

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KITALE
ELC APPEAL NO. E035 OF 2025

ANNE MATO-----

1ST APPELLANT

EDWARD OPONDO-----2ND

APPELLANT

VERSUS

ALICE LILIAN ACHIENG-----

RESPONDENT

**(Being an Appeal arising out of the Ruling and Order
of Hon. S.N. Makila (PM) delivered on 20/3/2024 in
Kitale CMCC Land Case No. 154 of 2023)**

JUDGMENT

1. The appellants, as the defendants at the lower court, had been sued by the respondent through a plaint dated **1/12/2023** seeking:

- (a) Declaration that upon the demise of Paul Opondo, who was their late husband, she was the beneficial owner of Plot No.47 in L.R. No. 6623 Makhombe Farm, Kitale Municipality, hereinafter the suit property.**
- (b) Declaration that the 1st appellant is a trespasser to the suit property.**
- (c) An order for the eviction of the appellant.**

(d) Permanent injunction restraining the appellant, her agents, or servants from encroaching, trespassing, disposing, alienating, and in any way interfering with the respondent's possession, occupation, or use of the suit property.

2. The respondent contended that her late husband in **1994** bought **0.25 acres** of the suit property, settled and established a matrimonial home therein, where they lived until his demise in **September 2023**, but despite a court order dated **28/9/2023**, the appellants defied the same, leading to interment of his remains in Siaya County, at his father's land without involving her and the children.
3. The respondent averred that following the secret burial of her late husband, the appellants, without any colour of right or justification, encroached upon and or trespassed upon a portion of the suit land and threatened to evict her from the suit property, which she has occupied for **29** years with her children.
4. Alongside the plaint, the respondent filed a notice of motion dated **1/12/2023**, seeking a temporary order of injunction restraining the appellants from evicting, or denying her free access, use, and quiet occupation of her matrimonial home constructed on the suit property, pending hearing and

determination of the suit. The notice of motion was supported by an affidavit of Alice Lilian Achieng, sworn on **30/11/2023**, in which she attached a copy of the sale agreement dated **1994**, payment receipts, letter dated **5/1/2004** for payment of an extra portion, a completion agreement dated **October 2023**, and a copy of court order issued on **28/9/2023**, annexed marked **ALA-(1), (2A), (3), (4) and (5)**. An order to maintain the status quo was issued on **7/11/2023**, pending an interpartes hearing on **13/12/2023**.

- 5.** The appellants upon service with court summons, filed a notice of appointment dated **11/12/2023** and grounds of opposition dated **18/12/2023**, alleging lack of capacity by the respondent to sue, that the suit touched on matrimonial property, hence was defective and an abuse of the court process, the court lacks jurisdiction, the cause of action, if any, could only be prosecuted in a succession cause and should be dismissed.
- 6.** Parties thereafter filed written submissions dated **16/1/2024** and **18/1/2024**, respectively. By a ruling dated **20/3/2024**, the trial court allowed the application, triggering an application by the appellants dated **12/4/2024** for a stay of execution of the ruling or orders, pending hearing and

determination of an appeal dated **17/4/2024** at the High Court, namely **Civil Appeal No. 18 of 2024**.

7. The respondent filed a replying affidavit dated **29/4/2024**, opposing the application or stay. The trial court on **15/8/2024** granted a conditional stay of execution on the payment of security of **Kshs.100,000/=** within **30** days; in default, the suit was to proceed for hearing.
8. The court record shows that on **13/12/2023**, the appellants were granted **14** days to file and serve a statement of defence. The proceedings of **8/5/2024** show that the trial court was informed that a statement of defence had been filed and served. The court is unable to find any copy either in the lower court file or in the record of appeal dated **10/7/2024**.
9. The appellants have come to this court via a memorandum of appeal dated **17/4/2024**, initially filed before the High Court. Following the judgment dated **3/10/2025**, Hon. Mr. Justice P.J.O. Otieno transferred this appeal to the court for determination for lack of jurisdiction.
10. The appellants fault the trial court:
 - (a) **For not finding that the respondent had no *locus standi* to institute the suit over the suit property jointly owned by the 1st appellant and the late Peter Opondo,**

who passed on, on 17/9/2023, for lack of letters of administration.

- (b) For not appreciating the existence of a continuous and uninterrupted physical and actual occupation of the suit property by the 1st appellant.
- (c) For issuing an injunction which was premature, irregular, improper, and against the evidential material facts on record.
- (d) For delivering an incoherent and misinformed ruling regarding who was the rightful owner and occupant of the suit property.
- (e) For delivering a fatally defective, irregular, and erroneous ruling in view of the evidence adduced by the appellants.
- (f) For disregarding their submissions on the evidence, facts, and issues before the court.

11. This appeal was canvassed through written submissions. The appellants rely on written submissions dated **3/6/2025**, isolating five issues for the court's determination.

12. On *locus standi*, it was submitted that the respondent had no letters of administration to file the suit, whether temporary or limited, and therefore, her acts amounted to intermeddling with a deceased's estate contrary to **Section 45** of the Law of Succession Act. Reliance is placed on **Hawo**

Shanko -vs- Mohamed Uta Shanko [2018] eKLR, In Re Matter of the Estate of Moraji Bhanji Dhanak (Deceased) [2000] eKLR, and Obado -vs- Omoro [2023] KEHC 22848.

- 13.** On the rights of the 1st appellant relating to the subject property, the appellants submit that paragraph **7** of the plaint admitted the said continuous occupation of the suit property, which the respondent did not controvert through any documentary evidence, over the alleged trespass, which instead of establishing the trial and misdirected itself on the evidence before her and the law.
- 14.** On matrimonial property, the appellants submit that the subject matter remains to be currently occupied by the 1st appellant who is the legal wife of the deceased, as per a copy of a dowry agreement dated **12/4/2015**, in line with **Section 43(2)** of the Marriage Act, which appears on pages **43** and **44** of the record of appeal, and further that she contributed putting up a structure on the subject suit property, as per house plans, approvals and receipt of payment of construction materials appearing on pages **45-49** of the record of appeal.
- 15.** The appellants submit that all the evidentiary material satisfies the requirements of **Section 6(1)**

(c) of the Matrimonial Property Act, **2013**, on what amounts to a matrimonial home.

16. On the law of injunction, the appellants submit that the respondent had not met the ingredients of issuance of an injunction as set out in **Giella -vs- Cassman Brown [1973] EA 358** and **Nguruman Limited -vs- Jan Bonde Nielsen & 2 others [2014] eKLR.**

17. As to the legality of the ruling, the appellants submit that the trial court failed to consider the material placed before it to reach a fair and just determination, particularly the grounds of opposition, the lack of capacity to sue, the jurisdiction of the court to handle succession matters, lack of evidence of joint ownership and or acquisition of the property and or evidence of the alleged attempts to evict, other than mere hearsay and speculation.

18. The respondent opposes the appeal through written submissions dated **30/9/2025**. It is submitted that there is no dispute that the respondent in **1994** jointly bought the suit property with the late Paul Opondo, where they established their matrimonial home and lived until he died in **September 2023**.

19. The respondent submits that after her husband died, the user, the 1st appellant, who had an affair

with him from **2015**, in collusion with her brother-in-law, secretly and hurriedly went and buried him in his ancestral land, Siaya County, without her involvement, and that of the children.

20. The respondent submits that after the burial, the appellants, without any colour of right or justification, trespassed on the suit land, took possession, and denied her access to her home and the entire suit property, leading to the suit, on account of joint tenancy under **Section 2** of the Land Act. The respondent submits that, as a joint tenant to the land yet to be registered under their two names, she had *locus standi* to institute the suit.

21. As to grounds **Nos. 2** and **3** of the memorandum of appeal, the respondent submits that such issues can only be canvassed at the hearing, where each of the parties will demonstrate the respective interests over the suit property, where the ruling was in respect to ownership, occupation, and use of the land. Reliance is placed on **Diana Muchiri -vs- Lydia Wariara Njenga & Another [2024] KEELC 527 [KLR]**.

22. On ground Nos. **4, 5, 6,** and **7** of the memorandum of appeal, the respondent submits that the trial court properly addressed herself to the ingredients

of granting an injunction as per page **98** of the record of appeal, which is a ruling this court should uphold.

- 23.** The role of an appellate court of the first instance is to relook at the entire record of the court below, rehearse and reappraise itself on both the facts, the evidence, the law, and come up with its independent findings. See **Gitobu Imanyara & Others -vs- Attorney General [2012] eKLR**. It is trite law that parties are bound by their pleadings and issues for the court's determination flow from those pleadings. See **Independent Electoral and Boundaries Commission -vs- Stephen Mutinda Mule & Others [2014] eKLR**.
- 24.** Pleadings in law mean a written presentation by a litigant in a lawsuit setting forth the facts upon which he or she claims legal relief or challenges the claim of his opponent. It includes a claim and counterclaim, but not the evidence by which a litigant intends to prove his case.
- 25.** The purpose of pleading, as held in **Joshua Mungai Mukoma Mulango & Another -vs- Jeremiah Kiama Mukoma [2015] eKLR**, is to set the agenda of the trial to ensure certainty and finality so that each party knows the case they have to meet as a guarantee of fair play. Each party is

therefore left to formulate its case through pleadings to avoid any surprises. Written submission cannot amount to pleadings or evidence, as held in **D.T. Moi -vs- Mwangi Stephen Muriithi & Another [2014] eKLR.**

26. A cause of action refers to acts on the part of the defendant that give a cause of complaint on the part of the plaintiff. See **D.T. Dobie & Company (K) Ltd. -vs- Joseph Mbaria Muchina & Another, Civil Appeal No. 37 of 1978[1982] KLR.**

27. It is through pleadings that a cause of action is disclosed. In this appeal, the respondent's primary pleadings is the plaint dated **1/12/2023**, where she pleaded that they jointly bought the part of the suit property with her late husband Paul Opondo, took vacant possession, established a matrimonial home, and lived there together with her children for over **29** years, before he passed on in **September 2023** at the United States of America, and was secretly buried by the appellants in his ancestral home despite a valid court order.

28. The respondent pleaded that immediately after the burial, the appellants encroached and or trespassed onto her matrimonial home, denied her access, use, or occupation, and had threatened to evict her,

hence the recourse to court for a temporary injunction. The applicant in the notice of motion for interim injunction dated **1/12/2023**, attached copies of the sale agreement dated **19/9/1994**, payment receipts, letter dated **5/1/2004**, completion agreement dated **5/10/2023**, letters dated **7/11/2003** and **25/9/2019**, death certificate, and a court order dated **28/11/2023**.

29. The applicant relied on written submissions dated **1/12/2023**, advancing the concept of joint tenancy under **Section 60** of the Land Registration Act as held in ***Estate of Johhson Njogu Gichohi (Deceased) [2018] eKLR, Mwangi Gakari -vs- Benard Kigotho Maina & Another H.C. Nairobi Succession Cause No. 2335/2011, Diana Muchiri -vs- Lydia Wariara Njenga (supra), In Re Estate of M'kiunga M'rinyiru (Deceased) [2021] eKLR, and Isabel Chelangat -vs- Samuel Tiro [2012] eKLR.***

30. The respondents to the application relied on a replying affidavit sworn by Anne Mato on **18/12/2023**, averring that the suit property was bought by her late husband in **1994**, who lived thereon with the applicant until **2006**, when she deserted him to remarry one Emanuel. The respondents deposed that the deceased lived on

the land alone until **2014**, when they met and legally married under Luo Customary as per the visit and dowry paid vide agreement dated **12/4/2015** attached as **AM-(1)**. The respondents deposed that since marriage, they have been living on the suit property to date until the deceased relocated to the United States of America in **2021**, leaving her in Kenya to take care of the matrimonial home, whereof in **2021**, they started building a permanent building as per annexures marked **AM-2(a) - (c)**.

- 31.** The 1st appellant deposed that the respondent had never stepped on the land for **17** years and only forcefully came back in August **2023**, to purport to bury her deceased son, while the said husband was away in the United States of America, to which he was unable to stop the same.
- 32.** The respondents deposed that before her husband died on **17/9/2023**, he had opposed the purchase of the extra piece of land as alleged by the respondent and was willing to return the same to the seller.
- 33.** It was deposed that the sale agreement dated **5/10/2023** was fraudulent and an action of malice by the respondent, to try to dispose of her of the matrimonial home or property. The respondent deposed that during the preparation of the burial in

Siaya County, the applicant visited the suit property, vandalized it, and replaced the locks with grill bars, to which she reported to the police and the chief as per annexure **AM-3(a) - (d)** and **AM-(4)**, who helped her regain access.

34. The 1st respondent deposed that her late husband did not pay any dowry for the respondent as claimed; the animals given in **2023** were intended to have her daughter married off as per Luo customs. The 1st appellant disposed that the issues raised in the suit could only be addressed in a succession cause.

35. In a supplementary affidavit sworn by Alice Lilian Achieng on **13/1/2024**, the applicant reiterated joint purchaser of the land and her substantial contribution toward its purchase, unlike the 1st respondent, who was colluding with the 2nd respondent to evict her from the suit property. She denied deserting her home as alleged in **2006** or remarrying anyone, unlike the 1st respondent, who had another previous marriage, with five children in that marriage.

36. The applicant deposed that in **2017**, their marriage with the deceased had marital challenges, after the deceased started having extramarital affairs with third parties, including the 1st respondent, and when

confronted by her, he became both abusive and cruel, leading to a short break.

- 37.** The applicant denied the alleged occupation of the homestead by the 1st respondent, as the alleged construction only started in **2021**, as per her documents. The applicant deposed that the 1st respondent has no claim on her house to use as an excuse to take over and evict her from a rightfully acquired property.
- 38.** The applicant deposed that the receipts held by the 1st respondent are not proof of any contribution to acquire the land or improve it and that the semi-permanent houses referred to by the 1st appellant belonged to her which she had build and occupied since **1995**, where they give birth and brought up their four children with the deceased, one of which after death, she with the consent of the late husband and uncles buried him on the suit property.
- 39.** Further, the applicant deposed that the respondents have no basis right or interests on her land jointly acquired with the deceased, which automatically devolves to her by virtue of the concept of survivorship. The applicant deposed that what happened to her and her late husband is that her son-in-law could not pay dowry to her before her

late husband paid the dowry to her parents as a wife.

40. The applicant deposed that jointly owned property cannot be part of succession proceedings with respect to her deceased husband's estate, hence she was properly before the court.

41. Order 40 Rule 1 of the Civil Procedure Rules as read together with **Section 63(e)** of the Civil Procedure Act, grant a court powers to issue temporary injunction pending hearing and determination of a suit, inter alia, where there is danger of the property being wasted, damaged, or alienated, breach of contract or injury to it, removal, or disposal of the property in dispute, or right to it.

42. To grant or not to grant a temporary injunction is a discretionary power of the court, to be exercised on sound legal principles set out in **Giella -vs- Cassman Brown** (*supra*) **Nguruman Ltd -vs- Jan Bonde Nielsen** (*supra*), **Mrao Ltd -vs- First American Bank of (K) Ltd & Others [2003] KLR 125.**

43. In this appeal, the appellants fault the trial court for exercising its discretion by granting a temporary order of injunction in favour of the respondent, pending hearing and determination of the suit. In **Mbogo -vs- Shah [1968] CA 93** and **Shabir Din -**

vs- Ram Parkash. Anand (1955) 22 EACA 48,

the court held that a Court of Appeal should not interfere with the exercise of the discretion of a judge, unless it is manifest from the case that the court exercised the discretion on wrong principles or that it did act perversely on the facts.

44. Further, the court held that a court will not interfere with the exercise of discretion unless it is satisfied that the decision was clearly wrong, the court relied on matters it ought not to have considered, and in so doing arrived at a wrong decision.

45. A temporary injunction serves several purposes: to prevent an irreparable injury to the applicant who has satisfied the court that he has a right or interest which has been infringed, threatened, or breached by the opposite party. The second purpose is to prevent the property in dispute from dissipation. The third purpose is to maintain a position that will more easily enable justice to be done when the final order is made, at the same time, regulate the acts of the parties in a way that is most just and convenient to all.

46. The fourth purpose is to improve the chance of the court being able to do justice after a determination of the merits of the case at the trial. See **National**

Commercial Bank Jamaica Ltd -vs- Olint Corp Ltd [2009] UKPC 16 (28 April 2009).

47. The sixth purpose is to preserve the substratum of the suit pending hearing and determination. See **Kengen -vs- Kibutu Ltd [2019] eKLR**. The last purpose is to guarantee the constitutional right to a fair hearing and due process, as provided under **Article 40** of the Constitution.
48. The court, by granting an injunction, therefore strikes a balance of justice as opposed to a balance of convenience as held in **America Cyanamid Co. Ltd -vs- Ethan Ltd [1975] AC 396**.
49. A party seeking equitable relief of an injunction must make full and frank disclosure of the facts as held in **Kenleb Cons Ltd -vs- New Gatitu Service Station Ltd & another [1990] eKLR**. A plaintiff has to show a *prima facie* case with a probability of success, as held in **East African Industries Limited -vs- Trufoods Limited [1972] EA 420**. A *prima facie* case, as held in **Mrao -vs- American Bank of Kenya Ltd (supra)**, is established if a right has been infringed to call for a rebuttal.
50. In this appeal, the respondent had attached exhibits to her supporting and supplementary affidavits giving details of her rights and interests in the suit property as a joint owner or purchaser of the same

in the course of her **29 years** of marriage with the deceased, making it a matrimonial home or house.

51. The 1st appellant, on the other hand, admits that she only came to the life of the deceased after the respondent had allegedly left her house and only started new developments therein in **2021**. The 1st appellant does not state how she acquired the suit property before **2021**. The 1st appellant only terms the agreement as fraudulent but has not demonstrated how the same is fraudulent.

52. Equally, the 1st appellant does not dispute the burial of the remains of the respondent's son on the suit property. If the 1st appellant had superior rights or interests, she would not have allowed the respondent's son to be buried there. Again, the 1st appellant says that the suit property was the matrimonial home that solely belongs to her. If that be so, then it means that the 1st appellant and the deceased would have joint shares therein. Consequently, if that is the case, the deceased's remains would be interred at the said matrimonial home and not in Siaya County.

53. Matrimonial home is defined under **Section 6** of the Matrimonial Property Act **2013**, as the property owned or leased by one or both spouses and occupied or utilised by the spouses as a family

home. **Section 7** of the Matrimonial Property Act vests that property in the spouse according to their contribution towards its acquisition. Property acquisition before marriage by either spouse shall remain separate. Beneficial interest in the property is acquired through contributions.

54. Under the Marriage Act, where a man elects to marry more than one wife, he is at liberty to register the marriage under customary law. The Marriage Act provides, under **Section 8**, that property rights, in cases of polygamous marriages, that property acquired by the man and his first wife, shall be shared equally between the two only if the property was acquired before the man married another wife.

55. In **MNK -vs- POM [2022] KESC [KLR]**, the Supreme Court held that since MKN had no capacity to marry, the long cohabitation was not deemed as marriage, ordinary laws governs property rights between strangers were applicable on beneficial interests based on the parties financial contribution to the acquisition of the property, while acknowledging other form of non-monetary contributions such as maintaining and improving the property.

56. Applying the foregoing caselaw, there is no doubt that, unlike the 1st appellant, the respondent had

disclosed previous interests or rights over the suit property before the 1st appellant began a relationship with the deceased. On that account, it cannot be true that the trial court had no jurisdiction to handle the matter.

- 57.** Trespass to land, as held in **M'Ikiara M'Mukanya & another -vs- Gilbert Kabere M'Mbijiwe [1983] eKLR**, requires an applicant to prove immediate exclusive possession rights or interests, which have been infringed by the intruder. It is a violation of the right to possession, use, and occupation. Separation is not the same as divorce or dissolution of a marriage under African Customary Law. Therefore, the respondent had established a *prima facie* case.
- 58.** Equally, the respondent, unlike the appellants, had demonstrated a defined interest in terms of personal contribution to acquire the suit property as a joint tenant.
- 59.** The 1st appellant relied on the building plan and a map. It relates to plot No. **TNC/Block 22/Mwiruti/79**. The suit property, as pleaded in paragraph **4** of the plaint, is **Plot No. 47 in L.R. No. 6623 Makhombe Farm**. A copy of the search certificate to show that the two parcels of land are the same is missing.

60. The annexure marked **AM-2(b)** does not contain the names of either the deceased or the 1st appellant. It lacks elementary stamps from either the physical, planning, or public health departments to qualify as an approved building plan. Annexure marked **AM-2(c)** has no names of either the deceased or the 1st appellant as the person who bought the building materials. The annexures do not bear any relationship to the appellants and the suit property. As to annexures marked **AM-3(a), (b), and (c)**, the same were not in compliance with **Section 106B** of the Evidence Act to have any probative value.

61. *Locus standi* signifies a right to be heard. Sufficiency of interest or a right to sustain a standing to sue in a court of law. A preliminary objection consists of a pure point of law, which has been pleaded or arises by clear implications out of the pleadings, based on facts as agreed by both sides. See **Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributions Ltd [1969] EA 696.**

62. It has the potential of disposing of a suit. It must not be blurred with factual details liable to be contested or proved through evidence. See **Oraro -vs- Mbaja [2005] 1 KLR 141.**

63. A claim that a party lacks *locus standi* or the court lacks jurisdiction are pure point of law. In this appeal, the appellants had attacked the suit for lack of *locus standi* and jurisdiction. The respondent's interest in the suit property is duly pleaded in the plaint and deposed in both the supporting and the supplementary affidavits, where she attaches a sale agreement before and after her husband passed on, where she says she substantially contributed towards its purchase as per the attached sale agreement.

64. In ***JOM -vs- MBO KESC 4 [KLR]***, the Supreme Court held that **Article 45(3)** of the Constitution espouses the principle of equality of spouses, as regards properties based on the proven respective contribution of each party, whether direct or indirect, guided by the principles of fairness and conscience. **Section 93** of the Land Registration Act provides that, subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property.

65. The respondent pleads that she jointly bought the land with the deceased and therefore, is entitled to

the suit property by dint of the doctrine of survivorship. On the other hand, the appellants submit that the deceased had not formally married the respondent under Luo Customary Law. The respondent swore that a ceremony was conducted by her late husband to signify marriage. The 1st appellant avers that she was legally married under Luo Customary Law from **2015** to the present, hence the suit property should be under her use, possession, and occupation, unlike the respondent, who claimed the matrimonial home.

66. In ***MNK -vs- POM Petition No. 9 of 2021***, the issue was whether parties to a union arising out of cohabitation and or in a marriage unrecognized by law can file proceedings under the Married Women's Property Act. The court held that uncontroverted evidence is weighty and courts can rely on it to prove facts in dispute. The court held that for a presumption of marriage to arise, the parties must have lived together for a long period of time, each must have a legal right or capacity to marry, there must be consent by both parties, and they must have held themselves out to the outside world as a married couple.

67. The trial court looked at the history of the suit property that was purchased, the financial

contribution of each party, and its registration status.

- 68.** The court made a finding that due to the contribution in acquisition and the development of the suit property, each had acquired proprietary rights to the property, which arose out of a constructive trust. The court said that Kenya has no laws to protect parties to cohabitation in case of a dispute relating to property acquired during the subsistence of such cohabitation.
- 69.** The court said that the issue of cohabiting couples' property has increasingly become a social problem due to the high number of people resorting to cohabiting and, in the process, acquiring properties, yet upon separation, there is no legislation governing the division of property, posing a difficult problem for courts. The court cited **Walker -vs- Hall [1984] FLR 126**, that such disputes, they cannot be decided in the same way as similar disputes are decided where there has been divorce. They have to be decided in accordance with the law relating to property, and in absence of such specific law an interest in property, as a result of a legal process must be identified and that the common intention of the parties at the time of purchase is sufficient to give rise to a constructive trust, which

can be inferred from the conduct of the parties. The court said constructive trust as cited in **Jutelabi African Adventure Ltd & Another -vs- Christopher Michael Lockley [2017] eKLR**, is premised on **Section 38** of the Land Act **2012**.

70.Applying the foregoing case law to the instant appeal, the respondent pleaded that they jointly bought the land in **2004** as per the annexure marked **ALA-(1), 2(A) and (B), and (3)**, and she later personally bought an extra piece of land, as per annexure marked **ALA-(4)**.

71.The 1st appellant, on the other hand, says she was married in **2015** as per annexure marked **AM-(1)** and found some semi-permanent structures on the suit land. In paragraph **7** of the replying affidavit, the 1st appellant admits that the respondent and the deceased lived on the suit land until **2006**, when she deserted the matrimonial home, leaving the deceased on the land until they got married in **2015**, after she paid dowry on **12/4/2015** under Luo customs, until **2021** when the deceased relocated to the United States of America and only began building a permanent house on the land in **2021**.

72.From the foregoing, testimony on oath, there is a clear interest in the suit property which is in favour of the respondent, which was a consequence of a

long cohabitation during which they bought the suit land in **1994** and continued living thereon with the deceased before the 1st respondent joined the relationship in **2015**. Such interest sufficiently gives rise to the rights of the respondent to claim the suit property, whether or not her marriage with the deceased had been terminated or separated. Both the deceased and the respondent had a beneficial interest in the property, which they jointly contributed to its purchase and development between **1994** and **2015**.

73. Turning to jurisdiction, a court without jurisdiction has to put down its tools. Matters relating to ownership, use, and occupation of land fall under the jurisdiction of the Environment and Land Court as per **Article 162(3)(b)** of the Constitution and **Section 13** of the Environment and Land Court Act. In **Re Estate of Stone Kathubi Muinde(Deceased) [2016] eKLR, In The Matter of the Estate of Mbai Wainaina (Deceased) (Succession Cause 864 of 1996) [2015] KEHC 6978 (KLR), Spinners & Spinners Limited -vs- Spinners & Spinners Limited [2017] eKLR**, the court held that a proprietary interest on land based on an alleged trust falls under the jurisdiction of Environment and Land Courts.

- 74.** In ***Diasproperty Limited & another -vs- Githae & 8 others (Petition E019 of 2024) [2025] KESC 19 (KLR) (11 April 2025) (Judgment)***, the court said that under **Section 28(b)** of the Land Registration Act, trusts are overriding interests. The Court of Appeal found that the succession court could have no jurisdiction to determine matters relating to a trust.
- 75.** In ***Roche -vs- Roche & another (Civil Appeal 177 of 2019) [2025] KECA 1637 (KLR) (3 October 2025) (Judgment)***, the court held that a trust arises as a result of a manifestation of an intention to create it. The court said that **Articles 10** and **27** of the Constitution, as read together with **Section 38** of the Law of Succession Act, do not discriminate on matters of inheritance or property rights or account of gender, or other status.
- 76.** I think I have said enough to show that the appellants' ground that the trial court had no jurisdiction and that the respondent should have filed a succession cause instead of the suit is bereft of merit. Being a co-purchaser of the suit property and the part of being married to the deceased before **2015**, gave the respondent rights to claim a superior right or interest over the suit property. The court, which has the constitutional mandate of

hearing and determining overriding interests such as constructive trust arising out of sale agreements, as held in **Shah & 7 Others -vs- Mombasa Bricks & Tiles Ltd [2023] KESC 106 [KLR]**, is the Environment and Land Court and not the Family Division of the High Court.

77. As to whether the trial court fell into an error, misapplied the law or principles relating to the grant or refusal of a temporary injunction, the burden is on the appellants to demonstrate the same. The court has looked at the ruling dated **20/3/2024**. The trial court on paragraphs **4-8**, considered the pleadings, responses, and written submissions by the parties. In particular, the application for temporary injunction, as alluded above, turned on the joint purchaser interest of the suit property between the respondent and the deceased, which the appellant had not denied through rival documentary evidence. Evicting the initial spouse of the deceased, who held the purchaser's interest from **1994** to **2015**, would be more unjust.

78. The 1st appellant could not ride on the back of the deceased to dislodge already accrued overriding interests or rights of the respondent, who had used, developed, and possessed the suit property before her co-wife arrived on the picture. The 1st appellant

took the risk of the second marriage while aware of the interests of the former spouse. She cannot, therefore, be heard to complain that the only way the respondent could establish her capacity to sue or rights or interests was to first file and obtain declaratory orders that the suit property was her matrimonial home. The respondent based her claim on the purchaser's rights, as held in the ***Diasproperty Limited -vs- Githae*** (*supra*), one could only go to the Environment and Land Court and not the succession court, as it is one seized of jurisdiction.

79. The upshot is that I find the appeal incompetent and lacking merit. It is dismissed with costs. The lower court ruling is confirmed.

80. Orders accordingly.

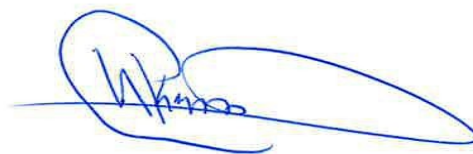
Judgment dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 24th day of March 2026.

In the presence of:

Court Assistant - Dennis

Nabwile for the appellant present

Gemenet for the respondent present



**HON. C.K. NZILI
JUDGE, ELC KITALE.**

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