



Leeuw v Mulie (Sued as the Executor and Legal Representative of the Estate of the Late Bernhard Martens) & 4 others; Unen (Interested Party) (Commercial Case E830 of 2021) [2025] KEHC 719 (KLR) (Commercial and Tax) (3 February 2025) (Judgment)

Neutral citation: [2025] KEHC 719 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E830 OF 2021**

**A MABEYA, J
FEBRUARY 3, 2025**

BETWEEN

MATHILDA CORNELIA DE LEEUW PLAINTIFF

AND

**ROBERT MAX MULIE SUED AS THE EXECUTOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE BERNHARD MARTENS 1ST DEFENDANT
SABINE HENRIETTE MARTENS 2ND DEFENDANT
THE REGISTRAR OF COMPANIES 3RD DEFENDANT
THE ATTORNEY GENERAL 4TH DEFENDANT
RYETS CONNIE MEULDIJK 5TH DEFENDANT**

AND

GRIETJE ALBERTA VAN UNEN INTERESTED PARTY

JUDGMENT

1. By a Plaint dated 28/9/2021, the Plaintiff filed this suit claiming that she is the majority shareholder and director of a company called Lulumizi Limited, incorporated in the year 1997 (“the Company”). That on various dates between April, 2000 and June, 2003, the late Bernhard Martens (“the deceased”) approached her for financial assistance.
2. The Plaintiff advanced him monies totaling €50,231 and in consideration, the Plaintiff was allotted 98 shares out of the 100 shares in the Company and she was appointed as a director thereof in the year



2000. The shareholding and directorship of the Company at the time the Plaintiff became a shareholder was as follows:

Mathilda Cornelia De Leeuw – 98 shares – Director

Bernhard Martens - 1 share – Director

Subash Chander Handa – 1 share – Auditor/Secretary

3. The deceased died on 4/6/2015 and the plaintiff contended that she was not aware of how Benard Martens 1 share in the Company was dealt with by the 1st defendant as the Executor of the Estate. The plaintiff claimed that sometime in 2019, in the course of ordinary business, a search of the Company was carried out and it revealed that as at 11/12/2019, the shareholding and directorship of the Company was as follows:

Mathilda Cornelia De Leeuw – 98 shares – Director

Sabine Henriette Martens - 1 share – Director

Subash Chander Handa – 1 share – Director

4. The plaintiff claimed that she was not aware how the 2nd defendant was made a shareholder and director of the Company. That a further search of the Company conducted in 2021 revealed that as at 23/4/2021, the shareholding and directorship of the Company was as follows: -

Estate of the Late Bernhard Martens – 99 shares – Shareholder Sabine Henriette Martens - 1 share – Director/Shareholder

5. That from the said search, the plaintiff had been removed as both the majority shareholder and director of the Company without her knowledge and/or consent. She was concerned at this turn of events and instructed her advocates on record who sent a representative to carry out a manual search of the file relating to the Company at the Companies Registry. On perusing the file, it was discovered that the file contained copies of the following documents: -

- a. A share transfer form dated 1/8/2003 showing that the deceased had transferred 1 ordinary share to the 2nd defendant;
- b. The Company's annual returns for the year 2004 showing that the 2nd defendant was a shareholder with 1 share in the Company as well as a director of the Company in place of the deceased;
- c. Form No.203A showing that the deceased resigned as a director and the 2nd defendant was appointed as a director of the Company from 1/8/2003;
- d. Form 203A showing that Subash Chandra Handa had resigned as a director of the Company with effect from 23/8/2005.
- e. A share transfer form dated 30/11/2010 showing that the plaintiff had transferred 99 ordinary shares to the deceased; and
- f. Form 203A showing that the plaintiff had resigned as a director of the Company with effect from 30/11/2010.

6. The plaintiff contended that she had never transferred her 98 shares in the Company to any person. That she was not aware of any of the changes set out above. She claimed that by a letter dated 4/5/2021, her advocates wrote to the 3rd defendant (“the Registrar”) seeking copies of records in support of the changes set out above in order to clarify the position but there was no response.



7. That the changes to the shareholding and directorship of the Company were not in accordance with the requirements of the now repealed Companies Act and the Companies Act (Chapter 486 of the Laws of Kenya) and she was concerned that there were efforts to fraudulently deprive her of her 98% majority shareholding in the Company.
8. The plaintiff particularized the fraud by stating that; section 185 of the repealed Companies Act required that a board resolution be made and lodged to approve changes in the shareholding and directorship of the Company. That there is no board resolution that accompanied any of the documents set out above.
9. That there were several inconsistencies in the documents referred to above; viz that Form 203A showing that Subash Chandra Handa had resigned as a director with effect from 23/8/2005 was inconsistent with the search of the Company as at 11/12/2019, 14 years later, which showed that Subash Chandra Handa was still a shareholder and director of the Company; no document to show that 1 additional share had been allotted or transferred to the plaintiff and therefore incapable to have ever transferred 99 shares to the deceased as alleged in the share transfer form dated 30/11/2010; that she did not sign the share transfer form dated 30/11/2010 and that the signature appearing thereon was a forgery.
10. She denied ever having resigned as a director of the Company as alleged in the Form 203A and that there was no letter of resignation or statutory declaration to show that she had resigned from her position of director. Further, that there was no documentation on the shareholding of Subash Chandra Handa and how he was removed as a shareholder.
11. That the aforementioned fraudulent efforts to deprive of her majority shareholding in the Company could also consequently deprive her of her home where she had lived since she became a shareholder in the Company over 20 years ago. That the home was built on the property known as C.R. 9940/1 (the Watamu Property) in Watamu, Kilifi County and that the property is registered in the name of the company. That if unchecked, the attempts to fraudulently remove the plaintiff as a shareholder and director of the company will have the effect of illegally and unlawfully depriving her of her shares in the Company and her home in breach of her constitutional right to property under Article 40 of the Constitution.
12. She stated that she was an elderly woman and had no other home and her shareholding in the Company was a significant part of her assets and that she will suffer irreparable harm, loss and damage if the orders sought in her pleadings were not granted. As such, she sought judgment against the defendants for:
 - a. A mandatory injunction do issue to compel the Chief Registrar, Companies Registry to rectify the entries to the Register of Companies in respect of Lulumizi Limited registration number C.75866 to show that:
 - i. Mathilda Cornelia De Leeuw holds 98 shares in Lulumizi Limited
 - ii. Mathilda Cornelia De Leeuw is a director of Lulumizi Limited
 - b. Costs of the suit.
 - c. Interest on (b) above at court rates from the date of the judgement until payment in full.
13. The defendants and the interested party responded to the suit through various statements of defence. The 1st defendant filed a defence dated 10/1/2022, the 2nd defendant an amended defence dated 12/11/2021, the 3rd and 4th defendant a defence dated 9/2/2022 and the interested party a defence dated 24/1/2022.



14. The 1st defendant contended that the majority shareholder of the Company was the Estate of the deceased. That the plaintiff was allotted ninety-eight (98) shares and appointed as director with effect from 4/9/1998 vide a board resolution of even date. He denied that the shares were allotted to the plaintiff in consideration for any loan advanced to the deceased by the plaintiff and that in any event, the averments of the plaintiff were insufficient to establish the existence of any loan agreement between the plaintiff and the deceased.
15. That at the time of the deceased's demise in 2015, the shareholding of the Company was as follows: -
Bernhard Martens (the deceased) – 99 Shares – Director
Sabine Martens – 1 Share – Director
16. He contended that it was disingenuous for the plaintiff to claim to be the majority shareholder in a company with which she had no contact or business with for years on end only to emerge from the “woodwork” to lay claim to the same almost 6 years after the death of the deceased. That the deceased transferred his one share to the 2nd defendant and was approved by the Board in a meeting held on 1/8/2003 at 10 a.m. That the changes to the shareholding and directorship of the Company was as it existed as at 23/4/2021 and that the changes removing the Plaintiff as the majority shareholder were made on 30/11/2010.
17. He further contended that the plaintiff was allotted ninety-nine (99) shares in the Company to hold as trustee on behalf of the deceased pursuant to the Declaration of Trust dated 23/10/2007. That pursuant to the terms of the Declaration of Trust, the shares that had been allotted to the plaintiff could be transferred at any time by the deceased without any notice to the plaintiff, which was what took place on 30/11/2010. He denied the allegations of fraud and contended that there was no requirement for a Board Resolution for the approval of changes in the directorship of the Company due to the Declaration of Trust.
18. That Subash C. Handa (Subasha) transferred his one (1) share to the plaintiff on 16/1/2006, which resulted in her having ninety-nine (99) shares in the Company, and thereafter the plaintiff and the deceased executed the Declaration of Trust dated 23/10/2007. That the Declaration of Trust did not require the plaintiff to sign any resignation letter or transfer as the deceased had the authority to sign the said transfer and letter of resignation to effect a transfer of shares to himself or to any other person.
19. That the plaintiff is a tenant at will of the heirs of the estate of the deceased in the Watamu Property and her claim to ownership thereof lacked merit. She was therefore an interloper trying her hand at unjust enrichment to the detriment of the estate of the deceased and that she was aware that the property was the subject of litigation in Succession Cause No. 1975 of 2015 — In the Matter of the Estate of Bernhard Martens (Deceased), which is yet to be determined as far as the property is concerned.
20. In the premises, the 1st defendant claimed that there was no cause of action disclosed in the plaint, as the actions of the deceased as far as the Company was concerned were all lawful and in line with the Declaration of Trust, the Articles of Association of the Company and the [Companies Act](#). He therefore urged that the suit be dismissed with costs and interest thereon.
21. The 2nd defendant denied any knowledge of advancement of monies by the plaintiff to the deceased as consideration for allotment of shares in the Company. That the plaintiff was appointed a director of the Company and was allotted 98 shares on 4/9/1998 and not in the year 2000. That the plaintiff held the shares in trust for the deceased as per the terms of the Declaration of Trust.
22. She contended that Subash Chana resigned from the Company and transferred one (1) ordinary share to the plaintiff on 25/8/2005 meaning the plaintiff had 99 shares whereas the 2nd defendant had 1



- share. That on 30/11/2010, the plaintiff transferred her 99 shares to the deceased making the new shareholding to be, the 2nd defendant having 1 share whereas the deceased held 99 shares. She denied the allegations of fraud against her and alleged that the Plaintiff occupied a portion of the Watamu Property as a bare Licensee. She therefore prayed that the suit be dismissed with costs.
23. The Registrar of Company responded to the suit by stating that the initial subscribers of the Company during incorporation were the deceased and Subash who held 1 share each. That the records currently held at the Companies registry indicated that the shareholding and directorship of the Company was as follows: -
- Sabine Henriette Martens – Director/Shareholder – 1 Share
- Estate of the Late Bernhard Martens – Director/Shareholder – 99 Shares
24. That the records further indicated that vide Form 213 filed on 15/9/1998 by Progressive Registrars Limited, the Company notified the Registrar about the allotment of 98 shares to the plaintiff who was appointed as director with effect from 4/9/1998. Further, that the Annual Return made up to 15/8/1999 indicated the Company had a nominal share capital of 10,000 divided into 100 ordinary shares of 100 each and held as follows: -
- Bernhard Martens - Director/Shareholder – 1 Share
- Subash Chander Handa – Director/Shareholder – 1 Share
- Mathilda Cornelia Deleew- Director/Shareholder – 98 Shares
25. That pursuant to sections 829 and 832(4) of the Companies Act, in October 2017 the Registrar instituted a semi electronic file audit and verification system to manage the company register called Link a Business which compelled all companies to update their records. Consequently, from the unverified electronic records an official search dated 11/12/2019 was issued to one Shantilal Khimji Shah confirming the position as pleaded by the plaintiff.
26. That on 12/3/2020, an application on Link a Business referenced AB-V8H2L3Q to update and verify the records of the Company was lodged by the 2nd defendant and that from the records, during the verification and updating, amongst other documents, there was lodged a Form 203A being a Notification of change of particulars of directors and secretaries of the Company with effect from 1/8/2003 lodged by MLR Associates indicating resignation of the deceased as company secretary and appointment of the 2nd defendant as director. Further, that there was also a Form of transfer of 1 ordinary share by the deceased dated 1/8/2003 to the 2nd defendant.
27. That a CR 12 dated 13/3/2020 was issued to the Company reflecting the updated and verified position of the directors of the company as at March 2020 as follows: -
- Sabine Henriette Martens - Director/Shareholder – 1 Share
- Estate of the Late Bernhard Martens– Director/Shareholder – 99 Shares
28. In sum, the Registrar listed the following entries as captured from his records in a chronological manner;
- a. Articles of Association of Lulumizi Limited dated 10/4/1997 drawn by the firm of Archer & Wilcock Advocates
- b. Statement of Nominal Capital of Lulumizi Limited dated 10/4/1997 for Kshs.10, 000.00 divided into 100 shares of kshs.100 each.



- c. Form 203 being the particulars of directors of Lulumizi limited at incorporation dated 10/4/1997 lodged on 11/4/1997.
- d. Certificate of incorporation no C.75866 of Lulumizi limited dated 17/4/1997
- e. Form 213 being a return of allotments made on 4/9/1998 by Lulumizi Limited and filed on 15/9/1998, allotting 98 ordinary shares to Mrs. Mathilda Cornelia Deleew.
- f. Form 203A being a notification of change of particulars of directors of Lulumizi limited filed on 15/9/1998 appointing Mrs. Mathilda Cornelia Deleew as director of the company with effect from 4/9/1998
- g. Form of Annual Return of Lulumizi Limited made up to 15/8/1999 lodged by Progressive Registrars limited on 15/9/1998 indicating the directors of the company to be Bernhard Martens, Subash Chander Handa and Mathilda Cornelia Deleew
- h. Annual Return form of Lulumizi Limited made up to 15/8/2004 lodged by MLR Associates indicating the directors of the company to be Sabine Henriette Martens, Subash C. Handa and Mrs. Mathilda Cornelia Deleew holding 1, 1 and 98 shares, respectively.
- i. Linking application form (AB-V8H2L3Q) dated 12/3/2020 by Sabine Henriette Martens for transition and update of the records of Lulumizi Limited from the manual records to the digital e-citizen portal.
- j. Form 203A being a Notification of change of particulars of directors with effect from 1/8/2003 lodged by MLR Associates indicating resignation of Bernhard Martens as director and appointment of Sabine Henriette Martens as director.
- k. Form of transfer of 1 ordinary share by Bernhard Martens dated 1/8/2003 to Sabine Henriette Martens
- l. Form 203A being Notification of change of particulars of directors with effect from 23/8/2005 lodged by MLR Associates indicating resignation of Subash Chander Hander as director.
- m. Forms of transfer of 1 ordinary share by Subash Chander Hander dated 25/8/2005 to Mathilda Cornelia Deleew
- n. Annual Return form of Lulumizi Limited made up to 30/8/2009 for the year 2009 indicating Sabine Henriette Martens, and Mathilda Cornelia Deleew as directors with 1 and 99 shares respectively lodged by MLR Associates on 24/12/2009.
- o. Form 203A being Notification of change of particulars of directors with effect from 30/11/2010 lodged on 30/12/2010 by MLR Associates indicating resignation of Mathilda Cornelia Deleew as director.
- p. Forms of transfer of 99 ordinary shares by Mathilda Cornelia Deleew dated 30/11/2010 to Bernhard Martens.
- q. Annual Return forms of Lulumizi Limited made up to 31/12/2010 for the year 2010 indicating the list of past and present members of the company as Sabine Henriette Martens, Bernhard Martens and Mathilda Cornelia Deleew as holding 1, 99 and NIL shares, respectively lodged by MLR Associates on 6/4/2011 indicating that Cornelia transferred her 99 shares to Bernhard Martens on 30/11/2011.



- r. Annual Return forms of Lulumizi Limited made up to 24/8/2011 for the year 2011 indicating Sabine Henriette Martens and Bernhard Martens as directors with 1 and 99 shares respectively lodged by MLR Associates on 24/10/2011.
 - s. Annual Return forms of Lulumizi Limited made up to 30/8/2012, 30/8/2013, 30/8/2014, 30/8/2015, 30/8/2016 and 30/8/2017 for the years 2012, 2013, 2014, 2015, 2016 and 2017 indicating Sabine Henriette Martens and Bernhard Martens as directors with 1 and 99 shares respectively all lodged by MLR Associates
 - t. Copy of certificate of death of Bernhard Martens who passed on, on 4/6/2015
29. That in the premises, the plaintiff resigned from the Company as a director and shareholder and transferred her 99 shares to the deceased and the suit should be dismissed.
 30. On her part, the 5th defendant stated that the plaintiff was not a majority shareholder of the Company having resigned as a director on 30/11/2010 and subsequently forfeited her shares. That there was no evidence of any loan arrangement between the plaintiff and the deceased for the allotment of shares. That the search as of 11/12/2019 showing the plaintiff as a shareholder would have been an error because of the Registrar's office not updating its records following the plaintiff's resignation as director and forfeiture of her shares on 30/11/2010.
 31. That the allegation of forgery in relation to the plaintiff's supposed signature on the share transfer form regarding her shareholding in the Company was not attributed to anyone. That sometime between 1983 – 1984, she and the deceased acquired as joint tenants the Watamu Property from a Mr. William Henry Winter. That she and the deceased had been married from 18/5/1966 but divorced on 15/6/1992 in the Netherlands.
 32. That during the divorce, the Watamu Property was allotted to her in the divorce settlement that was ratified by the judgment of the District Court at the Hague dated 15/6/1992. That following the deceased's death, she was the legitimate owner of the Watamu Property as the sole surviving tenant as the property had been held in joint tenancy.
 33. She contended that after the demise of the deceased, she discovered that the deceased had purportedly and fraudulently transferred the Watamu Property to the Company through an Instrument of Transfer dated 18/12/1995 which transfer was effected on 8/10/1998. That the issue of the ownership of that Property and the validity of the transfer to the Company on 8/10/1998 was pending determination before the Nairobi High Court in Succession Cause No. 1975 of 2015
 34. That at all material times, she and later the 2nd defendant had the possession of the property and the plaintiff had been allowed to live at the guest house as a tenant-at-will. That such occupation did not accord the plaintiff any proprietary rights thereof.
 35. The Interested Party also opposed the suit by stating that the Estate of the deceased was the majority shareholder of the Company by dint of its ownership of 99 shares. It was an asset of the Estate of the deceased as set out in a Schedule of the Assets of the Estate filed by the 1st defendant Succession Cause No. 1975 of 2015. She was unaware of any financial assistance by the plaintiff to the deceased.
 36. At the trial, the plaintiff testified as Pw1 and relied on her witness statement dated 1/2/2022 and the Bundle of Documents of the same date (PExh1). She called as her witness, Daniel M. Gutu (Pw2), a Forensic Document Examiner, who relied on his Report dated 22/7/2022.
 37. The 1st defendant testified as D1w1. He relied on his witness statement dated 2/2/2022 and produced the bundle of documents of the same date as D1Exh1. He called Emmanuel Karisa Kenga (D1w2),



- a Forensic Document Examiner who relied on his Report dated 2/2/2023 which he produced as D1Exh2. The 2nd defendant testified as Dw2 and relied on her witness statement dated 9/2/2022 and produced her documents dated 11/2/2022 and 22/12/2022 as D2Exh1 and D2Exh2, respectively.
38. The 2nd defendant called Patrick Lumumba Amolo (D2w2), a Forensic Auditor and Fraud Auditor who relied on his Report dated 26/10/2022 (D2EXh3). On his part, the Registrar called Eric Wanjala (D3w1), a Senior Assistant Registrar, who relied on his witness statement dated 9/2/2022 and produced the bundle of documents dated 9/2/2022 as D3Exh1.
39. The 5th defendant testified as D5w1 and relied on her witness statement dated 20/12/2022. She produced her bundle of documents of the same date as D5Exh1. The Interested Party also testified as IPw1 and relied on her witness statement dated 8/2/2022. She produced her bundle of documents of the same date as IPEXh1.
40. The testimonies of the parties as well as their submissions mirrored their respective pleadings which have been set out extensively at the beginning of this judgment. In this regard, the Court does not intend to rehearse them here.
41. As stated in the introduction, the plaintiff seeks a determination that she holds 98 shares in the Company and that she is a director therein and that the Court should direct the Registrar to rectify the entries in the Company register to reflect that position.
42. After considering the pleadings, the evidence and submissions on record, the issues that fall for determination are; whether the allotment of shares to the plaintiff in the company was backed by consideration; on what basis was the Plaintiff occupying the Watamu Property?; what is the status and validity of the Trust Declarations; what was the basis for the various transfer of shares in the Company to various people; whether the 2nd defendant attended the alleged meetings that resulted in the resolutions affecting the shareholding of the Company.
43. In making the determination, the Court will be guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. See sections 107 of the *Evidence Act* (Chapter 80 of the Laws of Kenya.
44. In *Miller vs. Minister of Pensions 1947 ALL E.R 372*, Lord Denning aptly summarised the application of the standard in the following terms: -
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”
45. In *James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR)*, the Court of Appeal simply put it that ‘courts will make a finding based on which party’s version of the story is more believable.’
46. The first issue is whether there was any consideration for the original allotment of shares in the company to the plaintiff. That the plaintiff was allotted the 98 shares in the Company was not disputed



by the parties. From the evidence on record, it is common ground that the company was incorporated on 7/4/1997 with two subscribers; the deceased and Subash Chander Handa each holding one share. The Memorandum and Articles of the Company indicate that the Company was made up of 100 shares meaning that 98 shares remained.

47. The defendants produced minutes of a directors' meeting held on 4/9/1998 where the plaintiff was appointed as director and allotted the 98 shares that were remaining in the Company (pg. 18 of D1Exh1). On her part, the plaintiff testified that between April, 2000 and June 2003, she advanced the deceased a sum of € 50,231. That the said sum was the consideration for the 98 shares that were allocated to her pgs. 15-18 of PExh1.
48. Although the defendants denied this fact, they did not controvert the evidence that these monies were paid to the deceased. Although she faced strenuous cross-examination, the plaintiff remained firm that the transfer of these sums to the deceased was the consideration for the 98 shares in the company. That evidence was not displaced.
49. It should be noted that save for the plaintiff, none of those who testified before me were present at these events. Having been unable to displace that evidence, it is the Court's finding that the plaintiff was allotted 98 shares in the Company for a consideration of € 50,231 paid to the deceased.
50. The next issue is the plaintiff's occupation of the Watamu property. The plaintiff testified that she was living in the Watamu property based on the shares she had paid for in the Company and that the Company was incorporated solely for the purpose of owning the Watamu property.
51. The 2nd and 5th defendant claimed that at all material times, they were in the possession of the Watamu Property. That the plaintiff was allowed by them to live at the guest house as a tenant-at-will.
52. However, in cross-examination, the 5th defendant admitted that she had not been in Kenya since her divorce with the deceased in 1992. It also came out that the 2nd defendant was also not living in Kenya until 2015. They both admitted that the plaintiff has been in occupation of the property to-date. The plaintiff produced some documents PExh1 pgs 67 to 71, to show that she has previously paid for the expenses thereon such as rates and other bills.
53. There was no evidence to show that any of the defendants was in occupation of the property or had been maintaining the property before the deceased's death. Even though the 5th defendant alleged that the plaintiff was paying rent for the property, there was no evidence of this.
54. The 2nd defendant admitted that the plaintiff had never paid any rent for the property and that she had been living there quietly for over 25 years.
55. The 5th defendant stated that her claim on the Watamu property was by virtue of the Divorce Settlement in the Netherlands (pg. 14 of D5Exh1). However, this judgment was never recognized or registered in Kenya. Further, the property did not belong to the deceased but the company (title pg. 65).
56. It was alleged that the ownership of the Watamu property was a subject of dispute in the Nairobi High Court in Succession Cause No. 1975 of 2015. This Court is not competent to deal with succession matters. That is a matter for the Family Court. However, as a Commercial Court, this Court makes a finding and holds that the Watamu property belongs to the company (see title at pgs. 62-66 PExh1). The property has been in continuous occupation by the plaintiff (a section thereof). The main house was always in use by the deceased or his guests.
57. From the evidence on record, it is clear that the plaintiff has been living in the Watamu property for a long time occupying the guest house. Her occupation was due to the fact that she was a shareholder of



the Company which is the owner of the property. The claim that the plaintiff was living in the property as a tenant-at-will or licensee is therefore without basis. The Court finds that the plaintiff has every right to live and occupy the property and not as a licensee or tenant-at-will but as of right.

58. The next issue is the basis and validity of the Declaration of Trusts and the various transfers of shares in the company. The defendants relied on the Declaration of Trusts dated 15/9/1997 and 23/10/2003 (DExh1 pgs 14 to 17 and 62 to 66. The declarations indicated that the plaintiff held 98 shares and 1 share respectively, and 99 shares in trust for the deceased. The plaintiff denied ever signing those documents.
59. Both the defendants and the plaintiff called expert evidence to support their contestations. Emmanuel Karis Kenga (D1w2) and Patrick Lumumba (D2w2) testified as handwriting experts for the defendants and produced their reports as D1Exh2 and D2Exh2, respectively. They concluded that the disputed signatures were by the plaintiff. On the other hand, Daniel M. Gutu (Pw2) testified as a forensic document examiner on behalf of the plaintiff and concluded in his report (PExh2) that the disputed signatures were not of the plaintiff.
60. In Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Anor]2016] KLR, the High Court held: -
- “The fundamental characteristic of expert evidence is that it is opinion evidence. ...
- Expert opinions are admissible to furnish courts with information which is likely to be outside their experience and expertise. ...
- To my mind, the weight to be given to expert opinion will derive from how that evidence is assessed in the context of all other evidence and circumstances of the case including the real likelihood of the expert witness having been compromised or the real likelihood of such witness using their expertise to mislead the court by placing undue advantage to the party in whose favour they offer the evidence. ...
- Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance.
- ...”

61. On appeal, the Court of Appeal held: -

“See also the reiteration by the High Court in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139, and Juliet Karisa vs Joseph Barawa & Another Civil Appeal No. 108 of 1988, that a Court is entitled to reject expert opinion if upon consideration of such opinion in conjunction with all other available evidence on record, there is proper and cogent basis for doing so, and secondly, that a court must form its own independent opinion based on the entire evidence before it and that such evidence must not be rejected except on firm grounds.”

62. In the present case, the expert opinions by the defendants’ witnesses supported the defendants while that of the plaintiff supported the plaintiff. That leaves this Court with no alternative but to test the respective opinions against the entire evidence on record.
63. The plaintiff appeared and gave evidence that was thoroughly tested. She denied ever holding the shares in trust for the deceased or ever transferring them to the deceased. She also denied ever signing the Declaration of Trusts that were relied on by the defendants. She further denied ever receiving one share from Subash to make her total shares 99 or that she ever resigned from the Company as a director.



64. The defendants produced the two Declaration of Trust dated 15/9/1997, respectively one for 98 shares and another for 1 share. However, they both admitted that the Trust Deeds did not identify who the Trustee was. They also admitted that the Minutes of the meeting of 4/9/1998 did not refer to this Trust or state that the shares allotted to the plaintiff were being held in trust.
65. The 2nd defendant also admitted that it was curious that the Trust Deed was signed one year before the shares were actually allotted to the plaintiff and that payment of stamp duty on the same was done over 20 years after the alleged Trust Deeds were signed and after this suit was filed.
66. Further, it was the defendants' position that the plaintiff held the 98 shares until 2005 when Subash transferred the one share to the plaintiff meaning that the plaintiff had 99 shares. They produced a Declaration of Trust dated 15/9/1997 (pg. 16-17 of D1Exh1) where apparently, Subash Chander stated that he was holding the one share in trust for the deceased.
67. However, both the 1st and 2nd defendant were at pains to explain how and why Subash was transferring the one share he was allegedly holding in trust for the deceased, to the plaintiff. The 1st defendant admitted that there was no resolution for the said transfer of share and resignation by Subash.
68. The 2nd defendant also admitted that in a meeting of the Company allegedly held on 10/8/2005 (Pg. 16 of D2Exh2), there is no mention of Subash even though he was yet to resign as a director and shareholder. She also admitted that as early as 27/4/2005 (Pg. 17 of D2 Exh2), the plaintiff is also questioning the manner and reason of the alleged transfer of Subash's share to her and his declaration of trust.
69. The defendants also produced and sought reliance on the Declaration of Trust dated 23/10/2007. In that document, the deceased nominates the plaintiff as the holder of 99 shares on trust. However, the 1st and 2nd defendant could not explain how the deceased was able to nominate the plaintiff to hold 99 shares when at this time, he was neither a director nor shareholder with authority to make such a decision.
70. They produced the Share Transfer Form dated 30/11/2010 and undated resignation letter in support of their position (pgs. 67-68 DEXh1). However, they admitted that the signatures in that declaration and the one in the Transfer Form dated 30/11/2010 were different at sight.
71. This Court has considered the three Declarations of Trust dated 15/9/1997 and 23/10/2007 and has the following observations.
 - a. The one of 15/9/1997 does not identify the plaintiff as the trustee neither does it disclose who the trustee is;
 - b. As at the date of 15/9/1997, neither the plaintiff nor the deceased had 98 shares capable of being held in trust. The plaintiff was allotted 98 shares on 4/9/1998 and the minutes for the same never stated the existence of a trust or that they were to be held in trust;
 - c. Clause 3 thereof states that "The trustee declares himself the trustee of the shares ...". The trustee is shown to be a male yet the plaintiff is female;
 - d. The witness to that document did not sign the same and if the writing of his name signified a signature, Tamseela Jiwa was never called to testify and confirm having seen the plaintiff execute the document nor was any reason given for his/her failure to appear and testify.
72. For the foregoing reasons, that document was of no probative value and of no consequences.



73. As regards the document dated 23/10/2007, it states in clause 2 as follows: -

“The said shares have been issued as fully paid up by the Company to the Nominee. The Principal has (as the Nominee hereby acknowledges) personally paid to the Company the nominal amount of the said shares in full.

And on remuneration at pg 4 of that document, it is stated: -

“During the continuation of the trust hereby declare, the principal will pay the Nominee remuneration for his (sic) services as such trustee and for each meeting which he (sic) shall attend as is required. The principal will also pay ...).

74. The said document presupposed that the plaintiff held 99 shares. That the deceased had paid for the said 99 shares. The plaintiff denied ever had the one (1) share of Subash being transferred to her. As at 23/10/2007, the deceased was not a shareholder of the Company. In all the documents produced, nowhere was it claimed or shown that he had paid for the 99 shares. In any event having found that the earlier Declaration of Trust was of no effect, the 98 shares allotted to the plaintiff on 4/9/1998 belonged to her.

75. Secondly, that document itself required that the Nominee of the shares do deliver to the deceased “... a transfer in respect of the said shares duly executed by the Nominee but neither dated nor stating the name(s) of the transferee(s) thereunder with written consent and grant of full authority to the principal to utilize the same ...).

76. There was no evidence produced to show that such written consent and authority was given to the deceased to transfer the shares written therein. Further, if the defendant wished to show that the declaration was what it is purported to be, there was no evidence to show that the plaintiff was ever remunerated by the deceased for acting as Nominee between the alleged 2007 and November, 2010 when the alleged transfer took place.

77. The Court saw all the witnesses testify before it. The inference that the Court made was that; the deceased had a calculated move to defraud the plaintiff. The declarations of trust must have been prepared without the knowledge or consent of the plaintiff. It is not clear from the record when they were signed.

78. One striking piece of evidence that led to the foregoing inference is the deceased’s communication of 1/3/2004 to his daughter, the 2nd defendant (DEXh2 pg 010). He wrote: -

“If I am not there anymore and no transfer is made yet then the only thing you have to do is to put your signature on that document and 98% is also yours.

Mark will help you with this in case of need he is aware, I agreed that Joop en Till can stay in the guest house where they are now in as long as they live and want to live there.

The whole property and houses are owned by Lumiluzi (sic) Ltd whose shares we are talking about. (Emphasis provided).

79. It would seem that the deceased had already prepared documents for transfer of 98 shares in the Company to his daughter, 2nd defendant as at 1/3/2004. As at that date, the one (1) share of Subash had not been transferred to the plaintiff.

80. The 2nd defendant also admitted that there were minutes of an alleged meeting of the Company where it was indicated that she was present but that in fact she was in the United States of America at the



time (See pg 1 od D2Exh1). This implies that either the meeting did not take place as alleged or that the minutes for the meetings were a forgery.

81. Looking at the foregoing, and having seen the witnesses testify before me, I was not inclined to believe the expert testimonies on the issue of the impugned signatures. The plaintiff seemed to me to be candid and would admit the truth even is it was against her unlike the defendants. Under section 107 of the Evidence Act, it was upon the defendants to prove that the impugned documents were made by the plaintiff. This they failed to prove.
82. In view of the foregoing, it is this Court's finding that the plaintiff never held 99 shares in the Company. That the one share of Subash was irregularly transferred to her. There was no evidence that Subash okayed this transfer and that if at all he was holding the one share in trust for the deceased, then he had no authority or capacity to transfer the said share to the plaintiff thereby making any that transfer a nullity.
83. The Court rejects the defendants' contention that the plaintiff resigned as a director of the Company as the letter relied upon by them was undated and that the alleged resignation remained unsupported as was stated by D3w1 in his testimony.
84. Accordingly, the plaintiff has on a balance of probability proved her case that; she owns 98 shares in the Company and that she has never held the same in trust or transferred the same to the deceased. Any such transfer was irregular and illegal and was done with the specific intention of depriving the plaintiff of the same. There is also no valid evidence to demonstrate that she ever resigned as a director of the Company or that she was living in the Watamu property as a tenant-at-will.
85. For the above reasons, the Court finds that the plaintiff's suit against the defendants is merited and ought to allowed with judgment being entered in her favor in the following terms: -
 - a. A mandatory injunction be and is hereby issued compelling the Chief Registrar, Companies Registry to rectify the entries to the Register of Companies in respect of Lulumizi Limited registration number C.75866 to show that: -
 - i. Mathilda Cornelia De Leeuw holds 98 shares in Lulumizi Limited,
 - ii. Mathilda Cornelia De Leeuw is a director of Lulumizi Limited
 - b. Costs of the suit are awarded to the plaintiff and are to be borne by the defendants and the Interested Party jointly and severally.
 - c. Interest is awarded on the costs above at court rates from the date of the judgment until payment in full.

It is so ordered.

SIGNED AT NAIROBI THIS 29TH DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2025.

F. GIKONYO

JUDGE

