

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ELCC 65 OF 2018**

**ANN KINANU KABURU (Suing as The Guardian At  
Litem And Heir Of The Estate Of Isaia Mabellini) .....  
PLAINTIFF**

**VERSUS**

**1. ORIANO MABELLINI  
2. AHMED HASSAN KOTAR  
3. THE LAND REGISTRAR MOMBASA  
4. ATTORNEY GENERAL.....  
DEFENDANTS**

**JUDGMENT**

**PLEADINGS**

1. Ann Kinanu Kaburu, the plaintiff herein, filed a plaint dated 26<sup>th</sup> March 2018. Her claim is that she is the guardian *ad litem* of the Estate of Isaia Mabellini who was the registered owner of plots nos 2743, 2744, 2745, 2746, 2747, 2748 (hereinafter also known as “*the suit properties*”.) On the suit properties stood the matrimonial home of Isaia and Ann. Isaia died domiciled in Italy on 6<sup>th</sup> February 2017. On 6<sup>th</sup> February 2017 Isaia died after a long illness, leaving the plaintiff and 8 children as his heirs. However, the 1<sup>st</sup> defendant denied the plaintiff access to the suit property and also instructed the 2<sup>nd</sup> defendant to deny the plaintiff from accessing them. She was violently ejected from the suit property and handed her belongings which had been kept there.
2. Ann Kinanu claims that on or about the 21<sup>st</sup> September 2016 Oriano, the 1<sup>st</sup> defendant, caused an indenture dated 20<sup>th</sup> September 2016 to be registered at the lands office. She claims that Oriana forged the signature of the deceased and had all the suit properties transferred to himself without the consent or authority of the deceased, who was alive by then, or of the plaintiff. Both Isaia and Ann were not aware of the 1<sup>st</sup>

defendant's activities. Subsequently, Oriano leased the suit premises to the 2<sup>nd</sup> defendant, Ahmed, in the year 2017 for a lease period of 4 years. Ahmed proceeded to partially demolish the matrimonial home for expansion of the hotel called Africa Dada Resort which is also situated on the premises, converting it into rooms for letting out to hotel clients.

3. The plaintiff claims that she and the deceased's children have been left destitute with her only known home and property taken by the 1<sup>st</sup> defendant in collusion with the 3<sup>rd</sup> defendant, the Land Registrar. The plaintiff listed particulars of fraud and misrepresentation and collusion against the 1<sup>st</sup> defendant at paragraph 19 of the plaint. The allegations include: tendering of forged documents to the lands office and transferring the property without the consent or authority of the deceased, who was alive by then, or of the plaintiff, and fraudulently leasing the suit premises to the 2<sup>nd</sup> defendant and obtaining and receiving moneys under that fraudulent lease, and trespass onto the suit property.
4. The particulars of fraud and breach of duty by the 3<sup>rd</sup> defendant are alleged to be: unlawfully and fraudulently conniving with the 1<sup>st</sup> defendant to unlawfully register and transfer the suit properties to the 1<sup>st</sup> defendant in complete disregard to the proprietary interest of the plaintiff; accepting fraudulent and forged documents for registration which effected a fraudulent change of ownership; ignoring the rights of the legal owner of the property and conspiring with the 1<sup>st</sup> defendant to defeat the legal rights of the plaintiff by purporting to transfer the suit lands to the 1<sup>st</sup> defendant. In addition, he failed to secure from the 1<sup>st</sup> defendant consent required from spouses for transfer of suit premises failed to act diligently.
5. By reason of the contact of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant, the plaintiff and other heirs of Isaia Mabellini have been rendered destitute and experienced loss of income from the hotel and loss of their only home, which is protected under Article 40 of the constitution. She also alleged that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant have by their conduct manifested

extreme ill will and bad faith against the plaintiff and that their actions and decisions have been accentuated by spite and malice, and they have refused neglected or otherwise failed to surrender the suit property, or transfer it, to the plaintiff despite demand.

6. The following prayers are sought by the plaintiff:
- a. *A declaration that Isaia Mabellini (deceased) is legal owner of plots of land known as plot numbers. 2743, 2744, 2745, 2746 ,2737 and 2748 Malindi at Tewa Road;*
  - b. *A Declaration that the transfer of a suit properties from Isaia Mabellini to the 1<sup>st</sup> defendant was fraudulent and illegal and a such null and void;*
  - c. *An order directing the Mombasa and registrar to immediately Counsel the transfer to the 1<sup>st</sup> defendant and rectify the land register in respect of the suit properties pirates dating the name of Isaia Mabellini as the registered owner thereof;*
  - d. *An order directing the 1<sup>st</sup> defendant to surrender to the plaintiff all the original titles /leases in respect of the suit properties;*
  - e. *A mandatory injunction compelling the 1<sup>st</sup> and 2<sup>nd</sup> defendants their servants and or employees to vacate the suit premises and to deliver vacant position thereof to the plaintiff failure to which an order of eviction be issued against the 1<sup>st</sup> and 2<sup>nd</sup> defendants or anyone on the suit properties;*
  - f. *Permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendant by themselves their servants or agents from entering ,remaining or trespassing onto or in any other way interfering with a suit property;*
  - g. *An order that the 1<sup>st</sup> and 2<sup>nd</sup> defendants do render an account of all amounts paid a as rents and the said amounts be paid to the estate of the late Isaia Mabellini;*
  - h. *An order that the defendants do jointly and severally pay the plaintiff general damages, pecuniary damages, punitive and exemplary damages quantum to be determined by the court at the rate of bank commercial rate (sic) of interest of 14% of the said sum of damages (sic) from the date of filing suit to the date when all the money shall be paid in full to the plaintiff;*
  - i. *Costs of the suit and interest on damages jointly and severally;*
  - j. *Any other relief which this court may find justified in the circumstances.*

### **3<sup>rd</sup> And 4<sup>th</sup> Defendants Statement of Defence**

7. The 3<sup>rd</sup> and 4<sup>th</sup> defendants filed their statement of defence dated 12<sup>th</sup> April 2018 through Mwarome Munga, Litigation Counsel and denied the claim. They stated that that registration of the transfer of the suit property or any act on their part with regard to the suit property was done in good faith and within the law. They denied fraud and avoid that they acted in accordance with the prescribed procedure.

**2<sup>nd</sup> Defendant's Statement of Defence and Counterclaim.**

8. In this pleading, the 2<sup>nd</sup> defendant denied the claim and stated that he is a *bona fide* tenant having lawfully leased the property from the 1<sup>st</sup> defendant. In the counterclaim, he reiterated the matters in the defence and prayed for judgment against the plaintiff in the main suit for a declaration that he is the rightful tenant entitled to enjoy his tenancy and costs of the counterclaim.

**1<sup>st</sup> Defendant's Statement of Defence**

9. The 1<sup>st</sup> defendant's defence was dated 29<sup>th</sup> June 2018. He denies the plaintiff's claim that there is a matrimonial home on the suit property. He states that on 28<sup>th</sup> December 2015, the deceased sold him the suit properties and all the buildings constructed thereon for valuable consideration, being 240,000 euros. The deceased executed the sale agreement. Also vide a conveyance dated 20<sup>th</sup> September 2016, which he executed in the presence of Rose N. Kamau Advocate; the deceased agreed to sell to the 1st defendant the suit properties. The 1st defendant complied with the terms of the conveyance and paid the required consideration on or around 25<sup>th</sup> September 2016. The 1<sup>st</sup> defendant denies forging the deceased's signature on the conveyance. He denies having ejected the plaintiff from or denied her access to the property.
10. The 1<sup>st</sup> defendant avers that he, the 2<sup>nd</sup> defendant and the deceased met in 2013, the deceased and the 1<sup>st</sup> defendant approached the 2<sup>nd</sup>

defendant with a view to entering into a lease agreement over the suit property, and the lease was executed on or around 3<sup>rd</sup> April 2015 between the three of them, and the 2<sup>nd</sup> defendant began paying rent as and when it fell due into an account with African Bank which was jointly owned and operated by the 1<sup>st</sup> defendant under the deceased. He denies the claim of fraudulent acquisition of a matrimonial home of the plaintiff, or the conversion of the matrimonial property into rooms, and maintains that the 2<sup>nd</sup> defendant is carrying out business on the suit premises in accordance with the terms of the lease agreement. He denied collusion connivance and fraud as alleged by the plaintiff. He denied forgery as alleged by the plaintiff. He denied that he is a trespasser on the suit properties. He denied the claim that the plaintiff has any proprietary interest over the suit properties and maintained that he is the rightful owner thereof, the same having been transferred to his name before the demise of Isaia Mabellini. He denied that the plaintiff has been rendered destitute. He maintains that the plaintiff is not entitled to any portion or share of the suit property or to any other orders sought in the plaint, and sought that the plaintiff's case be dismissed with costs.

## **EVIDENCE**

### **Plaintiff's Evidence**

11. The plaintiff testified as PW1 on 26<sup>th</sup> February 2024 and adopted her witness statement as her evidence-in-chief. Her evidence is that she is a nurse by profession. She met the deceased at Pandya Memorial Hospital where he had gone for a routine check-up for kidney failure in 2009, and they wedded on 3<sup>rd</sup> September 2011 at Casuarina in Malindi in Kenya, and there after they left for Italy for 3 months. She returned to Kenya in December 2011 to work at Mombasa hospital. Isaia was under dialysis in Italy where he had a surgery. He had developed complications after kidney transplant. He was undergoing great difficult. In September 2012, Isaia called her to relocate to Italy and she resigned from her job and

went to Italy. Isaia recovered and went on with his work of international art exhibition. They came back to Kenya in September 2013 and they went to Dar Es Salaam and on 26<sup>th</sup> September 2013 they returned to Italy. In December 2013 they came back to Kenya for holidays and entered the country through Mombasa airport and went to their home in the Africa Dada Resort, but Isaia fell sick again. He was taken to Maimoon Hospital in Malindi where he was admitted until 26<sup>th</sup> December 2013. After therapy, he was discharged on 27<sup>th</sup> December 2013 while still weak, and he had to stay indoors. On 16<sup>th</sup> January 2014, he developed fevers and remained in bed. He had a private doctor one Dr Rishad AS. The plaintiff called the doctor who informed her that Isaia should be taken to Mombasa. Ann contacted his manager called Athman they took Isaia to Mombasa where he was admitted from 7<sup>th</sup> January 2014 to 15<sup>th</sup> January 2014. When the medical scans identified brain abscess, the plaintiff decided that he would be operated in Italy and not in Kenya, and Isaia was discharged and Dr Rishad helped the plaintiff to take Isaia to the airport. The plaintiff and Abdulmalik, Isaia's 2nd son are the persons who took Isaia to Italy where he was taken to the Brescia Hospital the same day he arrived. A 2nd scan was done in Italy and the brain abscess was confirmed and surgery was scheduled for 24<sup>th</sup> January 2014. After surgery was done, Isaia was weak and totally dependent on support by others. On 4<sup>th</sup> June 2014, he was discharged on a wheelchair and went for physiotherapy where is bent 2 months and he returned home in August and a physiotherapy assistant was assigned for 2 to three times per week. The plaintiff kept close and followed him on his wheelchair during the physiotherapy. Isaia progressed to two clutches than one clutch and then he resumed business in the workplace hosted in the downstairs part of the house they were residing in. By 2015, he could go outside the gate walking under the care of the plaintiff. He could take a shower by himself or go to the washroom. In 2015 he began driving a manual drive car which he could not have done before. His third son, Christian came from

Kenya in 2015. The plaintiff had hoped to get work in Italy but since Isaia was sick, she could not go to work as she was doing home care most of the time, caring for Isaia. However, the economy in Italy was bad. The plaintiff came back to Kenya in June 2015 and worked at St Teresa's Hospital in Meru as a volunteer. In 2016, she got an interview with the Ministry of Health in Namibia and she told Isaia of it and he approved of her going to work there. On 20<sup>th</sup> February 2016 she went to Namibia and secured a job with the Ministry Of Health there. She stayed in Namibia and got a contract for 2 years in 2017 renewable. On 16<sup>th</sup> February 2017, Isaia's friend called him and told her that her husband had passed on in hospital. She called Abdul Malik the 2<sup>nd</sup> born son of Isaia and he confirmed the demise. She also got a call from the hospital, saying that Isaia had died. She was sent an email saying that Isaia had expressed a desire to be cremated and they needed concerned from the plaintiff since she was registered as his wife in the hospital records. She went to the Italian Embassy in Namibia obtained a cremation form and signed it before Roxanna, the Ambassador there, as Isaias's wife, and then she sent the consent form to Italy, authorizing Abdul Malik to be the custodian of the ashes after cremation. Abdul Malik received the cremation authorization form and acknowledged it. She could not travel to Italy because she had just signed a contract with the Namibia government. She came back to Kenya in 2018 February after she took leave. She passed by Casuarina at Africa Dada where they had lived as all her property was there as she had not removed it. There was a gate man. The gate man called the 2<sup>nd</sup> defendant who informed her that the 1<sup>st</sup> defendant had indicated that she should not be allowed into the property. However, for the purposes of recovering her property, she was shown a small store where her property had been stored in one suitcase, and she declined to take it saying that she wanted to see all the property inside the house. She tried to contact the 1<sup>st</sup> defendant on phone but he failed to receive the calls. She messaged him. But he never responded. She went to

Mombasa land registry and contacted a search and found an indenture science on 20<sup>th</sup> September 2016 for the transfer of the property which had been effected without her consent. She had become familiar with the deceased' signature, and she detected that the signature on the indenture was not the deceased's. She faulted the sale agreement as not having been certified or drawn by an advocate. She faulted the transfer as having been signed by members of one family. She maintained that was not consulted over the sale of the property. She admitted there was a family meeting before Isaia's surgery which took place on 19<sup>th</sup> January 2014 when the surgery was scheduled for 20<sup>th</sup> January 2014 but Isaia never spoke of his property at that meeting. In 2013, she had been with Isaia attending to him since he was normally bedridden and when they left for Italy in 2014 all the way to 2015, Isaia never came back in Kenya yet the 1<sup>st</sup> defendant says that the property was transferred to him in March 2016. She stated that the indenture was registered in September, 4 months after Isaia passed on and that the transfer was conducted illegally.

12. Under cross-examination by Mr muchoki she admitted that the deceased had seven children by the time they got married in 2011, with about 4 grown-ups in the family. By 2018, only one child was a minor. She has not been able to hold discussions with the family over the matter, she had to try to reach Abdul Malik and to Christian. That they were married for about **4** years. She was working in paid employment before marriage. When he came for checkups in hospital where she worked, he was not under her care. He however told her of his family members. She met his brothers Oriano and Ilario. He did not have sisters. The plaintiff has never had any problems with any of his sons or any of his brothers. Some of the sons were here in Kenya and others were abroad. None of the family members ever came to spend even a day with Isaia in hospital here in Kenya or in Italy except the two sons who gave them support and company to and in Italy. Isaia had deposited 1 million shillings from his

own account at Mombasa hospital. None of his brothers ever gave any any medical support. Isaia paid for Abdulmalik's university fees in Italy. However, the 1st defendant managed Isaia's at business in Italy when Isaia was in hospital at Brescia Hospital, but he never gave the plaintiff any money as a person. She admitted that her husband passed on and left some children in school and she had never spent any money on those children since 2011. While in Italy, the two sons who accompanied them lived in Isaia's house and Isaia left the business to them. The house in Italy belongs to Isaia. To her knowledge, there was no succession process that was undertaken in Italy. She was averse to the idea of going to lay claim to his properties in Italy. In 2011, Isaia left her in Italy. While in Kenya they, would reside at Casuarina from 2011 to 2015. The place was never hotel from the time she met Isaia in 2009, but he would hold international art exhibitions and give his international guests some rooms. She admitted that she did not contribute any of the money that was used to purchase the property. Some of Isaia's children lived in other Italian cities and their visits to Isaia were not frequent. The 1<sup>st</sup> defendants' home was a walking distance from Isaia's. She was so busy in Italy that she never visited the 1<sup>st</sup> defendant's home. She did not access Isaia's personal documents so she did not know his PIN number. She was aware that Daniella, named in page 62 to 66 of her bundle, is a daughter to the 1<sup>st</sup> defendant, that Massimiliano is wife to the 1<sup>st</sup> defendant. She was aware of the sale even before the wedding. She did not confirm whether the transaction was finalized. In 2014 just before his surgery, he never spoke about his property and no writings were to taken down during the meeting that he called. Why that Breschia hospital she stayed day and night with Isaia. According to her, Isaia had informed her that she had cleared the payments and the *caveat* over the property had been lifted. Her certificate of service states that she served from 20<sup>th</sup> March 2017 to 19<sup>th</sup> March 2019 yet her husband had died 6<sup>th</sup> February 2017 and she had not attended his last respects. **Page 580** of her bundle states that she

was registered on 26<sup>th</sup> February 2016. She doubted that anyone could transact 240,000 Euros in cash in Italy. She called the children of Isaia in respect of the property management. They said they were not aware of the goings on.

13. **PW2, Martin Esakina Papa**, testified on 27<sup>th</sup> February 2024. He works as a private Forensic Document Examiner who made a report on 8<sup>th</sup> March 2018 which he produced in evidence in this case. His examination came to the conclusion that the signature on the conveyance purported to have been executed by the deceased did not belong to him.
14. **PW3, Faizer Osman Ibrahim**, a businessman, testified on 27<sup>th</sup> February 2023 and adopted his witness statement dated 7<sup>th</sup> March 2019 as his evidence-in-chief. His evidence is that he knew Isaia Mabellini since he used to make for him picture frames. He would visit him at Casuarina. He introduced him to an artist called Onyango whom he promoted. The three even went to Italy on an art exhibition. PW3 met Oriano in Italy for the first time. When they came back, they formed a real property company but it was crashed by wrangles raised by one director. He was aware that Isaia was unwell. He drove him for some time. Isaia would attend dialysis at Mombasa. In 2009, he mentioned the plaintiff as a generous and humble nurse at Pandya Hospital, in whom he had developed a romantic interest. In 2010, there was an art exhibition at Casuarina on the deceased's property. The plaintiff was invited and PW3 was introduced to her. DW3 was told to prepare two of the rooms in the property to accommodate the plaintiff. The deceased married the plaintiff in 2011 at that residence. She brought all her belongings to the residence. On 17<sup>th</sup> September 2011, she and Isaia went to Italy. In 2012, Isaia's health deteriorated. In 2013, he drove the plaintiff and Isaia from the airport in Mombasa and took them to Malindi then to Maimoon hospital. PW3 knows Abdulmalik Isaia's son. The plaintiff stayed with Isaia at the Maimoon hospital. At one point , the plaintiff called PW3 from Italy and informed him that Isaia had gone for surgery. Abdulmalik's mother used

to visit Casuarina. Oriano terminated PW3's duties at the property in 2015. PW3 tried to communicate with Isaia, but it was not possible due to health reasons so he communicated with his wife Ann. When Isaia came to Kenya, a disagreement arose regarding PW3's termination and benefits. In 2017, the plaintiff texted him, informing him that Isaia had died. In 2018, the plaintiff told him that she could not access the casualty in a property and that many things had changed including ownership; that the plaintiff and Isaia had lived at the Casuarina residence. PW3 was in charge of the property while they were in Italy. Isaia had never mentioned any plans to transfer the property to anyone.

15. According to PW3, on cross-examination by Mr. Muchoki, Isaia occupied some of the rooms when he was in Kenya. The initial studio was on plot number 2743. According to PW3, the construction of the suit property was done with money raised from Isaia's art business. PW3 was present when Isaia was being rushed to Mombasa hospital on 7<sup>th</sup> January 2014, following him by vehicle as he was carried in an ambulance. He never heard Isaia say that he had transferred the casuarina property to Oriano yet he was almost his confidant.
16. On re-examination by Ms Bujra, PW 3 stated that in 2015, the 1<sup>st</sup> defendant came and requested all the documents he had. Some of the documents were in respect of payment of workers. At some point Isaia was being driven by Oriano.
17. **PW4, Evelyn Othim**, a Chief Inspector of Police base that DCIO offices in Kiambu testified orally on 15<sup>th</sup> May 2024. She is a Document Examiner in the Directorate of Criminal Investigations. She examined the document in question, a conveyance between Isaia and Oriano dated 30<sup>th</sup> May 1991. She compared the signature of Isaia thereon in contradistinction to his known signatures contained in his identity card dated 16<sup>th</sup> April 1945. She also compared the signature in the conveyance versus Isaia's known signatures in other documents and found that the signatures were made by different persons. Her report is at page 575 -577 of the plaintiff's

bundle. The only discontent of the 1<sup>st</sup> defendant's counsel is that the documents she mentioned in her report had not been tabled before court. However, this court notes that the qualifications of the witness were not challenged in any way, and neither were the procedures followed in execution of duty that transmitted the documents to her for examination.

***1<sup>st</sup> Defendant's Evidence.***

18. **DW1, Oriano Mabellini**, testified on 12<sup>th</sup> February 2025 and adopted his witness statement filed in Court, dated 19<sup>th</sup> February 2024. He stated that the plaintiff married his late brother Isaia Mabellini in September 2011 and that Isaia died on 6<sup>th</sup> February 2017 in Italy, and he (DW1) became the registered owner of the suit properties on 20<sup>th</sup> September 2016. He stated that Isaia, who was his elder brother, purchased the suit property in 1991. A fire destroyed the property in 1997. His brother decided to reconstruct the property and ask for some money from a Mr. Bharat to reconstruct it. The money Mr. Bharat lent was not sufficient to reconstruct the property, and Isaia asked Oriano to lend him money to proceed with the reconstruction, and Oriano gave him 15,000 euros. On the eve of his surgery, that is on 19<sup>th</sup> January 2014, Isaia was in the hospital ward, and he called Fabrizio Dos Santos, his son Sandro and Abdulmalik, and his daughters Eva and Guja, and the plaintiff. Isaia, with a guidance of his advocate, wrote two documents in DW1's favour and signed them in the presence of his 4 sons, his wife and the advocate. Isaia also prepared another document (DMFI1e). The plaintiff was present in hospital as the documents were signed, and she never demurred. Oriano denied that he was the one who asked Isaia to call for the meeting. The conveyance faced challenges at the registration stage due to a caveat that Mr. Bharat had registered against the title.
19. Defence exhibit "N" was the contract between Oriano and Isaia and it covered plot numbers 2743, 2744, 2745, 2746, 2747 and 2748. These are the plots on which the enterprise called Africa Dada Resort has been

constructed and also where Oriano's house was located. After the operation, Isaia remained for a few weeks in hospital and then he came home with his family, and he later died on 6<sup>th</sup> of February 2017. DW1 claimed that the plaintiff abandoned Isaia in June 2015 and came back to Kenya.

20. According to DW1, it was Isaia who called him to his house to communicate to him the decision to sell to him the entire property of Africa Dada Resort. He had prepared a "*contract preliminary of sale*" in respect of the property and considering that Oriano had given him 600,000 euros as a loan, he decided to sell the property to Oriano. The property was valued at 840,000 euros from which Kenyan shillings 600,000 was deducted which was said to be the equivalent of the amount that Oriano had given to his brother over the years. However, payment was to be made in Italy after the registration. Oriano, Isaia, Ilario, Christian, and Abdul Malik signed that document. At the end of February 2016, Isaia and Oriano came to Kenya in order to visit the advocate at Mombasa to execute the sale contract (**page 35** of the bundle). The advocate had already prepared the conveyance and Isaia and Oriano signed it and the advocate, Rose Nyambura Kamau, also signed it. Isaia gave instructions to Rose to attend to the registration of the contract. However, Rose did not proceed to register the conveyance and she had wait until Isaia paid and then register it. Oriano made payment 240,000 euros in cash to Isaia on 25<sup>th</sup> September 2016 in the presence of Ilario, Christian, and Abdulmalik. It was Isaia who had demanded to be paid in cash. After that, the advocate in Mombasa registered the conveyance. Both Isaia and Oriano called on the advocate at Mombasa and instructed her to register the conveyance since Oriano had paid the consideration. By then the plaintiff had abandoned Isaia.
21. According to Oriano, Isaia had no matrimonial home in Casuarina. The plaintiff and Isaia spent 95 days in Kenya traveling about or staying in a hotel room in Casuarina. When the hotel was busy, they changed rooms.

Oriano is the one who helped support Isaia's wife and children all his life. According to Oriano, the plaintiff was younger than his daughter, and she entered his family like a sister to his daughter. She would visit Oriano's house accompanied by Abdulmalik and Isaia every Sunday for lunch. All of Isaia's children are aware of the sale of the Africa Dada Resort to Oriano since they had signed the papers on 19<sup>th</sup> January 2014. According to Oriano, Isaia lived in the house in Italy with the plaintiff and Abdulmalik.

22. Under cross-examination by Mr. Abubakar, Oriano stated that reconstruction began in 2005 and was completed in the year 2010. The property was rented in April 2015 when Isaia was still alive. Oriano was involved in the lease agreement because he had financed the construction of the Resort and his interest was the money that he had lent to Isaia for the reconstruction. He admitted that in 2015, the 2<sup>nd</sup> 2 defendant had paid 15,000 / 3,000 euros to Isaia at a time when there was no lease; that after his brother's death, the lease proceeds came to him. It was DW1 who paid Bharat his money which he had lent to Isaia, so that Bharat could remove the caveat that placed on the title. He agreed that at the time of his testimony there was no lease with the 2<sup>nd</sup> defendant, the 1<sup>st</sup> lease having expired in March 2019, but the 1<sup>st</sup> defendant was still legally operating the Resort.
23. Upon cross-examination by Mr Munga, he denied that the property was Isaia's matrimonial property.
24. Upon cross-examination by Ms. Chepkwony, he admitted that he knew that there must be a sale agreement under Kenyan law but that there was no sale agreement executed in Kenya. He admitted that he does not have any receipt from Bharat for the money he alleged to have paid to Bharat. However, he pointed that **page 32** of his bundle was a declaration by Mr. Bharat. He admitted that he does not have any document showing he spent money on reconstruction of the Africa Dada Resort. He relied on the declaration by his brother made in 2014 that he had paid the amount. According to him, that was the only evidence that he had spent money on

African Dada. Although he stated that he was paying government taxes, he had nothing to show that he had paid any tax to the government. He admitted that though payment of consideration was to come before registration, it was actually made 5 Days later. He had nothing to show that he had paid his brother money in Italy because allegedly due to some unavoidable circumstances in Italy, Isaia could not receive money in his bank account. The money paid to Isaia was thus always paid in cash. Pressed further as to what problem occasioned the cash payment, he stated that his brother had not been paying taxes in Italy. However, he also had no evidence that Isaia was not paying taxes in Italy. Though he stated that he gave Isaia money from time to time, he conceded that he did not have any document to prove it. At the time they met at Rose Kamau Advocates office, Isaia's wife was not present.

25. DW1 stated that the payment of 240,000 euros to Isaia in cash was made in the presence of his brother Ilario Mabellini and two children of Isaia, that is, Christian Mabellini and Abdulmalik Mabellini. It was DW1's further evidence that since the marriage had not ended in divorce, the only person who could authorize the cremation of Isaiah's remains was the plaintiff who was not in Italy then. DW1 was aware that the government of Italy sought the plaintiff for her consent the cremation. DW1 admitted that the lease in favour of the 2<sup>nd</sup> defendant was executed on 3<sup>rd</sup> April 2015, and there was no other lease which was signed by the deceased after that. However, he also admitted that on that date, the deceased was in Italy. Though he attempted to assert that he signed the document on behalf of the deceased, on further cross examination, he admitted that he did not have any Power of Attorney donated to him by the deceased.

26. In re-examination by Mr. Muchoki, he stated that the lease dated 3<sup>rd</sup> of April 2015 does not state whether it was signed by him and Isaia in Kenya or in Italy. He added that when the lease was being executed, Isaia is the one who was collecting the rent.

27. **DW2, Fabrizio Dal Santo**, testified orally and adopted his witness statement dated 19<sup>th</sup> September 2023. He stated that he is a lawyer to Isaia Mabellini. he also knew Oriano Mabellini, and the plaintiff. According to him, Isaia called him One Sunday afternoon because he was to undergo a risky operation in hospital and he doubted that he would leave after the operation. His sons and the plaintiff were in the corridor. In the hospital room, there was Oriano Sandro and Isaia whom he also referred to as "Sarenco." The documents at **page 39 and 43** of the bundle were prepared in the presence of Isaia, Oriano and Sandro, and DW2 saw Isaia sign those documents.
28. Upon cross-examination by Mr. Abubakar, he insisted that the plaintiff and Isaia's other sons were outside in the corridor while the documents were being executed.
29. While under cross-examination by Ms. Chepkwony, he stated that Isaia used to organize art exhibitions at Malindi, but DW2 was never present when those exhibitions happened; that he had health problem even before 2012 which later worsened. He attended Isaia's wedding with the plaintiff. At that wedding, the reception was held at his house which was at Casuarina which is in African Dada Resort. In 2012, Isaia was in a Mombasa hospital and DW2 was also present. While preparing the documents at page 43 and 39 of the 1<sup>st</sup> defendant bundle, he was not shown in the receipts or acknowledgments of money paid by Oriano to Isaia. Not all the children of Isaia signed the document which DW2 drill in hospital. According to DW2, Oriano constructed his house in the property of Isaia Mabellini.
30. In 2016, the deceased called DW2 and informed him that he was traveling to Kenya but he did not disclose the reason for the travel. DW2 only came to know later that the property has been transferred to Oriano. According to DW2, there were two attempts at instituting a divorce which failed because the plaintiff had left Italy each time. However, the witness agreed that by the time the plaintiff and Isaia met, the plaintiff was a

professional woman and a nurse in hospital in charge of dialysis and she sacrificed her profession in 2012 and 2014 when Isaia was unwell. According to DW2, the 1<sup>st</sup> person to be contacted in cremation matters for consent is the nearest relative but DW2 does not know who gave consent for the cremation. According to him the plaintiff left Italy without telling anyone anything.

31. Upon re-examination by Mr. Muchoki, he stated that he did not advise Isaia to call the meeting of 19<sup>th</sup> January 2014. He also never suggested any figure as consideration at the meeting. He stated that the hospital room was small and not everyone could fit in it, but also testified that the plaintiff never complained at the suggestions made at that meeting. He was not paid by either Oriano or Isaia for that session, and his services were offered only on a friendly basis.
32. On examination by the court, he stated that he could not recall whether the documents at page 39 and 43 of the defendant bundle were ever read to the plaintiff.
33. **DW3 Abdulmalik Mabellini** testified and adopted his witness statement dated 19<sup>th</sup> September 2023 as his evidence-in-chief. In his oral evidence, he stated that he is 34 years old and he identified the plaintiff as the wife of his late father. He is also aware of the disagreement between Isaia and the Oriano and the 2<sup>nd</sup> defendant in respect of the African Dada Resort. According to him, the current owner of the African Dada is the 1<sup>st</sup> defendant. He testified that during the period of reconstruction of the resort, Oriano lent Isaia money for reconstruction. The task was finalized in March 2015. His father then called a meeting and stated that he owed Oriano 600,000 euros. His father decided to sell the property to Oriano. No agreement was executed between Oriano and Isaia before 2010 and Oriano was simply assisting Isaia in reconstruction by that time.
34. DW3 testified that the plaintiff and his father met in Kenya but later moved to Italy in 2011. He stated that they first lived in a room at Africa

Dada Resort before going to Italy. At one point, they lived in an apartment owned by DW3. DW3 met the 2<sup>nd</sup> defendant in 2013 and his father was proposing to lease the African Dada Resort to him and he entered into a written agreement with the 2<sup>nd</sup> defendant in the presence of the 1<sup>st</sup> defendant and the release was to commence in April 2015. According to him, his father signed the lease in his presence while in Italy; at that time, the property belonged to Isaia, yet the 1<sup>st</sup> defendant nevertheless signed on the lease. His father summoned some members of his family and a lawyer on 19<sup>th</sup> January 2014 in Italy. He testified that by the time of sale the property to Oriano, the plaintiff and Isaia were not on good terms; that between 2017 and 2018, Isaia had applied for separation which could not be concluded as his father had medical problems and could not attend. According to him, there is no fraud that has been committed by the defendants.

35. Upon cross- examination by Mr Munga, he admitted that he was not present when the conveyance of 20<sup>th</sup> September 2016 was purportedly signed by his father. He was also not involved in its registration at the lands registry.

36. Upon cross-examination by Ms Chepkwony for the plaintiff, he admitted that he never saw Oriano give any cash to his father. However, according to his evidence, he witnessed some contractor carrying on the construction. DW3 is the 5<sup>th</sup> born in Isaia's family. He was aware that his father was an artist and he was financially stable. He does not know the name of the import export business company owned by his uncle Oriano. By 2011, African Dada Resort was still in existence, but he does not know where the wedding between Isaia and the plaintiff took place, or where they slept after the wedding. He admitted that his father was living in a room in Africa Dada Resort. Has no documentary evidence to show that the 1<sup>st</sup> defendant ever paid any hospital bills for his father. His evidence regarding construction of the African Dada Resort was based on what he was told by his father and his sister. According to DW3 he his father and

the plaintiff went for a holiday to Malindi together in September 2013. Towards the end of December 2013, his father became ill.

37. He reiterated that his father signed the lease in favour of the 2<sup>nd</sup> defendant in his presence while in Italy Abubakar the advocate was not in attendance at the signing; that DW3 did not witness on the agreement; that the plaintiff was present at the meeting held on 19<sup>th</sup> January 2014; that however, some family members were not present at a family meeting held on 27<sup>th</sup> December 2015 at which his father announced that he had decided to sell the property to Oriano. Kismat, Latifah and Muna were absent. DW3 stated that he stayed in Italy between 2009 to 2015 as he undertook a course. He admitted that he was not present when the conveyance was being executed and he did not see his father execute it. He witnessed his father being given 240,000 euros in cash on 25<sup>th</sup> September 2016. He does not know whether stamp duty for the transaction was ever paid or by whom.
38. DW3 learned from his father that the plaintiff was a registered nurse in Namibia. He was not however aware a whether the plaintiff was in communication with his father when in Namibia. He admitted that the family contacted the plaintiff via email when her consent was required for the cremation by the cremation agency. According to DW3, his father was living in a rental house before he came to Kenya.
39. At first in cross-examination, DW3 denied having ever received money from the 1st defendant but when pressed further by Ms Chepkwony, he admitted that he had received some money from him.
40. In re-examination by Mr. Muchoki, he admitted that the 1<sup>st</sup> defendant had been helping him personally and also claimed that he had helped the plaintiff. He denied having any interest in the suit property. He confirmed that since his father died, they had never initiated any succession proceedings for issues of a ground of letters of administration.
41. **DW4, Emmanuel Karisa Kenga**, testified orally and stated that he was a Forensic Document examiner of more than 30 years' experience.

He produced his expert report dated 24<sup>th</sup> July 2019 as his evidence in the case. The net effect of his evidence is that the signatures on the questioned documents marked B1 to B5, attributed to Isaia bears similarity with the known signatures of Isaia marked A1 to A6.

42. Upon cross-examination by Mr Abubakar, he said that there is probability that one person can have more than one signature and that signatures are affected by age intoxication or drugs.
43. Upon cross-examination by Ms Chepkwony, he admitted that some of the documents he used in his examination were photocopies, and that photocopies can be manipulated. He also did not know the condition of the photocopier that was used to produce those photocopies or the expertise or the person who operated it.
44. **DW5, Guja Mabellini**, testified on 17<sup>th</sup> June 2025 and adopted his witness statement dated 19<sup>th</sup> September 2023 as her evidence-in-chief. Her evidence is that she is daughter to Isaia Mabellini who purchased the suit land in 1991, which hosted a house in which he and his wife Halima and his daughter Muna lived and which was afterwards destroyed by a fire. When rebuilding, he was assisted by Oriano Mabellini from whom he asked for a financial contribution and who agreed to give Isaia the money needed for the construction and for the expansion of the hotel that would later be named Africa Dada Resort. The plaintiff became married to Isaia in 2011. On 19<sup>th</sup> January 2014, Isaia called his wife the plaintiff is lawyer his brother Oriano his son's Abdul Malik and DW5 to his hospital room where he told them that he needs to sign some documents in favour of his brother Oriano, to confirm that Oriano had given him 600,000 euros for the construction of Africa Resort. He did sign such documents, which were also signed by the lawyer and Sandro and DW5 as witnesses. Another document for the value of €200,000 was also signed by Isaia. According to DW5, surgery left Isaia unable to work and this strained his relationship with the plaintiff and the plaintiff returned to Kenya in June 2015. In DW5's words, the plaintiff abandoned Isaia who was at that

particular time in need of assistance, and subsequently Isaia applied for a divorce from the law court at Brescia.

45. On 27<sup>th</sup> December 2015, Isaia called members of his family and his brother Oriano and Ilario and informed them that he had decided to this transfer all the property of Africa Dada Resort to Oriano for the price of 240,000 euros, and there at he signed a preliminary sales contract with Oriano which was also signed by Ilario Abdulmalik and Christian. In February 2016, her father and Oriano left for Kenya where Isaia transferred the Africa Dada Resort to Oriano.
46. On cross-examination by Ms. Chepkwony, she disclosed she was of tender age and never saw the house that was destroyed by fire in 1991, and that she came to Kenya for the first time in 2005.
47. She does not know how much money was given by Oriano to Isaia but she saw some money change hands in 2005. From 2005 she never returned to Kenya until the Year 2024.
48. She never saw her father receive any money while in hospital. She received the money later. Information that she received such money was conveyed to her by Isaia.
49. According to DW5, Oriano helped her by paying a university fee in the year 2006 -2007.
50. On re-examination, she does not recall whether the plaintiff was present at the hospital where Isaia met with the lawyer, Oriano and several of his family members. Isaia had no other property in Italy that she knows of. DW5 is a university professor in Italy and she is financially stable.
51. **DW6, Rose Nyambura Kamau**, testified and adopted her witness statement dated 17th October 2023 as her evidence in chief. Her evidence is that sometime in 2016, she received instructions from Isaia Mabellini to facilitate the transfer of the suit properties from himself to Oriano Mabellini and the two informed him that they were brothers. Pursuant to the instructions, she prepared a conveyance document which

they both executed in her presence and she also appended her signature and stamped it. They then asked her to hold on to the document before registration because the 1<sup>st</sup> defendant was required to pay a sum of 240,000 to Isaia but he had not done so. Subsequently, the deceased and the 1<sup>st</sup> defendant communicated with her and instructed her to proceed with the registration, and she lodged the conveyance for registration, and it was successfully registered.

52. Upon cross-examination by Mr Abubakar, she stated that execution of the conveyance was done in her office and the two brothers had their passport with them. She did not sense any fraud during the exercise.

53. Upon cross-examination by Mr Munga, she stated that all the requirements pertaining to registration were fulfilled and the documents were lodged at the land registry by her clerk and they came back registered.

54. Upon cross-examination by Ms. Chepkwony, she stated that none of the persons who attended the execution exercise at her office which occurred sometime in March 2015, was being physically supported by anyone else, and they were speaking in English. She was never instructed to draw any sale agreement and she used the intentions to draw the conveyance. She was not privy to the issue of payment of consideration. She understood that no consideration has been paid as at the time of execution of the conveyance. She received instructions to register the conveyance in September 2016 through a phone call through a number that she does not recall. An agent was dispatched too, to inform her that the consideration had been paid and so she proceeded with the registration. She was not aware whether or not the consideration had been paid by then but she followed the instructions. No money was passing through her hands in the engagement.

55. There was no caveat on the title as at the time of registration and she is not the one who removed the caveat. According to her, a sale

agreement is not mandatory for *transfer* of interests in land but it is mandatory in *sale* of land in Kenya.

56. With the evidence of DW6, the 1<sup>st</sup> defendant's case was marked as closed.

### ***2<sup>nd</sup> Defendant's Evidence***

57. **DW7, Ahmed Hassan Kotar**, the 2<sup>nd</sup> defendant, not having a witness statement on the record, was allowed to depend only on his defence and counterclaim as filed and was cross examined.

58. Under cross-examination, he maintained that the lease he signed with Oriano and Isaia was to commence on 1<sup>st</sup> of April 2015, and he was supposed to pay rent to Mr Oriano and Mr Isaia, and he is still in occupation of the property since 2015. He stated that when Isaia visited Kenya, he would stay in room number 006 next to the pool. He agreed that Isaia was in Italy by the time DW7 was executing the lease agreement.

59. According to him, he dropped Isaia and Oriano in Mombasa and never took them to anybody's office. He was also not aware that his name was used in the valuation for Stamp duty form until he was informed so in court.

### ***Evidence of the 3<sup>rd</sup> and 4<sup>th</sup> defendants***

60. With the close of the evidence of DW7, 2<sup>nd</sup> defendant's case was closed. The third and 4<sup>th</sup> defendants opted not to call any witnesses in their case, and their respective cases were marked as close.

## **Submissions Of the Parties**

### ***Plaintiff's Submissions***

61. Counsel submitted that Isaiah was the registered owner of the suit property and he had built on the suit property a matrimonial home and the hotel; there was no proof that 240,000 euros was paid by the 1<sup>st</sup>

defendant as consideration for the transfer of the suit land to him. There was no proof that 600,000 euros had been applied by the 1<sup>st</sup> defendant in the construction of the property. That the 1<sup>st</sup> defendant forged the deceased's signature and rented the suit property to the 2<sup>nd</sup> defendant.

62. That the plaintiff enjoyed overriding interests under the law and spousal consent is mandatory in every transaction involving the suit properties per **section 28(a)** of the **land registration act**. That at their alleged point of sale, the *status quo* was that the plaintiff had proprietary interest in the suit property anchored on her marital relationship. That disposing of the suit property without her consent was contrary to the provisions of **section 96 3B** of the **Land Registration Act** which provides that a disposition is void at the option of the spouse who has not consented to the transaction. Under **Section 92** of the Act, the suit property being matrimonial home was to be dealt with under the Matrimonial Property Act which defines the matrimonial property to be a matrimonial home or homes and also defines matrimonial home to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home. Under **Section 12(5)** of the Matrimonial Property Act, the matrimonial home shall not be mortgaged to or leased without the written and informed consent of both spouses; that the 1<sup>st</sup> defendant had conceded that Isaiah and the plaintiff had lived on the suit property and used that as their home, and that renovations were done until 2015 during the subsistence of the marriage. The couple had lived together in the suit property as their matrimonial home as well as in Italy and the plaintiff was known Isaia's family members as his wife. The marriage was celebrated at the suit premises and the reception was held on the suit premises. The 1<sup>st</sup> defendant confirmed that he removed the plaintiff's property from the suit premises and locked her out of the suit premises; that PW3 confirmed that Isaia was incapacitated and could not make any decisions at all and could not walk at the last meeting PW3 participated in with him and Oriano. That

the plaintiff had to resign from her job and the operation left him paralyzed and he was bedridden for 6 months in Brescia hospital.

63. The plaintiff was a loving and caring wife and that is seen in the fact that she even knew that the deceased had chronic renal failure in 2012, and later, a brain abscess and that he needed surgery, and made a decision that the surgery should be done not here in Kenya but in Italy. That the operation in Brescia hospital left Isaia paralyzed and bedridden for 6 months. The deceased needed full-time medical attention and that prompted the plaintiff to resign from her job in order to offer him the care he needed.

64. Counsel further submitted that there was no written agreement contrary to **Section 33** of the law of contract act, that there was no proof of payment of stamp duty for the transaction which is the foundation of the 1<sup>st</sup> defendant's defence is inadmissible in evidence in this case in the first place. That the defendant and his witnesses never produced any receipts for the transfer of funds for bills for building materials as evidence of consideration or any proof of advancement of moneys to the deceased; that the plaintiff had discharged her burden of proof while the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant had not and most of the defence evidence was mere hearsay. Section 112 of the Evidence Act was relied on for the proposition that in civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him, and when a party has custody or is in control of evidence which it refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it will be adverse to that party; that the conveyance dated 20<sup>th</sup> September 2016 lacked any proof of the basics of a contract. That it was registered before consideration was paid. That Rose Kamau Advocate was instructed to register the document through a telephone call which came through a number she cannot remember, informing her that consideration has been paid, in that contradicted the evidence of the 1<sup>st</sup> defendant who

maintained that consideration was paid after registration on 25<sup>th</sup> September 2016; that none of the 1<sup>st</sup> defendants' witnesses saw the 1<sup>st</sup> defendant pay of 240,000 euros to Isaia; that without proof of consideration, there was no valid contract as per **Chitty on Contracts Volume 1 General Principles 29<sup>th</sup> Edition Paragraph 3-004.**

65. It was submitted that there is no evidence that rent or rates or stamp duty were paid or that even valuation was done; that exclusion of the plaintiff denotes *mala fide*. The evidence of payment was struck out for being written in Italian, uncertified and thus not meeting the test of admissibility.
66. That regarding forgery, a document examiner gave evidence showing that there was forgery. That however the testimony of the 1<sup>st</sup> defendant's document examiner Mr Kenga is to be discredited because of failing to use the side-to-side method and also for over stepping his mandate/scope by giving opinion as to the owner of the signature contrary to the holding in **Criminal Appeal Number 844 Of 2004 Samson Tela Akute Versus The Republic** where he (Mr Kenga) was censured by the High Court and a conviction overturned based on his misconduct. That evidence of experts is not binding on a court but has to be considered alongside other evidence by the court in order for the court to form its own opinion on the matter in issue. Counsel cited Caroline **Wanjiku Ngugi versus Republic 2015 eKLR** on the definition of fraud; that there is reasonable suspicion that the deceased signatures were manipulated going by the brushed and invalid documents to the absence of credible corroboration.
67. Counsel also submitted on the 2<sup>nd</sup> defendant's lease and occupation of the suit property. She pointed out that the 2<sup>nd</sup> defendant filed no witness statement and could not be properly examined as the truth or lack thereof of his statements. The principal documents that he exhibited was the lease agreement; however, the copy in his list of documents was not signed by the deceased since he was in Italy; that it is not possible for an

advocate who was in Kenya on the alleged date and month of witnessing, witness the signature of a person who is in Italy on that same date and month and the document ought to have been notarized and/or witnessed by a notary public and not by way of a mere advocate's stamp if an advocate was in Kenya as the date of its execution in Italy; that the 1<sup>st</sup> defendant in his evidence admitted that Isaiah did not sign the lease in Kenya but in Italy; that the lease is therefore a fabrication. In any event, the lease emanated from acts of fraud committed by the 1<sup>st</sup> defendant and was clearly illegal. Counsel concluded that the plaintiff is entitled to the prayers sought.

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

68. The 1<sup>st</sup> defendant filed submissions dated 8<sup>th</sup> August 2025. Counsel for the 1<sup>st</sup> defendant identified 2 issues for determination as follows:

**a. Whether the 1<sup>st</sup> defendant's title to the suit properties was fraudulently and or illegally obtained;**

**b. Whether the plaintiff is entitled to the orders sought in the plaint.**

69. Regarding the 1<sup>st</sup> issue, citing the provisions of **Section 107** and **Section 116** of the Evidence Act and *Vijay Morjaria Versus Nansingh Madhusing Darbar and Another 2000 eKLR*, Counsel placed the burden of proof on the plaintiff to establish that there was fraud and illegality. Citing *Moses Parantai And Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (Deceased) Versus Stephen Njoroge Macharia 2020 eKLR* Counsel submitted that the plaintiff needed not only to prove and particularize the fraud and the alleged acts of collusion but also to present credible and reliable evidence before this court to warrant a finding that indeed there was fraud and collusion in the transactions leading to the transfer and registration of the suit properties the name of the 1<sup>st</sup> defendant.

70. Counsel submitted that Court decisions are not made in a vacuum but are shaped and informed by the specific circumstances of each case, that there existed a close relationship between the two brothers, Oriano and Isaiah and that those family ties must be considered. Counsel stated that as at September 2011 when the marriage between the plaintiff and Isaiah took place, the suit properties had been developed into an establishment now known as the African Dada Resort. Counsel dismissed the submission that the claim that money was provided for reconstruction of the resort should fail for lack of receipts; that there was no evidence led by the plaintiff to suggest that she was privy to the deceased's dealings at any time prior to the marriage and therefore she cannot speak to any events before 2011; that the evidence of contribution by the 1<sup>st</sup> defendant was not rebutted in any cogent manner by the plaintiff; that the deceased's two children DW3 and DW5 corroborated the evidence of DW1 and DW2 to the effect of the reconstruction of the suit property was done with money's advanced by the 1<sup>st</sup> defendant. Counsel was of the view that such direct evidence should be considered and cited the case of *Bwire Versus Wayo and Sailoki Civil Appeal Number 032 Of 2021 2022 KEHC KLR 24<sup>th</sup> January 2022 (Judgment)*. Citing *Dan Macharia Kamau Versus Stanley Mwangi Kimamo 2007 EK LR And Kenya Kiba Microfinance Limited Versus Ezekiel Chebii and 14 Others 2012 eKLR* counsel submitted that even though the documents encompassing the pronouncements of the deceased were rejected by the court for lack of certification and translation of DW1 DW2, DW3 and DW5 regarding the events of 19<sup>th</sup> January 2014 should be considered reliable evidence even in the absence of those documents.

71. Citing *Orion East African Limited Versus Ecobank Kenya Limited and Another 2015 eKLR*, Counsel submitted that the plaintiff failed to disclose to the court the fact that the deceased call for a meeting on 19<sup>th</sup> January 2014 to discuss matters related to the property. Therefore, she came to court with dirty hands contract with the principles of equity.

72. That contrary to the plaintiff's evidence which purported that the deceased was a man of means, the evidence of DW1, DW2, DW3 and DW5 painted a grim picture regarding the deceased's financial situation. That DW3 and DW5 who are the deceased children testified that the 1<sup>st</sup> defendant supported them financially through payment of their college or university fees as well as those of other siblings. That in any event, no evidence was presented to demonstrate the alleged solid financial status of the deceased during the period in question.
73. Counsel dismissed the plaintiff's submission that the evidence of the witnesses drawing from what their deceased father had allegedly told them regarding the good property was hearsay, drawing attention to the fact that they were testifying against their own interest as beneficiaries of the deceased's estate. Citing *Parker and Another Versus NQ And 2 Others Civil Appeal 139 Of 2020 2023 KECA 908 KLR 24<sup>th</sup> July 2023 Judgment*, Counsel submitted that **Section 33c** of the Evidence Act allows for the admission of evidence when the statement in question is against the interest of the maker. Counsel pointed out that Oriano and Isaiah jointly executed the lease in favor of the 2<sup>nd</sup> defendant in 2015, and the fact that the deceased allowed the 1<sup>st</sup> defendant to execute the said lease as a joint lessor is a clear indication that the deceased took cognizance of the 1<sup>st</sup> defendant's beneficial interest in the suit property owing to his contribution to the construction thereof. The deceased was aware of such lease and must have consented to the 2<sup>nd</sup> defendant's occupation of the property.
74. That the plaintiff deserted the deceased sometime in 2015 and came back to Kenya and the deceased passed away 2 years later on 6<sup>th</sup> February 2017, but she never went back to stay at the Africa Dada Resort where she purported that her matrimonial home was; that in the intervening period, that is, around 27<sup>th</sup> December 2015, while in Italy the deceased and the 1<sup>st</sup> defendant entered into an agreement relating to the sale of the properties at an agreed consideration of 240,000 euros and

the agreement was witnessed by the deceased's 2 children, Christian and Abdulmalik as well as Ilario the deceased's brother, and even in the absence of the said agreement on account of lack of a translation from the Italian language to English language the testimony of those 3 witnesses DW1, DW3 and DW5 is believable; that PW3 confirmed that the deceased and the 1<sup>st</sup> defendant were in Kenya in the year 2016; that Rose Nyambura Kamau advocate confirmed having received instructions from the deceased and the 1<sup>st</sup> defendant to proceed with the registration of the conveyance and that he affected those instructions in accordance with all statutory requirements including the payment of stamp duty. The onus to prove that statutory requirements were not complied with fell upon the plaintiff and not the 1<sup>st</sup> defendant.

75. Regarding the plaintiffs queries as to why and how possible it was that payment for the transaction was made in *cash* instead of through some formal means, Counsel submitted that the deceased was avoiding his creditors and that in any event, in accordance with the *National Bank Of Kenya Limited Versus Pipe Plastic Samkolit Kenya Limited 2021 ECLR* and *Housing Finance Company Of Kenya Limited Versus Gilbert Kibe Njuguna Nairobi HCCC Number 161 Of 1999* cited in *Rockview Investments Limited Versus Mungei (Civil Appeal E078 Of 2021) (2023) KEHC 21042 KLR (27th July 2023) (Judgment)* a court cannot rewrite an agreement between the parties. Therefore, if the agreement said the money would be paid in cash, then it should be paid in cash.
76. Counsel submitted that there was no evidence placed before the court to suggest that the deceased was in any way mentally incapacitated though it is not disputed that he was ailing. That renal failure and brain abscess did not mean that he was mentally incapacitated, and the evidence of PW3 regarding his interactions with the deceased in March 2016 demonstrated he was in good mental health; that mental incapacity cannot be a matter for presumption and there was no medical report submitted to prove mental incapacity. The case of *MMG Versus Tribunal*

*Appointed To Investigate The Contact Of Honorable Justice MMG Charge Of The Environment And Land Court Of Kenya Petition 10 (E013) Of 2022 (2023) K E S C 73 (KLR)(12th September 2023) And Patrick Muchiri Versus Patrick Kahiaru HCCC 13 Of 1999* were cited in this regard.

77. Regarding Expert Forensic Examination Reports, Counsel referred to *Miscellaneous Criminal Application Number 379 Of 2015 Martin Esakina Papa Versus Republic 2015 eKLR* and submitted that the forensic examiner had been charged, convicted and sentence to 3 years imprisonment on allegations that he had stolen some property. Counsel pointed out to the fact that the witness PW2 had denied having ever been charged with a criminal offense as being evidence of his lack of credibility hence the need for the court to treat his evidence with caution.
78. The allegation that he had the original conveyance dated 20<sup>th</sup> September 2016 between Oriano and Isaiah was challenged on the basis that PW1 indicated version did not avail such original documents to her lawyer or to PW2.
79. PW2's report dated 9<sup>th</sup> September 2019 was dismissed by counsel on the basis that a casual perusal gives state the impression that it was made to counter the forensic report dated 24<sup>th</sup> July 2019 filed by the 1<sup>st</sup> defendant (page 67 to 97 or the 1<sup>st</sup> defence bundle,) and that it was authored 4 days after filing and service of the report by Mr Emanuel Kenga. (DExh 1(i).)
80. On the other hand, the forensic examination report by Evelyn Othim (page 575 to 579 with the plaintiff's consolidated bundle documents) was faulted for failing to attach some documents that were examined but which were not part of a report filed in court or served upon the 1<sup>st</sup> defendant and hence it was labelled as incomplete and as of no probative value in the instant case.
81. Citing *Kimatu Mbuvi Trading as Kimatu Mbuvi and Brothers Versus Augustine Munyao Kioko Appeal Number 203 Of 2001 20071 EA 139* and *Parvin Singh Dhalay Versus Republic 1997 EKLR 1995 To 1998 1 EA 29*,

counsel submitted that the legal position was that expert opinion should be considered alongside other evidence available to the court. It was urged that the findings of forensic examiner Kenga are corroborated by the evidence of the defence witnesses.

82. Counsel also submitted that though the plaintiff has wrongfully included plot number 2743 among the transfers to be cancelled, the same had been transferred earlier in the year 2010 to Oriano. (62 to 66 of plaintiff's bundle and page 32 to 33 of the 1<sup>st</sup> defendants amended bundle and also page 26-34 the plaintiff's Bundle), the plaintiff's failure to disclose facts regarding plot number 2743 until she was confronted at cross-examination depicts malice on her part.

### **Analysis And Determination**

83. As seen herein above, this court has endeavoured to bring out as much as possible the evidence that was adduced by the parties in this case for ease of evaluation. There are several uncontested issues in this matter as follows:

- a. The deceased was chronically ill and the plaintiff took care of him;*
- b. The deceased and the plaintiff were husband and wife and their marriage had not been dissolved as at the time of the demise of the deceased;*
- c. Though the deceased had many children none of them stayed with him on any permanent basis;*
- d. When the deceased died it was the plaintiff who was asked by the Italian Governmental authorities to give consent for his cremation which she gave;*
- e. The deceased used to reside at the suit premises whenever he was in Kenya;*
- f. The suit land was owned by the deceased before it was transferred to the 1<sup>st</sup> defendant;*

- g. Besides the advocate who drew up the conveyance, the only other person who was alleged to be present at the execution of the conveyance was the 1<sup>st</sup> defendant; both persons who appeared before that advocate spoke in English;*
- h. Though the conveyance was left in her office to hold until payment of the consideration, the advocate who registered the conveyance could not tell who instructed him to register the conveyance.*
- i. There is no documentary evidence in the form of receipts, invoices or bills for the building expenses that the 1<sup>st</sup> defendant claims to have incurred in respect of the suit premises;*
- j. There is no receipt by the deceased acknowledging the advancement of monies to him by the 1<sup>st</sup> defendant;*
- k. The execution of the lease between the deceased, the 1<sup>st</sup> defendant on the one hand and the 2<sup>nd</sup> defendant on the other hand was not witnessed by an advocate;*
- l. The children of the deceased who testified in favour of the 1<sup>st</sup> defendant acknowledged having received benefits from him;*
- m. When the plaintiff came back to Kenya from abroad, she had to collect her belongings from the suit premises which were then under the control of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.*

84. The issues for determination in this matter are as follows:

- a. Whether the title to the suit properties was fraudulently and illegally transferred to the 1<sup>st</sup> defendant;*
- b. What orders should issue.*

85. Regarding the first issue, it is noteworthy that the deceased and the plaintiff were husband and wife. The close relationship between them is evinced by the fact that after the deceased chose to marry her, she took care of him when he was unwell. There is evidence that the deceased trusted her much. There is no discernible disagreement that is said to have occurred between the plaintiff and her husband so as to make the

court doubt the plaintiff's evidence regarding him. Though the 1<sup>st</sup> defendant submitted that the plaintiff can not competently speak of the events prior to 2011, the unbroken relationship of husband and wife between the plaintiff and the deceased persuades this court that, regarding the impugned transaction, that her evidence is crucial.

86. The plaintiff's claim is that there was fraud in the transfer of the suit properties to the 1<sup>st</sup> defendant. Fraud must be specifically pleaded and proved. In *Vijay Morjaria v Nansingh Madhusingh Darbar & Ano (2000)* eKLR the court stated as follows:

*"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out and then it should be stated that these acts were done fraudulently. It is also settled Law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts."*

87. As I stated earlier, the plaintiff pleaded fraud in her plaint and gave particulars. The remaining issue is whether she has proved those particulars. Proof of fraud is on a standard higher than that of ordinary claims. In the case of *Abdulkadir Shariff Abdirahim & another v Awo Shariff Mohammed T/A A. S. Mohammed Investments [2014]* eKLR the court held as follows:

*"As was stated in R. G. Patel Vs Lalji Makanji (Supra), while allegations of fraud must be strictly proved, the standard of proof may not be so heavy as to require proof beyond reasonable doubt; what is required is something more than a mere balance of probabilities."*

88. The Court of Appeal in *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020]* eKLR, observed as follows:

*"Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities..."*

89. Considerable evidence in the form of medical documents was produced by the plaintiff which was not in the hands of the 1<sup>st</sup> defendant or his children. Save for their presence the time he was hospitalized at Brescia, there is no other evidence that the children of the deceased or the 1<sup>st</sup> defendant ever took care of him in or out of hospital either in Kenya or in Italy. This court would expect that any person who took part in caring for the deceased would be in possession of such crucial records.
90. Neither the 1<sup>st</sup> defendant or the deceased's children objected to the plaintiff being in possession of such crucial documents -over **400** pages of the records, apparently officially released (*see page 510 of the plaintiff's bundle*) to the plaintiff, a Kenyan, by a hospital in the deceased's country of origin on the basis of her spousal relationship with the deceased - which they on their part did not and could not produce in court in this case.
91. There is no doubt that the hospital contacted the plaintiff to inform her of the demise of her husband because they were convinced, she was the wife and because of the way she had walked with him through his periods of illness. This court finds it very odd that the 1<sup>st</sup> defendant who claimed to have taken care of the deceased did not have any scrap of evidence such as custody of such crucial hospital records or evidence of expenses incurred on his illness showing to show that he participated in taking care of the deceased. This is crucial because in *paragraph 6* of his witness statement, Abdulmalik Mabellini, DW3, indicated that in May 2012, his father underwent a kidney transplant and the 1<sup>st</sup> defendant paid all the deceased's hospital and travel expenses while the plaintiff allegedly neglected him. The only documents emanating from the defendant's side are those that relate to property matters.
92. There was no evidence that the 1<sup>st</sup> defendant, who did not claim to have offered care personally like the plaintiff did, ever hired care services for the deceased. The plaintiff's evidence that she took care of the deceased after the operation left him almost paralyzed, and in a

wheelchair, was not controverted. DW2 stated as follows in his oral evidence:

*“By the time Isaiah met Ann, she was a nurse in hospital in charge of dialysis. She was a professional woman. She sacrificed her profession in 2012 and 2014 when Isaiah was unwell.”*

93. This corroborates the plaintiff’s evidence that in September 2012 after the deceased developed difficulties after a kidney transplant, he called her to go to Italy to take care of him, she resigned her job in Kenya and joined him there where she cared for him for a long time. This court will come back to the implications of the above analysis later in this judgment.

94. The plaintiff’s evidence is that after Isaia healed, the plaintiff had hoped to get a job in Italy but did not and the couple agreed that she can return to Kenya and seek work, and she worked at St. Theresa Hospital in Meru before getting a job with the government of Namibia.

95. While in Namibia, the plaintiff was also contacted for her consent by the cremation agency because of the husband-wife relationship with the deceased.

96. It is the view of the court that the evidence of a spouse viewed in the above-described background is of such great probative value that it would take considerably stronger evidence to dislodge it. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334*, the Court of Appeal held that:

*“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”*

97. One of the vital issues around which the present dispute revolves is whether there was a matrimonial home on the suit property. A

matrimonial home is not like any other property, as it is even constitutionally and statutorily shielded from any unwarranted predations both during and after the dissolution of a marriage. Article 45(3) of the constitution provides as follows:

*“(3) Parties to a marriage are entitled to equal rights at the time of the marriage,  
during the marriage and at the dissolution of the marriage.”*

98. This court appreciates that in *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) [2023] KESC 4 (KLR)*, the Supreme Court reasoning was that there no authorizing provision in the Constitution providing that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and that Article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only. However, article 45(1) provides as follows:

*“45. (1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.”*

99. Section 12 of the Matrimonial Property Act provides as follows:

*“12. Special provisions relating to matrimonial property*

*(1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.*

*(2)A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man’s wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.*

*(3)A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.*

*(4) Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except—*

*(a)on the sale of any estate or interest in the matrimonial home in execution of a decree;*

*(b) by a trustee in bankruptcy; or  
(c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.*

*(5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses."*

100. In *P N N v Z W N* [2017] eKLR the court also observed as follows:

*"It cannot be gainsaid that the people of Kenya in promulgating a new Constitution in 2010 intended a fundamental transformation of society. A society imbued with values like respect for human rights and human dignity, equality, equity, respect for the rule of law; non-discrimination (Article 10); a society that recognizes and protects the family as the fundamental unit of society and honors entitlement of spouses to equal rights at, during and after marriage (Article 45); a society that upholds the supremacy of the Constitution which incorporates the general rules of international law and Conventions ratified by Kenya as part of our law (Article 2)."*

101. It is trite that family does not automatically dissolve upon the demise of one spouse, and that the implication of the contents of Article 45(1) is that the family's protection of the law and by the State transcends the demise of one spouse. Having that in mind, it is clear that the submission of Counsel for the 1<sup>st</sup> defendant that as at September 2011 when the marriage between the plaintiff and Isaiah took place, the suit properties had been developed into an establishment now known as the African Dada Resort is quite misplaced. Counsel's dismissal of the submission that the defendant's claim that money was provided for reconstruction of the resort should fail for lack of receipts as there was no evidence led by the plaintiff to suggest that she was privy to the deceased's dealings at any time prior to the marriage and therefore she cannot speak to any events before 2011 is also misplaced. Both submissions are of no relevance in the present case where the issue is inheritance and succession under Cap 160 the Law of Succession Act rather than sharing of property under the Matrimonial Property Act, an Act of Parliament meant to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. This can be easily

construed from decisions such as *P N N* (supra) where the court observed as follows:

*“10. The Echaria case had, of course, considered and strictly applied pre-1970 English precedents on the interpretation of Section 17 of the Matrimonial Property Act 1882. After analyzing English authorities, this Court stated in part as follows:*

*“It is clear from those cases that when dealing with disputes between husband and wife over property the court applies the general principles of law applicable in property disputes in all courts between all parties irrespective of the fact that they are married. Those principles as Lord Diplock said in Pettitt are those of English law of trusts. The House of Lords specifically decided so in Gissing vs. Gissing. According to the English law of trusts it is only through the wife’s financial contribution, direct or indirect towards the acquisition of the property registered in the name of her husband that entitles her to a beneficial interest in the property.”*

102.The decisions in the cases of *MSW v JNM Matrimonial Cause 1 Of 2018 [2022] KEHC 17000 KLR 15 December (2022)*, *Supreme Court Petition No.11 of 2020 Joseph Ombogi Ogentoto vs Martha Bosibori Ogentoto*, and section 9 of the Matrimonial Property Act relied on by the 1<sup>st</sup> defendant are inapplicable at this instant since the only issue to be proved herein is that the plaintiff was heir to the deceased. Since the plaintiff claims there was a matrimonial home on the suit property, Section 2 of the Matrimonial Property Act is applicable in so far as the same defines a matrimonial home, and section 9 is applicable in so far as it stipulates the protections accorded to a matrimonial home.

103.Having said as above, it is now time for this court to compare the evidence of the adversarial parties herein on that issue to come up with a conclusion that may largely steer the court to its ultimate decision in this case as to whether a matrimonial home existed on the suit property. The matter of status as a matrimonial property is associated with user of a dwelling and thus covered by article 165(2)(b) of the Constitution. A

matrimonial home is defined by Section 2 of the Matrimonial Property Act as follows:

*“Matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;”*

104. Section 6 of the Matrimonial Property Act provides as follows:

*“6. Meaning of matrimonial property*

*(1) For the purposes of this Act, matrimonial property means—*

*(a) the matrimonial home or homes;”*

105. No spouse can deal with a matrimonial home to the exclusion and prejudice of the other as section 12 of the Matrimonial Property Act herein above set out shows.

106. The plaintiff's evidence is that she and Isaia stayed in her husband's house while in Italy, and in a house on the suit property while they were in Kenya. *Paragraph 11* of the 1<sup>st</sup> defendant's witness statement seems to suggest there was such a matrimonial home in Italy, but it is curious that the same was never mentioned again in evidence in this case by any of the defence witnesses save in denial by DW3 and DW5. On her part, DW5 stated categorically that Isaia had no other property in Italy that she knows of.

107. Regarding property here in Kenya, the 1<sup>st</sup> defendant denied that there was a matrimonial home on the suit premises but in vain. Even the evidence of his own witnesses conflicted with his. The evidence adduced by at least two witnesses in this case which the 1<sup>st</sup> defendant did not controvert is that the wedding took place on the suit property. What the 1<sup>st</sup> defendant never expected was that one of the witnesses who he called would make a bold statement before court that would conclude this issue: DW2 was called to testify on other issues regarding execution of documents in Italy but stated as follows under cross-examination by Ms. Chepkwony the advocate for the plaintiff:

*“I was witness in his wedding. Reception was done in the house of Isaia Mabellini at the house in Casuarina which is Africa Dada.”*

108. There was no evidence from the 1<sup>st</sup> defendant to controvert the evidence that the deceased lived at the suit premises even before marrying the plaintiff. In particular, if the reconstruction took about 5 years between 2010 - 2015, the 1<sup>st</sup> defendant's evidence never addressed where the deceased was living between 1997 when the original house on the suit land, which he describes as a *“small house with a makuti roof”* at **paragraph 3** of his written statement, was destroyed by fire, and the year 2005.

109. DW5, Guja Mabellini's evidence is that the suit property hosted a house in which the deceased and his wife Halima and his daughter Muna lived and which was afterwards destroyed by a fire. However, in this court's consideration, the matter holding greater consequence is that there was a house oriented towards a family dwelling user structure on the suit property. As to how the house came into being, it is decipherable from defence evidence, that the original reconstruction of that house took place in the 1<sup>st</sup> defendant's absence, regardless of the veracity or otherwise of the 1<sup>st</sup> defendant's claim that it was financed with money borrowed from one Bharat, which latter claim is in any event unsupported by evidence.

110. In view of the foregoing, by the time the 1<sup>st</sup> defendant claimed to have come into the scene and repaid Bharat his money, if at all he did so, there was already at least one structure on the property. This is the structure which the court believes, was among others, used accommodate the plaintiff and her husband. It also accommodated guests, both during exhibitions and after the couples' wedding. And apparently, the development was not small in stature. This court finds credible the evidence of the plaintiff when she states that the place was never a hotel from the time she met Isaia in 2009, but he would hold international art exhibitions and provide his international guests with some rooms to stay

in during those exhibitions. There is bound to be a difference between a dwelling house in which guests are hosted when visiting for exhibition, and a hotel. This court is persuaded that the former was the status of the suit property by the time the 1<sup>st</sup> defendant came into the picture.

111. Further, DW1 testified in this court that “*construction began in 2005*”. In another section of his evidence, he claimed that the construction took 5 years. In yet another part of his statement he stated that the construction went on until 2015. However, DW1 never provided concrete evidence of his involvement in the reconstruction that took place up to 2015. On the other hand, DW3, Abdulmalik, the deceased’s son, stated that he and the plaintiff and the deceased visited Kenya in 2013 for a holiday and during that holiday, the deceased met with the 2<sup>nd</sup> defendant to whom he proposed to lease the African Dada Resort. Abdulmalik also stated in his evidence at *paragraph 11* of his witness statement that there were 18 rooms as at 2013, the layout of which he did not provide. It was during that holiday in 2013 that the 1<sup>st</sup> defendant and the deceased allegedly discussed the matter and agreed that the number of rooms could be increased to 25.

112. The total sum of the evidence adduced before this court leads to the conclusion that a matrimonial home existed on the suit property.

113. Regarding the claim that the defendant directly and indirectly financed construction on the suit property, there is no evidence that the 1<sup>st</sup> defendant paid a man called Bharat any money in connection with the deceased. Bharat’s alleged withdrawal of *caveat* instrument at page 32 of his bundle does not name the person paid or how much he was paid and when; and it is not decipherable whether the payment was made on a date recent to the date of that instrument, or long before that. Besides, if any money was paid, there is no evidence that the money was in connection with any other plot save the plot named therein being **Portion No 2743**. Plot No 2743 is not in contest in this matter, it having been acknowledged to have been transferred to the 1<sup>st</sup> defendant earlier on

vide a conveyance dated 13<sup>th</sup> December 2010. That non-contestation of transfer raises even more vexing question; if the plot no 2743 was indeed the subject of the conveyance dated 13<sup>th</sup> December 2010, why was it necessary to include it in the conveyance dated 20/9/2016?

114. The 1<sup>st</sup> defendant's advocate posits at **para 77** of his submissions that the conveyance was not registered due to outstanding moneys owed to Bharat and once those monies were paid, the caveat was removed. Yet that document bears stamps from the Collector of Stamp Duties meaning that it may have been booked at the land registry for stamp duty and registration on 22/11/2022, and there was no reason why, after the removal of caveat, its registration could not proceed to the extent that a fresh one had to be prepared later on. Also, there is no reason why, if the registration could not proceed immediately for any reason, a caveat in favour of the 1<sup>st</sup> defendant on all the suit properties could not be lodged to secure funds paid to Bharat or to the deceased.

115. The documents that the 1<sup>st</sup> defendant had hoped would convince this court that he had paid 240,000 euros as partial consideration to the deceased having been rejected by this court as inadmissible, and the lending of money to Isaia and the refund to Bharat and its connection with the suit premises not having been proved the 1<sup>st</sup> defendant faces a steep hurdle in convincing this court that the conveyance dated 20/9/2016 was executed by the deceased in exchange for any valuable consideration. And the sum involved is a colossal sum of 840,000 euros in total. A conversion of that sum at the present exchange rate just for the purpose of getting acquainted better with a much more familiar value yielded upwards of Kshs 100,000,000/=. The 1<sup>st</sup> defendant states that only 240,000 euros out of the total consideration was allegedly paid in cash after the conveyance was signed. The rest (600,000/- Euros, more than two thirds) is purported to have been advanced earlier to Isaia, and in this court's view may include the unsubstantiated payment to Bharat, the erstwhile caveator. While what immediately strikes this court is the

rounded nature of the figures, the more vexing concern is that while fully aware the plaintiff's marriage was undissolved, the 1<sup>st</sup> defendant not only failed to involve her in the matter, but also neglected to register a caveat like Bharat's, which would have been solid evidence of money lent to the deceased. He would prefer this court to believe there was an excellent relationship between the two families which enabled that purported casual approach; that there also existed a close relationship between the two brothers, Oriano and Isaiah and that those family ties must be considered by the court as persuasive of the fact that he indeed lent him the money.

116. It is worthy of reiterating that there is no substantiation of the claim that he added any structures to those he found already built on the suit land. However, as whatever structures that the 1<sup>st</sup> defendant added to the suit land are what makes him claim that the deceased owed him money, perchance it is to be believed that the claim that he built such structures on the suit properties, he has not demonstrated with credible evidence, e.g., registered architectural plans and Kilifi County planning permission, set out by way of evidential maps or photography which structures these were, and the dates of their erection on the suit premises. That omission is quite amazing because he has control over the suit premises and can not claim lack of access thereto.

117. In the absence of such easily retrievable and possibly conclusive evidence, it would be imprudent for this court to presume the veracity of the 1<sup>st</sup> defendant's oral evidence while the law provides for proof through cogent evidence. Though the 1<sup>st</sup> defendant's counsel insisted that the evidence of contribution by the 1<sup>st</sup> defendant was not rebutted in any cogent manner by the plaintiff, that submission can not be correct; for how can a plaintiff who does not know of anything rebut it except by saying: "*no, it did not happen*" or "*I did not see or know of it.*" That in itself is the answer that shifts the evidentiary burden of proof onto the adversary alleging that the denied thing happened. On most occasions

proving a negative is more difficult because it may not require evidence, and it simply relies on a denial, upon which the adversary bears the burden of proving that the thing denied actually happened. On such an occasion, the provisions of section 107-109 of the Evidence Act are not helpful in their ordinary sense, for they appear to expect tangible evidence to be adduced in proof. For the same reasons, the 1<sup>st</sup> defendant's counsel's submission that the plaintiff failed to disclose to the court the fact that the deceased called for a meeting on 19<sup>th</sup> January 2014 to discuss matters related to the suit property, and that she therefore came to court with dirty hands contrary to the principles of equity, must fall by the wayside because she has already stated that she was not aware of the alleged discussions or transactions, a statement already corroborated by the 1<sup>st</sup> defendant's own witnesses, including Fabrizio the lawyer; those witnesses stated that the plaintiff was in the hospital corridors when the meeting happened. Strangely enough, Fabrizio, the lawyer/expert in the room, fully aware of the law and the matrimonial relationship subsisting, testified on cross-examination that he does not know whether the contents of the documents written in his presence in the hospital, were read to the plaintiff.

118. In this court's view, it would have been in the interests of the 1<sup>st</sup> defendant's to consciously involve the plaintiff in those matters, if at all they occurred, in view of the existence of a matrimonial home on the suit property that would automatically pose a threat to his interests. That involvement would have secured his interests since, as relates to marriage, Article 45 (3) of the constitution provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. This court would not have ignored such evidence if it had been presented. In the case of *Barclays Bank of Kenya Ltd v Attorney General & another [2015] eKLR* observed that:

*“A spouse cannot, having been aware of the existence of the charge and having for instance participated in its servicing simply turn around and become obstructionist by resorting to the provisions of the Act to curtail a chargees’ legitimate exercise of its powers under the charge.”*

119. Not having presented any sale agreement between him and the deceased, the 1<sup>st</sup> defendant is in the extremely embarrassing and unenviable position of having to rely on mere oral evidence to support a transaction conducted in the digital age allegedly involving very valuable property and very colossal sums. To compound his situation, his own evidence that Isaia was in financial problems is contradicted by his own very witness DW3 who stated as follows about his father:

*“My father was an artist. I am not the first born, I am number 5-born. He was doing the business when I was born. My father was then financially stable.”*

120. Therefore, what the 1<sup>st</sup> defendant hangs on is the thin thread of oral evidence in which the plaintiff has no share, whereas documentary evidence of the appropriate probative value would have assisted him prove his claim with ease. It was submitted that on 27<sup>th</sup> December 2015 or thereabouts, while in Italy the deceased and the 1<sup>st</sup> defendant entered into an agreement relating to the sale of the properties at an agreed consideration of 240,000 euros and the agreement was witnessed by the deceased’s 2 children, Christian and Abdulmalik as well as Ilario the deceased’s brother; he maintains that even in the absence of the said sale agreement, the testimony of those 3 witnesses DW1, DW3 and DW5 is believable. That is contrary to this court’s view. Evidence was given mostly by members of one family which dilutes its credibility. Also, counsel has offered only well-arranged submissions which cannot substitute evidence where a party has failed to prove his claim by evidence- see *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR*.

121. It is not lost on this court that while the documents in acknowledgment of alleged indebtedness of the deceased were allegedly being prepared in

a hospital room on 19<sup>th</sup> January 2014, the plaintiff is said to have remained in the corridors. There is no explanation as to why the deceased's wife was left out in the corridors of Brescia hospital on 19/1/2014. She was also not involved in the visit to the advocate's office. It is also noteworthy that the 1<sup>st</sup> defendant's conveyancing advocate Rose Nyambura Kamau, DW6, could not tell who the gentlemen who appeared before her were, save that they executed a conveyance, which she was later instructed by an unknown person by telephone, to register. I find that disclosure of facts is vital, but since it is apparent that the plaintiff did not know of the things that the defendant alleges, This court finds that the plaintiff can not be said to have breached the doctrine of uberrima fides espoused in the case of *Re Estate of Julius Ndubi Javan (Deceased)* [2018] KEHC 8523 (KLR) Media Neutral Citation [2018] KEHC 8523 (KLR) as follows:

*“Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (uberimae fidei) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure steams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”*

122. Thus, perchance it is presumed, for argument's sake, to be true that the impugned documents were indeed prepared, the question that arises is why the plaintiff, being the wife of Isaiah, was excluded. The 1<sup>st</sup> defendant may provide an answer to that question by stating that such an approach of secrecy was the deceased's preference, but as seen from the analysis of article 45(3) and section 12 of the Matrimonial Property Act herein above, with respect to rights under a recognized marriage, neither the statute nor constitution is a respecter of such secrecy or exclusion of a spouse with regard to a matrimonial home. Besides, the law expressly provides in section This court finds that she could not have known of any

transaction of the nature intimated by the 1<sup>st</sup> defendant perchance they happened, and the burden of proof remains on the 1<sup>st</sup> defendant.

123. The recollection of the quality of DW3's father's life can not be dismissed; he was about 8-10 years by the year 2000, long before the defendant's stated date of initial involvement in the loaning of money to the deceased, and thus capable of observing how well his family lived, which to him was an indicator of wealth on Isaia's part. Also, how or when Isaia's alleged financial problems subsequently commenced to the extent that he would need to be financially bailed out, is not disclosed by the 1<sup>st</sup> defendant. The matters of default in payment of tax back in Italy were kept concealed just as the fate of the matrimonial house of the deceased in that country. Further, the lease document allegedly executed between Isaia, Oriano and the 2<sup>nd</sup> defendant was discredited when it transpired that it was not notarized and that the advocate Abubakar was not present in Italy and thus never witnessed whether the deceased did actually execute it, and the conclusion of this court is that no lease was ever executed. However, what emerges is that Isaia was still receiving rents from the African Dada Resort by 2015 before the 2<sup>nd</sup> defendant is said to have leased it, and before the 1<sup>st</sup> defendant claims to have purchased it; thus, this court surmises that then he must have been doing so as owner even as at that time. It is also not lost on this court that the details and history of the Bank into which the two brothers are said to have been banking the monies were not given. Closely connected with fact that is this court's observation is that the relationship between the children of Isaia and the 1<sup>st</sup> defendant's family does not seem to be excellent, to the extent that they can not even recall the names of his import/export companies, yet he was supposed to be a father figure to them who allegedly met some of their financial needs at some point in his life. Also, the majority of Isaia's children are those who did not appear to testify on the 1<sup>st</sup> defendant's behalf. It is not proper to attach much credibility to a

small number of children, especially when they have admitted to having received benefits from their uncle.

124. Lastly, the 1<sup>st</sup> defendant's bursts of clear English on two occasions, forgetting that he was meant to speak in Italian for translation into English, did not endear his credibility to this court. It was also not lost on the court that both of those slips happened in moments of loss of control when he was addressing the apparently emotive subject of his sister in law's alleged desertion of his brother Isaiah at his time of need, thus evincing some agitation; however, what is of greater essence is that he despite his insistence on Italian and translation, he actually knew English but for his own reasons dragged the court through a whole session of unnecessary and time-consuming translation, a fact betrayed only by those two accidental slips noted on the court record. It is an additional thing to note that Rose Nyambura Kamau advocate stated that the two gentlemen who went to her office for the execution of the conveyance spoke to her in English. By the 1<sup>st</sup> defendant's own admission he was one of those, but the court does not have the clear identity of the man other save through his evidence that it was the deceased, which has not been sufficiently proved.

125. In the case of *Parvin Singh Dhalay Versus Republic 1997 ECLR 1995 To 1998 1 EA 29*, the court held as follows:

*"It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo V George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts: -*

*"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide*

*whether or not it believes the expert and give reasons for its decision. A court cannot simply say: - "Because this is the evidence of an expert, I believe it."..."*

126. It is the evidence analyzed herein before this court has to consider alongside the expert forensic examination reports that have been produced before this court in line with the holding in the case of *Parvin Singh Dhalay Versus Republic 1997 ECLR 1995 To 1998 1 EA 29*. And to sum it up in brief, it is that the deceased and the plaintiff had such a close relationship as husband and wife that it sounds strange that he never informed her of any sale of the suit property to the 1<sup>st</sup> defendant; that no divorce ever took place between the plaintiff and the deceased; that the plaintiff never deserted the deceased as alleged but was called upon to go and work to practice her nursing profession rather than be idle; their dwelling house having been located on the suit land, the suit land was therefore a matrimonial home within the meaning of the provisions of Section 2 of the Matrimonial Property Act; that it being matrimonial home, any confirmed sale or disposal thereof without consent of any one of the spouses would have been in contravention of Section 12 of the Matrimonial Property Act; that there is no credible evidence whatsoever of expenses incurred by the 1<sup>st</sup> defendant on the reconstruction of the Africa Dada Resort and neither is there any evidence of the payment of any money to one Bharat or of when that money was paid; that there was a dwelling on the suit property which the plaintiff and her husband considered their home; that very few of the deceased's children appeared in court to testify in favour of their uncle, and those who did acknowledged some kind of financial support from him and can not be deemed independent witnesses; the document the 2<sup>nd</sup> defendant has produced as a lease is not notarized, yet the deceased is alleged to have executed it in Italy. The same has an advocate's stamp, Yet the advocate was still in Kenya on the date that he is stated to have witnessed Isaia affixing his signature to the said lease; that though the 1<sup>st</sup> defendant,

apparently as an alternative, attempted to assert that he signed the document on behalf of the deceased, on further cross-examination, he admitted that he did not have any Power of Attorney donated to him by the deceased, and in the eyes of this court, there is no iota of authenticity in that document. There is therefore no direct evidence that the deceased executed any lease agreement in favour of the 2<sup>nd</sup> defendant.

127. Before starting to address the expert reports produced in this case, a review of the plaintiff's own evidence is necessary. She testified that when she did a search and found an indenture dated 20/9/2016 for the transfer of the property, she wondered how the transfer could happen without her consent as wife to the deceased. She saw that the signature on the indenture was not the deceased's and asked the police to investigate.

128. Pursuant to that request, a report was produced, made by PW4, one Evelyn Othim. Her evidence is that she compared the signature of Isaia thereon in contradistinction to his known signatures contained in his identity card, an old identity card dated 16<sup>th</sup> April 1945. She also compared the signature in the conveyance versus Isaia's known signatures in other documents and found that the signatures were made by different persons.

129. The plaintiff also called PW2, Martin Esakina Papa, a private Forensic Document Examiner who made a report on 8<sup>th</sup> March 2018 which he produced in evidence in this case and it is noteworthy that his examination came to the conclusion that the signature on the conveyance purported to have been executed by the deceased did not belong to him. The 1<sup>st</sup> defendant's counsel attacked the character of PW2, but the court notes that basis of that attack was a theft charge conviction that he is said to have received, but which appears to have been set aside on appeal. His report is also blamed by the 1<sup>st</sup> defendant's counsel for having been made a few days after the 1<sup>st</sup> defendant served his expert witness' forensic report on the plaintiff's counsel; it is thus discredited as having

been tailor-made to counter the 1<sup>st</sup> defendant's disclosed evidence. (See the forensic report dated 24<sup>th</sup> July 2019 filed by the 1<sup>st</sup> defendant (page 67 to 97 of the 1<sup>st</sup> defendant's bundle,) Besides those objections, which this court does not find weighty enough to utterly deprive PW2's report of all creditworthiness, there was nothing else said to be wrong with the report. It is noteworthy that PW2 and DW4 once worked in the same office in the government with DW4 supervising PW2, but this court must consider that PW4's evidence was unshaken on cross-examination, and it supports the possibility, just like PW2's, that the signature on the conveyance dated 20/9/2016 may not have been made by the deceased. It is noteworthy that the evidence of PW4 is not the evidence of a private forensic document examiner but that of a person in execution of her duty in the ordinary course of her employment with the Directorate of Criminal Investigations. I am persuaded that of all the forensic reports made, I agree only with the reports of PW2 and PW4 as they accord with the implausibility, decipherable from the evidence of circumstances set out hereinabove, of Isaia Mabellini having ever executed the conveyance dated 20/9/2016.

130. Considered alongside the other evidence of the parties and construed in a wholistic manner, the expert evidence of the plaintiff's witnesses proves that there was indeed fraud and that the conveyance dated 20/9/2016 was fraudulently procured by way of forgery; it is not the deceased who executed it.

131. The conclusion of this court is therefore that the plaintiff has proved on a balance of probabilities that the conveyance dated 20/9/2016 was not executed by her late husband Isaia Mabellini, and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants' dealings in the suit land were contravention of Section 12 of the Matrimonial Property Act. The suit property was therefore fraudulently and illegally transferred to the 1<sup>st</sup> defendant by that conveyance and the 1<sup>st</sup> and 2<sup>nd</sup> defendants are trespassers thereon. No fraud was established against the 3<sup>rd</sup> and 4<sup>th</sup> defendants and it is credible

that they executed their duty in good faith on the basis of presentation by the 1<sup>st</sup> defendant, of documents they believed to be genuine, for registration. In this court's view, the plaintiff has established her claim against the 1<sup>st</sup> and 2<sup>nd</sup> defendants while the 2<sup>nd</sup> defendant has not proved his counterclaim.

***What orders should issue?***

132.I therefore allow the plaintiff's claim originally brought to this court against the defendants vide plaint dated 26/3/2018 and I disallow the counterclaim dated 4/5/2018 and I issue the following final orders:

- a. The plaintiff's claim brought vide the plaint dated 26/3/2018 is hereby allowed while the 2<sup>nd</sup> defendant's counterclaim dated 4/5/2018 is dismissed with costs;***
- b. A declaration is hereby issued declaring that Isaia Mabellini (deceased) is the legal owner of plots of land known as Portion numbers 2744, 2745, 2746 ,2747 and 2748 Malindi at Tewa Road;***
- c. A Declaration is hereby issued declaring that the transfer of title for Portion numbers 2744, 2745, 2746 ,2747 and 2748 Malindi at Tewa Road from Isaia Mabellini to Oriano Mabellini is fraudulent and illegal and as such null and void;***
- d. The Mombasa Land Registrar shall immediately cancel the transfer from Isaia Mabellini to Oriano Mabellini and rectify the Land Register in respect of the suit properties Portion numbers 2744, 2745, 2746 ,2747 and 2748 Malindi at Tewa Road and reinstate the name of Isaia Mabellini as the registered owner thereof;***
- e. The 1<sup>st</sup> defendant, Oriano Mabellini, shall surrender to the plaintiff Ann Kinanu Kaburu all the original title documents in respect of Portion numbers 2744, 2745, 2746 ,2747 and 2748 Malindi at Tewa Road forthwith;***

- f. A mandatory injunction is hereby issued compelling the 1<sup>st</sup> and 2<sup>nd</sup> defendants, their servants and or employees to vacate the suit premises known as Portion numbers 2744, 2745, 2746 ,2747 and 2748 Malindi at Tewa Road forthwith and to deliver vacant possession thereof to the plaintiff failure to which the 1<sup>st</sup> and 2<sup>nd</sup> defendants or anyone claiming under them who is on the suit properties known as Portion numbers 2744, 2745, 2746 ,2747 and 2748 Malindi at Tewa Road shall be forcibly evicted at the instance of the plaintiff;**
- g. A permanent injunction is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendant by themselves, their servants or agents from entering, remaining or trespassing onto or in any other way interfering with the suit properties known as Portion numbers 2744, 2745, 2746 ,2747 and 2748 Malindi at Tewa Road;**
- h. The 1<sup>st</sup> and 2<sup>nd</sup> defendants shall render an account of all amounts paid as rents for the suit properties known as Portion numbers 2744, 2745, 2746 ,2747 and 2748 Malindi at Tewa Road and the said amounts shall, if not already paid into court as ordered by court in its ruling dated 10/2/2022, be paid to the estate of the late Isaia Mabellini;**
- i. The 1<sup>st</sup> and 2<sup>nd</sup> defendants shall jointly and severally pay the plaintiff nominal general damages in the sum of 1,000,000/= each for trespass onto the suit property known as Portion numbers 2744, 2745, 2746 ,2747 and 2748 Malindi at Tewa Road;**
- j. It is hereby ordered that the 1<sup>st</sup> defendant shall pay the plaintiff exemplary damages in the sum of Kshs 3,000,000/=;**

- k. It is hereby ordered that the 2<sup>nd</sup> defendant pay the plaintiff exemplary damages in the sum of Kshs 1,500,000/=;***
- l. The sums in (j) and (k) herein above shall attract interest at court rates from the date of filing suit to the date when all the money shall be paid in full to the plaintiff;***
- m. The costs of the suit and interest shall be borne only by the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally;***
- n. The costs shall attract interest from the date of taxation until payment in full.***

**Dated, signed and delivered at Malindi on this 17<sup>th</sup> Day of March, 2026.**

A rectangular box containing a handwritten signature in blue ink, which appears to read 'Mwangi Njoroge'.

**MWANGI NJOROGE,  
JUDGE, ELC, MALINDI.**