with the reliefs sought in the matters before me save to strengthen the 1<sup>st</sup> Defendant’s position that she had in her possession in law and fact a duly prepared power of attorney in her favour. Regarding the finding Milimani ELC No. 280 of 2015, the issue of relevance determined therein was the balance of the purchase of price of the parcel No. Trans Nzoia/Kapomboi/193. It was submitted that the same should be the finding of this Court. I respectively disagree with the Plaintiff’s submissions on that. This is the stealing of a match on others that I referred to earlier on. Whatever he alludes to was not supported by the evidence he produced.
252. Having decided upon the preliminary issue, this court postulates that the following issues fall for determination:
- (i) The substance of the Agreement dated 16/09/2013
253. The Plaintiff challenged the agreement dated 16/09/2013 marked DExh.19. In his view, it amounted to a sale agreement that could not support the sale of two (2) properties namely L.R. No. Trans Nzoia/Kapomboi/193 and Mavoko L.R. No. 18990. He raised suspicion because the said suit property was offered to DW2 in May, 2013 while the Mavoko property was offered on 24/08/2012 thus preceding the said agreement. In his view, this was irregular to enter into the said agreement as those properties were unavailable.
254. Furthermore, the Plaintiff contended that there were no bills of cost or fee notes justifying the legal fees sought by DW2. In the absence of any documents, coupled with the fact that DW2 sat duck in



not claiming his legal fees all those years, the Plaintiff questioned the legality of DW2, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's actions particularly because DW2 was the deceased's Counsel. In his view, DW2 ought to have advised the deceased to seek independent legal advice because on one part he was securing his fees and interests but in his statement it was to safeguard clients' interests.

255. This court takes the liberty to decipher the inconspicuous features of the agreement dated 16/09/2013 as hereunder: According to the 1<sup>st</sup> Defendant, in settling DW2's outstanding legal fees, an agreement dated 16/09/2013 was then prepared, drawn and executed by the deceased, DW1 and DW2 as parties.
256. Under the terms of engagement, parties agreed that DW2 would purchase L.R. No. 18990 Mavoko to enable the deceased and the 1<sup>st</sup> Defendant raise university fees for their daughter. The program's effective date was stated to run from 04/10/2012. The consideration sum, agreed at Kshs. 3,000,000.00 was to be transferred to their daughter's account number.
257. The agreement further acknowledged that over the years, the couple was indebted to DW2 in the form of legal fees spanning seven (7) years totaling Kshs. 10,000,000.00.
258. In addition, DW2 agreed to pay an additional Kshs. 2,300,000.00 towards the deceased and 1<sup>st</sup> Defendant's daughter's school fees. They acknowledged further payments from DW2 on diverse dates in 2012 and 2013 totaling Kshs. 1,350,000.00.
259. The agreement further spoke to several payments in respect to various properties situated in Noonkopir Trading Centre. It was further agreed that the necessary transfer and consent documents would be executed by the deceased and 1<sup>st</sup> Defendant.
260. Citing several cases that DW2 acted for the deceased, it was also acknowledged that DW2 disbursed Kshs. 120,000.00 to the deceased as a friendly loan. Furthermore, the deceased agreed to transfer No. Trans Nzoia/Kapomboi/193 to DW2 as a means of settling the accrued debt in legal fees and taking further account of the monies that DW2 had transferred towards paying their daughter's fees.
261. Although the suit land namely No. Trans Nzoia/Kapomboi/193 was poised to be transferred in the name of DW2, it was also agreed that as a sign of good faith, DW2 would withhold registration of the executed transfer to his favor in the event the couple found a better deal for its sale in which case DW2 would be entitled to legal fees with interest. This was premised on the fact that certain prospective buyers had approached the couple. It was further acknowledged that an additional Kshs. 200,000.00 as ex gratia payment was also to be transferred from the DW2 to enhance more school fees for their daughter.
262. Importantly, it was acknowledged that the agreement entered by the parties was done so in good faith and without misrepresentation, duress or undue influence. They further appreciated DW2's valiant efforts to safeguard the deceased properties noting that they would have suffered serious monetary losses from a memorandum of understanding executed by the deceased and attested by his cousin.
263. Following this agreement, the deceased surrendered title number L.R. No. Trans Nzoia/Kapomboi/193 together with a copy of his PIN certificate, ID and photos, an executed undated transfer form marked DExh.27 together with the deceased's passport photograph as well as an undated land control board Application form, citing sale of suit land, marked DExh.28.
264. From the wordings of the agreement, it appears that the parties were in a meeting of the minds to establish how they would settle DW2's accrued debt. Noting that they had properties that they were willing to dispose of, the couple thus agreed to sell their properties to DW2 at a throw away price to settle their outstanding legal fees and the payments that DW2 had made overtime towards settling their daughter's school fees.



265. While indeed the parties agreed to dispose of two (2) parcels of land to DW2, with the suit land's registration being withheld pending the finding of another purchaser, it is noted that the same was advanced in the interest of settling DW2's legal fees and their daughter's fees. So that contrary to the Plaintiff's allegations, there was no foul play from DW2 in terms of time. This was a mutually agreed executed agreement.
266. Section 3 (3) of the Law of Contract Act and Section 38 of the Land Act state that a contract for the disposition of an interest in land shall be founded on a contract in writing, signed by all parties and attested by a witness who is present when the contract was signed by such party. Given that the said document was not attested to, I find that the same was not an agreement for the disposition of land but one to settle the deceased's debts.
267. One of the issues raised by the Plaintiff is that the suit titles were lost. That the matter was reported at the police station. However, as stated in the Plaintiff's evidence, it was only the deceased's national ID and ATM card that were reported missing. Furthermore, it is evident that pursuant to the agreement dated 16/09/2013, the deceased on his own volition surrendered title number L.R. No. Trans Nzoia/Kapomboi/193.
268. Furthermore, this court notes that the decision in Kitale Chief Magistrate Criminal Case No. 3836 of 2014 found that though relatives attempted to blame the 1<sup>st</sup> Defendant, PW2 and PW9 conceded that DW2 admitted that the title deed was taken to his office by the deceased and the 1<sup>st</sup> Defendant.
269. The Plaintiff further questioned why DW2 was in possession of the suit land in 2012 when the property was purchased in 2013. He questioned DW2's actions. In his view, the deceased had no intention of selling the suit land because he never met the 2<sup>nd</sup> Defendant and the deceased. Looking at the substance of the agreement dated 16/09/2013, and in particular clause twelve (12), parties agreed that the transfer of L.R. No. Trans Nzoia/Kapomboi/193 would be withheld pending the discovery of a better sale with a third party. It was thus not sold at that juncture to DW2 as stated by the Plaintiff.
270. Another issue that comes to play is the acknowledgment by the deceased and the 1<sup>st</sup> Defendant that as at 16/09/2013, the couple had not concluded settling fees owed to their daughter's tertiary institution. In fact, they were exploring the option of disposing of L.R. No. Trans Nzoia/Kapomboi/193 which proceeds would offset the said fees and further pay DW2.
271. The Plaintiff only denied that such a contract would be entered by the deceased based on his interpretation of the modalities. The parol evidence rule is clear and unambiguous. Treitel in 'The law of contract' discussed parol evidence rule as follows:

“The parol evidence rule states that evidence cannot be admitted (or, even if admitted, cannot be used) to add to, vary or contradict a written instrument. In relation to contracts, the rule means that, where a contract has been reduced to writing, neither party can rely on extrinsic evidence of terms alleged to have been agreed, i.e. on evidence not contained in the document. Although the rule is generally stated as applying to parol evidence, it applies just as much to other forms of extrinsic evidence. Of course, if a contractual document incorporates another document by reference, evidence of the second document is admissible, but the rule prevents a party from relying on evidence that is extrinsic to both documents.”



272. The Court of Appeal in *Twiga Chemicals Industries Ltd vs. Allan Stephen Reynolds* [2014] eKLR, cited with approval, a passage in *Ogders Construction of Deeds and Statutes* (5th edn) at p.106 noting in respect to the rule that:

“It is familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence”.

This position is also reiterated in *Halsbury’s Laws of England* (4th edn) vol. 9(1) where para 622 partly states that:

“Where the intention of parties has in fact been reduced to writing, under the so-called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms”.

273. Evidently, the Plaintiff could not challenge the document which was not found to be entered under duress, coercion or misrepresentation but willfully and within the parameters set out therein. The intention of the parties was very clear and the Plaintiff could not, on oral evidence, attempt to deviate from those stated terms.

274. In the absence of any evidence to the contrary, the said agreement dated 16/09/2013 diluted several accusations laid out by the Plaintiff as follows:

- a. The agreement acknowledged that the deceased and the 1<sup>st</sup> Defendant were indebted in legal fees spanning years to DW2;
- b. The agreement acknowledged that DW2 had met the couple’s daughter’s legal fees on several occasions;
- c. DW2 had transferred the daughter’s legal fees to her account number directly;
- d. The agreement sought to settle DW2’s legal fees and refund the school fees paid by DW2 to their daughter;
- e. Payment was in the form of L.R no. 18990 sold at a throw away price to DW2
- f. It was further agreed that L.R. No. Trans Nzoia/Kapomboi/193 would settle the couple’s legal fees but only if no other buyer could be found. The transfer of the suit land was thus withheld;
- g. The couple surrendered No. Trans Nzoia/Kapomboi/193 to DW2. It was thus not lost;
- h. The agreement was entered by the parties own free will;
- i. The agreement was not a sale agreement for disposition of land in the strict context of it.

**i. Whether The Application For Consent, Transfers, Power Of Attorney And Stamp Duty Declaration Form Were Obtained By Means Of Fraud?**

275. At the kernel of the dispute is a strong condemnation against the 1<sup>st</sup> Defendant for committing fraud. According to the Plaintiff, the 1<sup>st</sup> Defendant forged the deceased’s signature as captured in the Power of Attorney dated 25/03/2013, the transfer dated 25/02/2014 in respect to L.R. No. Trans Nzoia/Kapomboi/193, the Land Control Board Application form dated 14/10/2013, the transfer dated



13/04/2013 and Stamp Duty declaration form dated 07/02/2014 all in respect to L.R. No. Trans Nzoia/Liyavo/36 which were all adduced into evidence.

276. The above transactions were the subject of criminal proceedings in Kitale Chief Magistrate's Court Criminal Case No. 3836 of 2014; Republic vs. Emily Kivali Mulaya. The 1<sup>st</sup> Defendant was charge with inter alia, four (4) counts of making a document without authority contrary to Section 347 (d) of the Penal Code and five (5) counts of uttering a false document contrary to Section 353 of the Penal Code. She was subsequently acquitted of all the charges after the trial court found that she had no case to answer.
277. Speaking to the forgeries on the deceased's signature, the Plaintiff called PW2 C.I. MICHIRA NDEGE a forensic document examiner. He examined the specimens on 16/07/2014 which were submitted to him on 02/07/2014 via exhibit memo marked PExh.22b. PW2's professional opinion in his report dated 16/07/2017 was that the signatures captured on A1 - A6 in comparison to the signature and writings on B1, B2, C1 and C2 were not made by the same person.
278. In determining the probative value of PW2's evidence as a forensic examiner expert, this court shall adopt the principles enunciated in the case of Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another [2016] eKLR as follows:

“The fundamental characteristic of expert evidence is that it is opinion evidence. To be practically of assistance to a court, however, expert evidence must also provide as much detail as is necessary to allow the court to determine whether the expert's opinions are well founded.

While the test for admissibility of expert evidence differs from jurisdiction to jurisdiction, judges in all jurisdictions face the common responsibility of weighing expert evidence and determining its probative value. This is no easy task. Expert opinions are admissible to furnish courts with information which is likely to be outside their experience and knowledge. The evidence of experts has proliferated in modern litigation and is often determinative of one or more central issues in a case. Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence and the circumstances of the case including the real likelihood of the expert witness having been compromised or the real possibility of such witnesses using their expertise to mislead the court by placing undue advantage to the party in whose favor they offer the evidence. The court must be alert to such realities and act with caution while analyzing such evidence. It is important to bear in mind the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this as reiterated by this court in the case of Stephen Wang'odu vs. the Ark Limited.

Firstly, expert evidence does not “trump all other evidence.” It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision. Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing. A court's findings



will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence. Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred. Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional one.”

279. In summary, this court will analyze the evidence of PW2 as an expert in a way that doesn't conclude the findings of a certain fact as gathered from his opinion in isolation. This court will thus holistically look at the evidence before it without looking at PW2's expert opinion in a lacuna.
280. The Plaintiff's case is that the 1<sup>st</sup> Defendant committed acts of forgery by executing the said documents on the deceased's behalf with a view to defrauding him. This was vehemently opposed by the 1<sup>st</sup> Defendant who in her evidence stated that the deceased executed the said documents to safeguard the interest of his assets which was done in his own volition.
281. Black's Law Dictionary, 9th Edition at page 131 defines fraud as: “a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”
282. In *Ratilal Gordhanbhai Patel vs. Lalji Makanji* (1957) EA 314, the Court of Appeal established the threshold on the burden of proof required in civil cases founded on fraud when the court observed:
- “There is one preliminary observation which we must make on the learned Judge's treatment of this evidence: he does not anywhere in the judgment expressly direct himself on the burden of proof or on the standard required. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required...”
283. Did the 1<sup>st</sup> Defendant commit acts of forgery in terms of signing the documents, the subject of fraudulent activities as complained by the Plaintiff? Firstly, it is indispensably critical to point out that the 1<sup>st</sup> Defendant was accused of committing this offence in Kitale Chief Magistrate's Court Criminal Case No. 3836 of 2014. Though this court is reminded not to insulate a determination based on a criminal process, it is worth noting that the trial court observed that after hearing the evidence of the Prosecution that the 1<sup>st</sup> Defendant had no case to answer. She was subsequently acquitted of that offence.
284. Secondly, although PW2 concluded that the documents were not executed by the same author, an act according to the Plaintiff was committed by the 1<sup>st</sup> Defendant, it must be noted firstly that the specimens marked B1 and B2 were never adduced before the trial court for their consideration. This thus punctures loopholes as to ascertaining the handwriting of the deceased as follows: what were the specimens in comparison to?
285. In addition, PW2 made significant observations during his cross examination that this court cannot wish away. He stated that though not captured in his report, poor eyesight and writing as well as time lapse were factors to consider as well as health, age, length of time and a stroke which can affect one's writing.
286. PW2 maintained however that the duration of when the time the documents were made herein were not of significant value. In this court's view, this is, on the contrary a significant consideration and a very critical factor since handwritings overtime can change. For that reason, capturing a signature taken



in 2013 versus one taken in 2014 may not entirely be similar on face value. In fact, the Court of Appeal in *Asira vs. Republic* [1986] KLR 227 concurred with my sentiments when it held as follows:

“The most an expert on handwriting can properly say is not that somebody definitely wrote a particular thing but that he does not believe a particular writing was by particular person or that the writings are so similar as to be undistinguishable. It is the duty of a court to make an examination and satisfy itself whether the handwriting expert’s opinion can be accepted and the court cannot blindly accept such an opinion...The decision on handwriting, whether it is genuine or not, always rests with the Court...The art of comparing handwriting is no doubt one in which time and thought are given to the formation of letters and words, and therefore expert status may be accorded to a person versed in such comparisons. But as has been accepted in *Wainaina’s case* (*Namaina v Republic* [1978] KLR 11) such an expert is not able to say definitely that anybody wrote a particular thing. The reasoning is based upon the knowledge that handwritings can very easily be forged. Moreover a person may not write in the same style all the time. (underline mine) The expert is therefore faced with trying to analyze forged writing as well as disguised writing. In cases where there is a problem about the writing it is the duty of the court to satisfy itself after examination whether the expert’s opinion can be accepted and cannot blindly accept such opinion. In these areas of conflict, it is prudent to look for other evidence so that forgery can be excluded on the one hand, and mistaken identification excluded on the other.”

287. Furthermore, had the Plaintiff bore the genuine belief that it was the 1<sup>st</sup> Defendant who executed the purported forged documents on behalf of the deceased, what stopped the Plaintiff from instructing PW2 to conduct a comparison analysis with the 1<sup>st</sup> Defendant’s handwriting to establish that the 1<sup>st</sup> Defendant committed an offence?
288. Thirdly, Section 76 (1) of the *Land Registration Act* allows the Registrar, with or without the application of an interested party to make an order for restriction prohibiting or restricting dealings with any particular land. It is this court’s considered view that if the 3<sup>rd</sup> Defendant considered that the documents were fraudulently forged, it would have acted accordingly. The fact that the 3<sup>rd</sup> Defendant suo motto failed to enter restrictions during the relevant window period speaks as to the lack of fraudulent activities.
289. Fourthly, this court takes with great inspection the existence of the deed of revocation of a Power of Attorney dated 04/06/2014. The said deed acknowledged that it had appointed the 1<sup>st</sup> Defendant by Power of Attorney to do certain things connected with all acts, deeds, matters and things whatsoever over his estate’s property and its affairs which the deceased would have done had the deed not been made. It thereafter revoked the deed disclaiming that the said revocation did not affect the validity of any act or thing done by the 1<sup>st</sup> Defendant by virtue of the powers conferred on her by the said deed in good faith before receiving the notice of revocation hereof.
290. In respect to the transfer documents dated 07/02/2014 and 25/02/2014, the Plaintiff contended that the said documents were not executed by the deceased as he was in Aga Khan Hospital Nairobi between 04/02/2014 and 07/02/2014. According to PW5, he attested to the blank transfer document dated 25/02/2014 that with the assurance of the parties, would be executed by them at a later date. He thus executed the transfer. In the Plaintiff interpretation, there was no attestation since the same must witness the signing of the document. For those reasons, the document was in breach of Section 44 of the *Land Registration Act* and Section 71 of the *Evidence Act*.



291. Of relevance is Section 44 (2) of the *Land Registration Act* which provides that the execution of any instrument shall consist of appending a person's signature, thumb print or other mark as evidence of personal acceptance. The evidence of PW5 was that he trusted that the parties in his presence would execute the said transfer. He thus acknowledged the existence of the transfer by appending his signature which was not denied. Contrary to the Plaintiff's submissions, the purpose of PW5's signature was to accept personally the execution of the instrument. That fact was not controverted.
292. Regarding Section 71 of the *Evidence Act*, the same provides as follows:
- “If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence: Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document which has been registered in accordance with the provisions of any written law, unless its execution by the person by whom it purports to have been executed is specifically denied.”
293. None of the parties in question denied execution of the document. In fact, they all stated that indeed the document was executed by the respective parties. If the Plaintiff was of a contrary view, then it was incumbent on him to demonstrate with sufficient evidence that the said documents were not executed by the said parties. That burden was not discharged. For this reason, that allegation similarly fails.
294. The Plaintiff further challenged the spelling of the deceased's name as erroneous. In his view, such a document ought not to have borne such a discrepancy. His conclusion was that in the circumstances, it was void. Contrary to his assertions, such a document becomes voidable and not void because it can be cured. Nonetheless and ultimately, the necessary documents were verifiable as belonging to the relevant parties. It is for that reason that the transfers were registered in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
295. The Plaintiff stated that it was farcical for the deceased to have paid stamp duty in respect to the transfer of L.R. No. Trans Nzoia/Kapomboi/193. This is because the deceased was in hospital between 04/02/2014 and 07/02/2014 yet he was required to personally attend to and fill the said stamp duty declaration form. It is observed that stamp duty was paid. Firstly, the stamp duty declaration form was dated 25/02/2014, way after the deceased was discharged from hospital. Secondly, the amount as captured, was paid by the 2<sup>nd</sup> Defendant. Finally, the same was executed by the payer who was the 2<sup>nd</sup> Defendant and not by the deceased as alleged.
296. Nothing speaks further to the legality of the said Power of Attorney complained to have been forged. It is evidently clear that the deceased executed the same in his own will and was not coerced into doing so. So that if the deceased executed the Power of Attorney, by deduction, he also executed the other documents complained of willingly in furtherance of the Power of Attorney donated therein.
297. None of the witnesses to the Plaintiff's case testified that they saw or were aware with conclusively that the 1<sup>st</sup> Defendant was seen forging the deceased's signature. The evidence on the contrary tends to point to the direction that the deceased knowingly and unwittingly executed the documents the subject for determination.
298. Based on the above analysis, I am satisfied to hold that the Plaintiff failed to discharge its burden of proof that the 1<sup>st</sup> Defendant forged Power of Attorney dated 25/03/2013, the transfer dated 25/02/2014 in respect to L.R. No. Trans Nzoia/Kapomboi/193, the Land Control Board Application form dated 14/10/2013, the transfer dated 13/04/2013 and Stamp Duty declaration form dated 07/02/2014 all in respect to L.R. no. Trans Nzoia/Liyavo/36. those allegations are thus found in the



negative. Thus, this court finds that no fraudulent activity was commissioned by the 1<sup>st</sup> Defendant as stated by the Plaintiff.

**ii. Whether The Power Of Attorney Was Statutory Compliant And Therefore Valid As To Confer Authority To The 1<sup>st</sup> Defendant?**

299. One of the concerns raised by the Plaintiff when cross examining the Defence witnesses was that the Power of Attorney dated 25/03/2013, registered at the Central Lands Registry on 24/04/2013 was never registered under the repealed Registered Land Act. In the Plaintiff's view, the document was not only duly registered but also failed to confer rights to the 1<sup>st</sup> Defendant to sell L.R. No. Trans Nzoia/Kapomboi/193 as she did.

300. Another objection raised by the Plaintiff was in respect to Section 8 of the Registration of Documents Act which provides that no non-testamentary document relating to immovable property shall be accepted for registration unless it contains a description of the property sufficient to identify the same. He contended that since the suit titles were not listed in the Power of Attorney, it was irregular and could not donate any legal authority to the 1<sup>st</sup> Defendant.

301. He continued that the said document further breached the provisions of Section 91 of the Evidence Act for the 1<sup>st</sup> Defendant failed to ascertain that it was executed and authenticated. In addition, it was not in the required standard format as set out in the Land Registration Act.

302. In cross examining the witnesses, the Plaintiff purported to stated that the document ought to have been registered under the repealed Registered Land Act. However, that argument must failed since as at the time the document was registered in 2013, the subject Act was repealed by the Land Registration Act on 06/05/2012. This court shall however dissect the relevant Act as to establish whether mandatory requirements necessitated its registration under the Land Registration Act.

303. Section 4 of the Registration of Documents Act Cap 285 Laws of Kenya provides as follows:

1. All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed:

Provided that the registration of the documents following shall not be compulsory:

- i. ...
- ii. ...
- iii. ...
- iv. ...
- v. ...
- vi. ...
- vii. any document registrable under the provisions of the Government Lands Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the Registered Land Act (Cap. 300):

Provided that, if any such document relates to land registrable under any such Act and also to land not so registrable, such document shall also be registered under this Act.



304. Under the repealed Registered *Land Act*, Section 116 required that powers of attorney "which contain any power to dispose of any interest in land" be registered. Section 48 (2) of the *Land Registration Act* provides that the original of a Power of Attorney or, with the consent of the Registrar, a copy certified by the Registrar shall be filed. The above statutes necessitate that such document requires registration. However, no format has been set out by the *Land Registration Act* as purported to be held by the Plaintiff.
305. Be that as it may, and even if that would be the case, Section 72 of the *Interpretation and General Provisions Act* provides:
- "Save as is otherwise expressly provided, whenever a form is prescribed by written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."
306. The same provision also cures the wordings of Section 8 of the *Registration of Documents Act*. Furthermore, during registration of L.R. No. Trans Nzoia/Kapomboi/193, other documents were submitted in support of the Power of Attorney as to crystallize the relationship between the deceased and the 1<sup>st</sup> Defendant in ascertaining the origin of the authority donated. In light of the above position, this court observes that the absence of noncompliance with any format does not invalidate the said instrument. That argument must thus fail.
307. It should also be pointed out that it was a general Power of Attorney that did not specifically set out with specificity the authority donated to the 1<sup>st</sup> Defendant. In fact, it donated authority to the 1<sup>st</sup> Defendant to do all acts, deeds, matters and things whatsoever over the deceased's estate's property and its affairs which the deceased would have done had the deed not been made. In this court's view, since the Power of Attorney was general in its nature, it was duly registered at the Central Land's Registry on 24/04/2013. It was in the circumstances of the foregoing statutorily compliant.
308. Propounding his case further, the Plaintiff argued that the said general Power of Attorney did not grant authority to the 1<sup>st</sup> Defendant to dispose of all that parcel of land namely L.R. No. Trans Nzoia/Kapomboi/193 to the 2<sup>nd</sup> Defendant. What value then is attached to this Power of Attorney?
309. Byles J in *Stagg vs. Elliot* (1862)6 L.T. 433 held as follows when faced with a similar question:
- "...where an act purporting to be done under a Power of Attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair instrument, the authority in question is to be found within the four corners of the instrument, either in express form or by necessary implication"
310. A reading of *Ogden's Construction of Deeds and Statutes* 5<sup>th</sup> Edition by Gerald Dworkin (Sweet and Maxwell) 1967 at pg 23 states in part:
- "...what does the deed mean? It must be noticed that this is not necessarily the same as what did the parties intend to say that which they have in fact said, so their words as they stand must be construed. The question is not what did the parties intend to say, that is precluded by the presumption that they have said what they intended to say. The question to be solved is, what have they said. What meaning is to be attached to the expressions they have used?"



311. The Court of Appeal in *Mayfair Holdings Ltd vs. Ahmed* (1990 - 1994) 1EA 340 (CK) considered a Power of Attorney as part of the wider concept of the law relating to principle and agent. It held as follows:

“The general proposition is that “whatever a person who is sui juris can do personally he can also do through his agent” – per Stirling LJ in *Bevan v Webb* [1901] 2 Ch D 59 at p 77. The reason is set out in *Story on Agency* 9th Edition where the author says at the beginning:

“In the expanded intercourse of modern society it is easy to perceive that the exigencies of trade and commerce, the urgent pressure of professional, official and other pursuits, the temporary existence of personal illness or infirmity, the necessity of transacting business at the same time in various remote places, and the importance of securing accuracy, skill, ability, and speed in the accomplishment of the great concerns of human life, must require the aid and the assistance and labours of many persons, in addition to the immediate superintendence of him whose rights and interests are to be directly affected by the results.”

The relationship of principal and agent can be created in many ways, for example by a verbal telephone conversation, by fax, telex or even by circumstances from which agency can be implied. The execution of power of attorney is but one of the ways in which the relationship can be so created, and if the authority of an agent is required to be conferred by deed or an instrument under seal, as where the agent is given power to execute a deed, then the necessary authority has to be conferred by a power of attorney. However, although under section 3(3) of the Contract Act, cap 23, a contract for the disposition of an interest in land must be evidenced by writing (as under its similar counterpart in the United Kingdom, section 40(1) of the Law of Property Act (1925), writing is not necessary for the appointment of an agent to sell or purchase land, so that the agency in this case (if it existed) could have been created independently of a power of attorney.

312. From the above authorities, what can be discerned in interpreting a Power of Attorney instrument is to underscore the intention of the parties as embedded in the document. It must also be construed as a principal agency relationship where by any inability or otherwise, the principal has donated his powers to the agency to act according to the parameters set out in the Power of Attorney.
313. The undisputed facts giving rise to the execution of the Power of Attorney were that sometime in 2013, the 1<sup>st</sup> Defendant grew wary of the manner in which the deceased was handling his assets. She thus urged the deceased to accompany her to pay a visit to their lawyer that had been acting for him in several matters since 2005. The 1<sup>st</sup> Defendant also thought that it was fit to obtain funds to settle the deceased’s debts, hospital bills and their last born daughter’s school fee balance.
314. Desirous of securing the assets of the deceased in the best manner possible and to further settle the debts incurred, the 1<sup>st</sup> Defendant and the deceased were advised to execute a general Power of Attorney in which the deceased would be the donor and the 1<sup>st</sup> Defendant the donee. Agreeing to such instructions, the deceased gave the go ahead to DW2 to prepare the said instrument. DW2 in addition testified that the Power of Attorney was drafted to secure his legal fees.
315. The deceased executed the said document but in the absence of DW2 who was one of two (2) witnesses that saw the 1<sup>st</sup> Defendant executing the said document. The other witness was GEORGE WAFULA KHAEMBA, the 1<sup>st</sup> Defendant’s brother. It was also attested to by DW2 contrary to the Plaintiff’s allegations thus met the requirements set out in Section 91 of the *Evidence Act*. Thereafter, the Power of Attorney dated 25/03/2013 was registered on 24/04/2013 at the Central Lands Registry.



316. The above facts were only denied or stated by the Plaintiff to meet the threshold set out in Section 109 of the *Evidence Act*. However, in the absence of evidence to the contrary, this court finds that those facts were proved to the required standard being on a balance of probabilities.
317. In the present case, it cannot be gainsaid that the deceased executed a Power of Attorney granting authority to the 1<sup>st</sup> Defendant. The said Power of Attorney, which was general in nature, granted the 1<sup>st</sup> Defendant powers to do all acts connected with the deceased as long as the said deed were done in good faith. As a matter of fact, all the deeds done to the benefit of the deceased were validity accepted by the deed of revocation before renunciation of the said Power of Attorney.
318. Nothing was adduced before this court as to establish that the 1<sup>st</sup> Defendant acted in bad faith in fulfilling the objectives set out in the Power of Attorney. Her unwavering testimony was that the actions done in favor of the deceased were to safeguard the deceased's interest, settle outstanding debts, the school fee balance of their daughter and pay off outstanding hospital bills.
319. The Plaintiff attempted to challenge the 1<sup>st</sup> Defendant's actions as based on fabrications, ill will and bad motive.
320. For instance, he observed that the 1<sup>st</sup> Defendant's school program ran from 04/10/2012 up to 30/09/2013. He thus accused her of fabricating her evidence as to state that her daughter could only graduate upon settlement of the full school fee balance. In addition, the Plaintiff challenged the cheque in settlement of school fees as having not been cashed out as the beneficiary did not testify in court. Furthermore, he questioned why the school fees was paid directly to the 1<sup>st</sup> Defendant's daughter's account adding that this issue was not approved by the deceased.
321. The determination of this allegations lie in the agreement entered by deceased, DW1 and DW2 dated 16/09/2013 with a view to settling DW2's outstanding debt. The said agreement also acknowledged that DW2 had settled a sum in school fees to their daughter. Following this agreement, the deceased surrendered title number L.R. No. Trans Nzoia/Kapomboi/193 together with a copy of his PIN certificate, ID and photos, an executed undated transfer form together with the deceased's passport photograph as well as an undated land control board Application form, citing sale of suit land.
322. It is evident from the said agreement that the deceased had every intention of disposing of the suit land with a view to settling his daughter's school fee balance and the debt owed to DW2. Nothing could be held on the contrary.
323. On the settlement of the balance of the purchase price to MRS. KHASAKHALA, the Plaintiff denied that took place because the deceased became the registered proprietor of the suit land on 16/02/2009. In his view, that was conclusive proof that he had paid the full purchase price. He accused the 1<sup>st</sup> Defendant of lying since no relation was established between MRS. KHASAKHALA and EDWARD KHASAKHALA, no demand on balance of the purchase price was served upon the deceased. The 1<sup>st</sup> Defendant was thus not genuine. She further failed to demonstrate that she was instructed by the deceased who never benefitted from the proceeds.
324. The Plaintiff opined that the allegation of fees balance, payment of medical bills and debts was not proved by the production of receipts and were an afterthought.
325. All that is heard from the above allegations by the Plaintiff is a denial of the 1<sup>st</sup> Defendant's actions. The Plaintiff in this court's view sought to shrewd interpretations of the actions or lack thereof of the 1<sup>st</sup> Defendant to simply defeat the 1<sup>st</sup> Defendant's actions. He ultimate claim was that those actions were not approved by the deceased.



326. While the burden of proof in civil matters always remains with the Plaintiff, the evidentiary burden of proof is not static and shifts depending on the party alleging the evidence on the contrary. In *Mbuthia Macharia vs. Annah Mutua Ndwiga & another* [2017] eKLR, the Court of Appeal when dealing with the issue of burden of proof observed:

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift” to the party who would fail without further evidence?”

327. No evidence was adduced in support of the Plaintiff’s allegations as to suggest that the 1<sup>st</sup> Defendant’s actions could be countermanded and were fabricated. The allegations were never substantiated and are hereby dismissed.

328. The Plaintiff purported to state that the deceased never met the 2<sup>nd</sup> Defendant and PW3 during the transaction for sale of the suit property. In my view, his presence or absence thereof was immaterial on the strength of the Power of Attorney. His presence or absence was thus too secondary as to invalidate the actions advanced by the 1<sup>st</sup> Defendant.

329. The Plaintiff purported to allege that the circumstances leading up to the creation of the Power of Attorney were suspicious and fraudulent. However, I find the evidence of DW2 as corroborated by the 1<sup>st</sup> Defendant as unshaken. DW2 testified that other than safeguarding his client’s interest, he drafted the Power of Attorney to secure his own interests.

330. This court further takes note of the Deed of Revocation of Power of Attorney dated 04/06/2014. As rightly pointed out by the 2<sup>nd</sup> Defendant, this Deed of Revocation was not the subject of any challenge by any of the parties. In fact, it was acknowledged by all parties having existed when the deceased executed the same. It was a validly enforceable instrument.

331. The import of this instrument is to be found in Section 22 of the *Evidence Act* provides as follows:

“Oral admissions as to the contents of a document may not be proved unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the provisions of this Act or unless the genuineness of a document produced is in question.”

332. Gathered from the above, it is to be stated that the said Deed of Revocation was by the rule of parol evidence not to be subjected to any challenge as to its validity and tenor. See *Treitel* (supra) and *Twiga Chemicals* (supra)

333. The Deed of Revocation in essence revoked the general Power of Attorney dated 25/03/2013. Its unequivocal contents acknowledged that the 1<sup>st</sup> Defendant was granted authority to do certain things connected with all acts, deeds, matters and things whatsoever in or about his estate’s property and the affairs or concur with the person’s jointly interested with himself therein in doing all acts, deeds, matters and things therein either particularly or generally described as amply and effectually for all intents and purposes as he could do in his own proper person if the deed had not been made as long as they were exercised in good faith.



334. It is this court's finding that no evidence to the contrary was adduced as to vitiate the actions of the 1<sup>st</sup> Defendant in that they were done in bad faith. At all material times as long as the 1<sup>st</sup> Defendant was vested with authority, this court finds that her actions were validly done.
335. Furthermore, evidence was adduced as to demonstrate that those actions were not fulfilled in the end. It is for this reason that this court holds that so long as the 1<sup>st</sup> Defendant exercised her authority as set out in the Power of Attorney, her actions stood valid and in conformity with the law.
- ii. Whether the consents to transfer the suit lands were lawfully obtained?
336. The Plaintiff challenged the legality of the consents stating that they were unlawful for the following reasons; firstly, the consent to transfer the suit land to the 2<sup>nd</sup> Defendant dated 30/10/2013 preceded the agreement dated 11/12/2013. In the resulting circumstances, he was of the view that there was nothing like a special Land Control Board consent. Secondly, they were obtained in the absence of the parties, in particular, the deceased. Thirdly, he questioned their authenticity since they were issued the same day that the application for consent was made. Finally, no minutes as to the meeting of the Land Control Board was produced. For those reasons, the consents were obtained illegally.
337. If I am made to understand the Plaintiff's claim, he was dissatisfied with the issuance of the consents giving an array of reasons why they should be found illegal.
338. The *Land Control Act* is the statute governing agricultural land. It inter alia, governs the issuance of Land Control Board consents by the relevant Land Control Board. Section 6 states that any disposition or dealing in respect to agricultural land is void unless a consent in respect to the particular transaction has been issued by the Land Control Board.
339. Under Section 8 (1), the application shall be made in the prescribed form to the appropriate land control board within six (6) months of the making of the agreement for the controlled transaction by any party thereto. Noticeably, the Act does not state that the agreement must precede the application. In my view, as long as the agreement is in existence, the application must be done within the statutory time period.
340. Under Section 8 (2), the Land Control Board shall either give or refuse its consent to the controlled transaction and, subject to any right of appeal conferred by the Act, its decision shall be final and conclusive and shall not be questioned in any court.
341. In light of the above, the Act provides for an internal dispute resolution mechanism where a party is dissatisfied with the decision to grant or refuse the consent. The same is provided at Section 11 to Provincial Land Control Appeals Board with a further appeal lying to the Central Land Control Appeals Board as enshrined in Section 13 of the Act.
342. What is evident from the above is that firstly, the decision to grant or refuse to grant a consent is final and shall not be subject of proceedings before any court. It is that decision to grant that the Plaintiff is dissatisfied with because had the consents not been issued, he would not have questioned their legitimacy. The only available remedies are as set out in statute.
343. The Plaintiff, evidently dissatisfied with those findings instead filed the present suits challenging inter alia the said consents. I find that the Plaintiff's claim on the question of the veracity of the consents illegal and unprocedural since he failed to establish why he did not explore the available fora as set out in statute. Secondly, if indeed he explored, what was the findings of those proceedings?
344. This court is alive to the doctrine of exhaustion and the exceptions thereto. The Plaintiff is indeed guilty of failing to uphold that doctrine. He furthermore failed to establish why he ought to be exempted



from the said doctrine. He has adduced nothing to support why this court ought to hear and determine the question of the validity of the consents before it. In light of the above, this court finds no merit in this issue and is hereby dismissed.

ii. What was the nature and import of the transfer of L.R. no. Trans Nzoia/Liyavo/36 from the deceased to the 1<sup>st</sup> Defendant?

345. The Plaintiff submitted that the 1<sup>st</sup> Defendant could not be held to have contributed to the purchase of all that parcel of land namely L.R. No. Trans Nzoia/Liyavo/36. In addition, he disputed that the property was transferred as a gift. In his view, the 1<sup>st</sup> Defendant was only unjustly enriching herself particularly so because the deceased was unwell. That if she was laying claim to the property described as matrimonial property, her recourse lay in filing a matrimonial cause.
346. In addition, it was the Plaintiff's evidence that his mother was a wife to the 1<sup>st</sup> Defendant. This was captured in Kitale Chief Magistrate Criminal Case No. 3836 of 2014. That she lived on the said parcel of land between 2000 and 2004 before moving to Botswana. In his view, it was necessary for the 1<sup>st</sup> Defendant to acquire consent from the Plaintiff's wife under Section 12 (2) of the Matrimonial Property Act to transfer the property to herself.
347. Two concepts come to the fore; was the Plaintiff seeking an interpretation of the transfer of the suit land namely L.R. no. Trans Nzoia/Liyavo/36 from the deceased to the 1<sup>st</sup> Defendant in its nature matrimonial property or a gift inter vivos.
348. The Plaintiff relied on the evidence of the 1<sup>st</sup> Defendant to concluded that the suit land was matrimonial. In her testimony, the 1<sup>st</sup> Defendant invited this court to paint a picture as to how the property was initially acquired. It was her evidence that L.R. No. Trans Nzoia/Liyavo/36 measuring approximately 8.1 hectares was obtained in 1993 and successfully acquired in 1998 from the vendor one JAMES TERREN located in Kitale at a cost of Kshs. 600,000.00.
349. Although the property as registered in the name of the deceased, both parties contributed to the purchase price was paid in the form of trade in of DW1's BMW318 car valued at Kshs. 400,000.00, the deceased's contribution and Kshs. 600,000.00 borrowed by DW1 from Barclays Bank secured by way of mortgage over the deceased's title deed namely L.R. No. 209/9861.
350. In terms of contribution towards the purchase of the suit land, the Plaintiff formulated a contrary narrative. He called PW4 who testified that the deceased financed the purchase by way of a mortgage over his old Racecourse house over L.R. No. 209/8124 with Transnational Bank (subsequently sold owing to his default in payment), trading his motor vehicle registration number KZS 934 BMW, valued at Kshs. 500,000.00, to MR. JAMES TIREN, the vendor, proceeds from the delivery and supply of computers to KPA headquarters as the successful bidder and proceeds from the sale of a plot in Bungoma town. Out of the proceeds of the tender, the deceased paid a balance of Kshs. 400,000.00 to the vendor.
351. This court notes that the mode of acquisition was the reason why the 1<sup>st</sup> Defendant testified as to how the couple paid for the suit property. Later on, the 1<sup>st</sup> Defendant testified that the deceased transferred the suit land to her favor as the sole proprietor of the suit land. She recalled that the reason the deceased elected to transfer the suit land in her name was to safeguard the property and prevent the same from being disposed of given the fact that he had amassed a lot of debt.



352. The concept of gift inter vivos or the doctrine of presumption of advancement is not peculiar to our jurisdiction. It was elaborately discussed by the Plat, Gachuhi and Masime Ag JJA Court of Appeal in the case of Mutiso vs. Mutiso [1988] eKLR. Plat JA held as follows:

“No doubt the presumption of advancement applies where a husband makes a gift to his wife. But Lord Diplock warned in *Pettit v Pettit* [1970] AC 777 that the strength of the presumption in modern times may be diminished. I would add that the presumptions to be drawn in Kenya, must similarly accord with the social conditions which prevail, so as to conform with the most likely intentions of married spouses here. It seems to me that Mr. and Mrs. Mutiso were dealing with a period during which the husband in prison could not deal with his affairs, but yet would emerge again one day. During this temporary inability the aim would be to keep their property intact, and where there were male heirs to make sure that they were not deprived of their inheritance. It would be in exceptional circumstances that the main asset would be given entirely to the wife. It would be dealt with in trust for the husband until he came back to the family. In my opinion the presumption of advancement in circumstances such as in this case would not be strong at all.”

353. Gachuhi JA held:

“My emphasis is on the doctrine of advancement or as it is known as gifts. Such advancement should be clear from the time of inception. It must be free from any consideration such as for defeating creditors. But where there is a rebuttal evidence that it was not the intention of the donor to make such a gift any advancement must be held on a resulting trust, the donor retaining the legal ownership and the transferee must retransfer the property to the donor at the donor’s request... For a presumption of advancement to be inferred, the intention of the parties must be clear untainted with any irregularities fraud or duress.”

354. Thus for one to establish that the transfer of an asset from one spouse to another is a gift, it must be demonstrated that it was not conditional upon the happening of an event. That it was bereft of duress. That the intention as to create a gift must be clear.

355. In this court’s view, the mode of acquisition of the suit parcel of land is immaterial. What is agreed by both parties is that the suit property was registered in the name of the deceased and before his death, transferred to the 1<sup>st</sup> Defendant. Evidence was led by the 1<sup>st</sup> Defendant as to demonstrate that the deceased desired to save the suit property from any form of disposal. That it was his desire that the said property remains a family home. No evidence to the contrary was adduced. Furthermore, that evidence was not subjected to any challenge as to find that those assertions were not truthful.

356. In the resulting circumstances, this court finds that the nature of the transfer from the deceased to the 1<sup>st</sup> Defendant was a gift under the doctrine of presumption of advancement.

ii. Whether the transfer of L.R. No. Trans Nzoia/Liyavo/36 from the deceased to the 1<sup>st</sup> Defendant was valid?

357. The Plaintiff’s contention was that the transfer of the suit land namely L.R. no. Trans Nzoia/Liyavo/36 from the deceased to the 1<sup>st</sup> Defendant was obtained by means of fraud and therefore invalid for the following reasons:

358. Firstly, the Plaintiff questioned the entire process as in his view, the Land Control Board Application form dated 14/10/2013, the transfer dated 13/04/2013 and Stamp Duty declaration form dated 07/02/2014 all in respect to L.R. no. Trans Nzoia/Liyavo/36 which were all adduced into evidence,



were obtained by means of fraud. This court has already established that no element of fraud was proved by the Plaintiff to the required standard. On this ground, the allegation fails.

359. Secondly, the 1<sup>st</sup> Defendant's failure to adduce the stamp duty forms, KRA pay slips and the valuation in evidence connoted that stamp duty was never paid. In his view, the 1<sup>st</sup> Defendant ought to have applied for exemption of stamp duty under Section 117 (1) (i) and clause B of the Schedule to the [Stamp Duty Act](#) in order to validate the said transfer. He further denied that the deceased authorized the transfer.
360. Thirdly, the Plaintiff inferred from the evidence of DW4 that it was the 1<sup>st</sup> Defendant, and not the deceased, who wrongfully presented the documents for registration and not the deceased. Relying on Section 45 and 48 of the [Land Registration Act](#), the Plaintiff submitted that the documents presented for registration failed to meet the requirements of those provisions.
361. The process of registration and validity or otherwise of the suit land from the deceased to the 1<sup>st</sup> Defendant lies in the evidence of DW4. A Land Registrar at Trans Nzoia Land Registry, DW4 explained that a transfer of land is made when a transferor and transferee execute the same for registration. The executed transfer form in respect to the suit land from the 1<sup>st</sup> Defendant to the deceased was produced and marked 3<sup>rd</sup> DExh.2. The parties included their ID number and attached copies of their KRA PINs and passport photos.
362. The said transfer forms were accompanied by the deceased's and 1<sup>st</sup> Defendant's ID copies marked 3<sup>rd</sup> DExh.3 and 3<sup>rd</sup> DExh.4 respectively, a copy of their KRA PIN certificates marked 3<sup>rd</sup> DExh.5 and 3<sup>rd</sup> DExh.6, a copy of the application for consent from the Land Control Board dated 13/04/2013 applied by the deceased marked 3<sup>rd</sup> DExh.7a and the letter of consent dated 31/01/2014 marked 3<sup>rd</sup> DExh.7b.
363. The transfer was accompanied by an Affidavit of marital spousal consent. Furthermore, the transfer form did not have any consideration indicated therein. As such, no valuation for stamp duty was prepared and no spousal consent was required.
364. DW4 testified that the meeting of the Board issuing the consent took place on 30/10/2013. She produced the stamp duty payment slip dated 07/02/2014 marked 3<sup>rd</sup> DExh.8 that accompanied the transfer forms. She continued that the title deed was surrendered to their offices for cancellation. The said copy was produced and marked DExh.9. DW4 also produced a certified copy of the receipt dated 07/02/2014 for payment of Kshs. 1,000.00 marked 3<sup>rd</sup> DExh.18.
365. DW4 explained that no reason justified an impede of the process. As such, the transfer was effected by virtue of a clean process and due to the fact that no encumbrance on the property had been registered. She further negated the allegations by the Plaintiff in that no stamp duty valuation form and the valuation report were required as there was no consideration in respect to this transfer.
366. Although the Plaintiff stated that the 1<sup>st</sup> Defendant was in breach of the provision of Section 45 of the [Land Registration Act](#), the Plaintiff failed to substantiate those allegations. Nothing demonstrated that the verification of execution exercise was not conducted by the 3<sup>rd</sup> Defendant. His allegation is thus dismissed.
367. Lastly, the Plaintiff accused the 1<sup>st</sup> Defendant of failing to accord with the provisions set out in Section 46 of the [Land Registration Act](#) which provides that an instrument required by law to be stamped shall not be accepted for registration unless it is stamped in accordance with the [Stamp Duty Act](#). However, looking at the evidence of DW4, a stamp duty payment slip dated 07/02/2014 marked 3<sup>rd</sup> DExh.8 that accompanied the transfer forms. Once again, the Plaintiff's allegation is unsubstantiated and is thus



- dismissed. The 1<sup>st</sup> Defendant needed not to apply for exemption to pay stamp duty as the stamp duty was actually paid.
368. In terms of receipts, DW4 explained that the name on the receipt is ordinarily the person presenting the documents with name indicated. This even when an Advocate presents the documents for registration. Concluding, she testified that Section 14 of the [Land Registration Act](#) was not invoked as the information availed before the Registrar was sufficient.
369. Section 26 (1) of the [Land Registration Act](#) provides that the certificate of title issued by the Registrar upon registration shall be taken by the court as prima facie evidence that the named person is the absolute and indefeasible owner. Furthermore, that title shall not be challenged except on grounds of fraud, misrepresentation or if the certificate was acquired illegally, unprocedurally or through a corrupt scheme.
370. Nothing was advanced by the Plaintiff as to demonstrate that the Certificate of Title in the name of the 1<sup>st</sup> Defendant was challengeable. Taking cue from the above, this court holds that the 1<sup>st</sup> Defendant is the prima facie absolute and indefeasible owner of the suit land namely L.R. No. Trans Nzoia/Liyavo/36.
- ii. Whether the 1<sup>st</sup> Defendant passed good title to 2<sup>nd</sup> Defendant over L.R. No. Trans Nzoia/Kapomboi/193 and remains the indefeasible proprietor?
371. The Plaintiff submitted that the transfer of L.R. No. Trans Nzoia/Kapomboi/193 from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was obtained by means of fraud. He that in light of unauthorized actions of the 1<sup>st</sup> Defendant, the failure to obtain a consent six (6) months after the sale agreement and NOT before and the deceased failed to attend the meeting granting the consent to transfer the suit land. However, I have already established as stated in this judgment above herein that the consent was lawful and that the 1<sup>st</sup> Defendant was possessed with authority to transfer the suit land on behalf of the deceased to the 2<sup>nd</sup> Defendant.
372. The Plaintiff further challenged the discrepancies on the consideration sum. According to the Plaintiff, consideration could not be ascertained as the purchase price in terms of the agreement dated 11/12/2013 was Kshs. 12,500,000.00 while the stamp duty declaration form dated 25/02/2014 stated that the consideration was Kshs. 600,000.00.
373. On whether the registration of the transfer of the suit properties was lawful and procedurally sound, the Plaintiff inferred from the evidence of DW4 that it was the 1<sup>st</sup> Defendant who wrongfully presented the documents for registration and not the deceased. Relying on Section 45 and 48 of the [Land Registration Act](#), the Plaintiff submitted that the documents presented for registration failed to meet the requirements of those provisions.
374. Regarding L.R. No. Trans Nzoia/Kapomboi/193 measuring 20 Ha, DW4 produced the green card in respect to the suit property opened on 20/12/2004. The fourth entry was a transfer from the deceased to the 2<sup>nd</sup> Defendant on 25/02/2014 with a title deed issued on that date. The green card was produced and marked 3<sup>rd</sup> DExh.17.
375. The transfer dated 25/02/2014 between the deceased and the 2<sup>nd</sup> Defendant was executed by the said parties. It was produced and marked 3<sup>rd</sup> DExh.10. Accompanying the transfer was an application for consent to the Land Control Board marked 3<sup>rd</sup> DExh.11, a letter of consent dated 30/10/2013 marked 3<sup>rd</sup> DExh.12, KRA payment slip dated 25/02/2014 marked 3<sup>rd</sup> DExh.13, valuation for stamp duty dated 25/02/2014 marked 3<sup>rd</sup> DExh.16 and receipt for payment of the sum of Kshs. 1,000.00 marked 3<sup>rd</sup> DExh.16. The title deed was surrendered for cancellation. It was produced and marked 3<sup>rd</sup> DExh.14.



376. During this process, the property was free from encumbrances as the only reason to reject transfer. She added that consideration can be the same as that in the agreement. Although indicated in the sale agreement, ultimately, the valuation of the property determines the stamp duty payable. The figure could resultantly increase or decrease.
377. In terms of receipts, DW4 explained that the name on the receipt is ordinarily the person presenting the documents with name indicated. This even when an Advocate presents the documents for registration. She also recalled that the Power of Attorney PExh.9 and the spousal consent sworn on 27/01/2013 and marked DExh.1 were presented to them. Concluding, she testified that Section 14 of the [Land Registration Act](#) was not invoked as the information availed before the Registrar was sufficient.
378. In this court's view, DW4's evidence dissolves the Plaintiff's allegations. The unwavering evidence advanced by the Land Registrar was the process was lawful and procedural. Section 26 (1) of the [Land Registration Act](#) provides that the Certificate of Title issued by the Registrar upon registration shall be taken by the court as prima facie evidence that the named person is the absolute and indefeasible owner. Furthermore, that title shall not be challenged except on grounds of fraud, misrepresentation or if the certificate was acquired illegally, unprocedurally or through a corrupt scheme.
379. In light of the above, I find and hold that the 2<sup>nd</sup> Defendant not only properly acquired ownership of L.R. No. Trans Nzoia/Kapomboi/193 but also retains an indefeasible title that is not subject to challenge, at least in the manner the Plaintiff purported. The conclusion therein is that the 2<sup>nd</sup> Defendant holds a valid and absolute title over L.R. No. Trans Nzoia/Kapomboi/193.
380. The 2<sup>nd</sup> Defendant submitted that he was an innocent purchaser for value without notice. Under its definition in Black's law Dictionary 8<sup>th</sup> Edition, a bona fide purchaser is:
- “One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”
381. In the Ugandan case of *Katende v. Haridar & Company Limited* [2008] 2 E.A.173 it was held:
- “For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:
- a. he holds a certificate of title;
  - b. he purchased the property in good faith;
  - c. he had no knowledge of the fraud;
  - d. he purchased for valuable consideration;
  - e. the vendors had apparent valid title;
  - f. he purchased without notice of any fraud;
  - g. he was not party to any fraud.
382. The above conditions precedent is conjunctive in their nature. For a party to successfully demonstrate that s/he was an innocent purchaser for value without notice, the party must establish all the above



conditions including purchasing without any notice of fraud to wit the party was not party to the fraud.

383. In this case, I have already established that no fraudulent activities were commissioned or occasioned by the 1<sup>st</sup> Defendant. The absence of any element of fraud thus negate the elements set out in proving a bona fide purchaser for value without notice. In the circumstances, I find and hold that the 2<sup>nd</sup> Defendant was not a bona fide purchaser but remains the absolute and indefeasible proper and registered proprietor of all that parcel of land namely L.R. No. Trans Nzoia/Kapomboi/193.

ii. Whether the 3<sup>rd</sup> Defendant was a necessary party to the proceedings?

384. The 3<sup>rd</sup> Defendant submitted that it was wrongly enjoined in these proceedings. It pointed out that the 3<sup>rd</sup> Defendant was only cited in paragraph thirteen (13) and fourteen (14) of the Plaints in ELC no. 120 of 2014 and ELC no. 119 of 2014 respectively.

385. It thus submitted that there was no fault in registration and issuance of titles to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants since the suit lands were unencumbered, the transfers were duly executed and attested to and accompanied with the required completion documents. Furthermore, PW1 admitted that there was no specific complaint against it. For these reasons, the 3<sup>rd</sup> Defendant submitted that it was an unnecessary party to the proceedings.

386. Acknowledging the provisions set out in Order 1, Rule 10 of the Civil Procedure Rules, the 3<sup>rd</sup> Defendant contented that the discretion was improperly exercised as the overwhelming evidence demonstrated a dispute between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

387. Deciphering the dispute, the 3<sup>rd</sup> Defendant observed that the contention was whether the deceased secured the transfer instruments to the favor of the 1<sup>st</sup> Defendant and ultimately the 2<sup>nd</sup> Defendant. However, the 3<sup>rd</sup> Defendant was neither a party to those transactions nor participated in any alleged fraudulent activities.

388. I agree with the 3<sup>rd</sup> Defendant. It was evident from the Plaintiff's pleadings that no fault was attributed to the 3<sup>rd</sup> Defendant in the discharge of its statutory mandate. Furthermore, in his evidence during cross examination, it was his acknowledgement that the 3<sup>rd</sup> Defendant was not a necessary party.

389. What the Plaintiff ought to have done was call the said office as a witness and testify as to the transactions on the suit lands.

390. In Apex International Ltd and Anglo Leasing and Finance International Finance Ltd vs. Kenya Anti-Corruption Commission [2012] eKLR, the Court quoted the words of Mukhtar J. of the Supreme Court of Nigeria in Goodwill and Trust Investment Ltd vs. Will and Bush Ltd (2011) LCN/B820 (SC) as follows:

“It is trite law that to be competent and have jurisdiction over a matter proper parties must be identified before the action can succeed, the parties must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the Court, the Court lacks jurisdiction to hear the suit and where the Court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”

391. Order 1, Rule 9 of the Civil Procedure Rules provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in



controversy so far as regards the rights and interests of the parties actually before it.” In that vein, this court will endeavor to champion against wrongful joinder of parties to the suit. It is only right and proper and will save on the resources expended by the parties wrongfully enjoined in the proceedings. I will thus take this into consideration when giving my final orders in this matter.

### **Orders and Disposition**

392. Section 27 of the *Civil Procedure Act* provides that costs follow the event unless for some other reason on account of justice, the court deems it fit to order otherwise. Bearing the above analysis in mind, I find that the Plaintiff in both consolidated suits is unsuccessful while the 1<sup>st</sup> Defendant is successful in both suits. Costs shall follow the event.
393. On the claim for defamation, the 1<sup>st</sup> Defendant failed to prove to the required standard of proof the elements set out in the tortious claims of defamation and malicious injurious falsehood. The said claim together with the relief sought in general, aggravated and exemplary damages is thus dismissed. It is further dismissed on account of the fact that the 1<sup>st</sup> Defendant failed to address this court on the said relief.
394. The upshot of the above is that judgment is entered in disposing of both consolidated suits namely Kitale ELC No. 119 of 2014 and Kitale ELC No. 120 of 2014 as follows:
- a. A declaration be and is hereby made that the 1<sup>st</sup> Defendant is the lawful, indefeasible and absolute proprietor of all that parcel of land namely L.R. No. Trans Nzoia/Liyavo/36.
  - b. The caution registered on L.R. No. Trans Nzoia/Liyavo/36 order be and is hereby lifted.
  - c. A declaration be and is hereby made that the 2<sup>nd</sup> Defendant is the lawful, indefeasible and absolute proprietor of all that parcel of land namely Trans Nzoia/Kapomboi/193.
  - d. The caution registered on L.R. No. Trans Nzoia/Kapomboi/193 be and is hereby lifted.
  - e. The 1<sup>st</sup> Defendant’s Counterclaims in Kitale ELC No. 119 of 2014 & Kitale ELC No. 120 of 2014 succeed to the extent of the reliefs given above and she is awarded costs to be met by the Plaintiff, with interest from the date of this judgment.
  - f. The Plaintiff’s suits in Kitale ELC No. 119 of 2014 & Kitale ELC No. 120 of 2014 lack merit and are hereby dismissed with costs to the Defendants, together with interest from the date of judgment.
395. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 5<sup>TH</sup> DAY OF DECEMBER, 2023.**

**HON. DR. IUR FRED NYAGAKA  
JUDGE, ELC KITALE**

