Mosaisi & another v Akombe & another (Environment & Land Case E014 of 2022) [2024] KEELC 134 (KLR) (18 January 2024) (Judgment)

Neutral citation: [2024] KEELC 134 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE E014 OF 2022

FO NYAGAKA, J

JANUARY 18, 2024

BETWEEN

PETER AKOMBE MOSAISI ..... 1ST PLAINTIFF

ANNAH MOKEIRA ROBERT ..... 2ND PLAINTIFF

AND

EUNICE NYANCHAMA AKOMBE ..... 1ST DEFENDANT

JELIAH NYAKERARIO ..... 2ND DEFENDANT

JUDGMENT

1. The emotional drain and stress that went into this suit when one part of a family pitted itself against another over a property which, if the family sat and resolved would have saved hundreds of thousands or even millions by avoiding a court dispute, reminded the Court of the Biblical account of the case of two mothers who lived in the same house, bore children two days apart, one of them lay on hers and it died and staged claim to the one who was alive (read 1 Kings 3: 16-28). It is written that the dispute went before King Solomon who, upon hearing the facts, asked for a knife to split into two the living baby. For love of the child its mother decided to give it up so that the child could live. This Court wished by asking the parties right from the start and still wishes not to split the 'live baby' they stage claim to by asking them to let wisdom, love and truth guide them in ending the wrangles over the 'baby' by this judgment.

2. By the above I mean that this Court hopes that even though by the end of this judgment it would have pronounced itself on both the law and facts herein, the parties will still find it in their hearts to reconsider their stands and give Caesar what belongs to him and God what belongs to Him (Mathew 22:21). This is urged of them through wisdom bearing in mind that the things of this world are temporal (2 Corinthians 4: 18) and each one of us should lay their treasures in heaven where neither moths nor rust will get to and destroy (Mathew 6: 19-21). This is further borne of the stark reality that

in this world the parties herein, just like any other being born on woman, their days are few and filled with sorrow (Job 14: 1-2) and they should look for a better country where with God not being ashamed of them (Hebrews 11: 16) they will live in streets of gold and transparent glass (Revelation 21: 21) and not houses built by bricks/stone and cement. That now set me to determining the dispute herein.

3. Through a Plaint dated 07/05/2022 and filed on 12/05/2022, the Plaintiffs instituted this suit against the Defendants. Incidentally, the 1st Plaintiff was the husband to the 1st Defendant, and the father to the 2nd Defendant. The 2nd Plaintiff was described as the 2nd wife of the 1st Plaintiff.

4. The suit pits, on the one hand, a man together his alleged newly married wife against his previously married wife and child(ren), on the other hand. If the dispute is not mere jealousy, wife rivalry and family strife I am not sure what else it can be. But the understanding of this Court is that the suit land and the house constructed thereon is only a fulcrum upon which these play out. If the family does not handle the emerging strain well, the once famous and respected iconic family will grind to a halt and cause enduring agony within its members.

5. At the outset the Court notes that the battle between the rival sides was extremely bitter, emotional and intense hence the long and detailed pleadings, with many witness statements and counter-statements aimed at clarifications of facts raised in turn, and even submissions. Therefore, the judgment is lengthy, too.

6. This Court wished and encouraged the parties, as much as possible, both before the hearing and particularly after the full hearing of the case, but before embarking on writing the judgment, following the dramatic withdrawal of one George Gisemba (PW4) as a witness and his evidence, and his passionate appeal for them, to reconcile and resolve the matter amicably but each side stuck to its guns. Thus, the Court had to do its duty: expeditious disposal of the dispute.

7. It is worthy of note that this Court does not have jurisdiction to determine matrimonial issues whether or not the parties herein claiming the existence of a marriage or the specific size of the share of property as between them have meritorious claims. In any event it has not been called upon to do so specifically but evidence was led and submissions made that way. But the issues herein are closely related to the two aspects. Therefore, it shall be cautious making findings that may easily touch on issues falling outside its jurisdiction and avoid them. For instance, as to the validity or otherwise of the marriages said to be in existence between the 1st and 2nd Plaintiffs, and the 1st Plaintiff and 1st Defendant.

Pleadings

8. The parties herein filed lengthy pleadings. But the Court understands the emotional strain this matter puts the families herein into.

a) Plaint

9. The 1st Plaintiff averred that he was validly married to both the 2nd Plaintiff and 1st Defendant, with the marriage between him and the two being conducted under Gusii Customary Law.

10. It was the Plaintiffs' case that the 1st Plaintiff was the registered owner of all that parcel of land known as Trans Nzoia/Kipsoen/1903 (herein referred to as "the suit land") measuring 2.30 Hectares or thereabouts. Further, that the 1st Plaintiff started a love affair with the 2nd Plaintiff in 2016 and eventually married her. He averred that as at the time of filing this suit the two were blessed with a boy aged 3 years old.

11. The 1st Plaintiff further alleged that as a result of the 2nd marriage he started establishing on the suit land a matrimonial home for the 2nd wife. He deposited some building materials on the suit land, sought

approvals of building plans and erected a permanent residential house which was near completion at the time of suit. He moved the 2nd Plaintiff from their rented house in Kisii County to Trans Nzoia County so that she would oversee the construction work. His further case was that the 1st Defendant had a matrimonial home established in Nyamira County more than 4 decades ago, and he and the Defendants ordinarily reside in New Jersey, USA. That due to irreconcilable differences since 2010 the 1st Plaintiff lives on his own but in the same city in the USA as the 1st Defendant.

12. The 2nd Plaintiff pleaded further that on 31/01/2022 she received a demand letter that she was a trespasser on the suit land and should vacate. Further, that on 14/03/2022 the Defendants, in the company of about 40 goons, armed with crude weapons, forcibly entered the suit land after pulling down the main gate and mounting their own and chased away the Plaintiffs' watchman and deployed their own unlawfully without the Plaintiffs' consent. She reported to the Karaus Police Post vide Occurrence Book (OB) No. 02/16/03/2022 but to little assistance. Further, that thereafter the Defendants ploughed the suit land and blocked the Plaintiffs from accessing it and planting crops thereon.

13. The Plaintiffs averred that the Defendants were violating their rights. As a result, they prayed for the following reliefs:-

    a. An order that the 1st Plaintiff is the validly registered owner of title No. Trans Nzoia/ Kipsoen/1903 and that it is not the 1st Defendant's matrimonial home.

    b. An order of permanent injunction to restrain the Defendants, their agents or anyone claiming through them from trespassing on the suit premises, laying any claim whatsoever over the same or in any way interfering with the Plaintiffs' use and quiet enjoyment of the suit premises.

    c. Costs of the suit

    d. Interest on c above.

b) The Defence and Counterclaim

14. The Defendants entered appearance and filed a Defence and Counterclaim dated 19/05/2022 on 20/05/2022. The 1st Defendant admitted that she and the 1st Plaintiff contracted a marriage under the Gusii customary law on 03/02/1973. From it they had seven (7) issues one of whom was the 2nd Defendant. They, however, denied knowledge and validity of the marriage between the Plaintiffs or that averment the 1st Plaintiff had two wives.

15. Regarding the registration of the suit land in the name of the 1st Plaintiff, which they admitted, they pleaded that the suit property was a subject to a trust in favour of the 1st Defendant as a joint tenant and the 2nd Defendant as the daughter of the 1st Plaintiff and 1st Defendant together with all her siblings with equitable rights of access to it as a family home.

16. At paragraph 5 the Defendants pleaded that the trust arose from a meeting held in February, 2015 at the home of Dr. Roselyn Akombe, a daughter of the 1st Plaintiff and 1st Defendant, at Eastern Parkway, Hillside in New Jersey in the United States of America in which both parents and all the seven issues (children) attended. Further, that in the meeting dubbed as "family meeting" it was resolved that the seven children provide funds for buying a parcel of land in Kitale for construction of a retirement and family home for the 1st Plaintiff and 1st Defendant.

17. They pleaded further that pursuant to the resolution the seven children raised an aggregate sum of Kshs. 4,373,475.41 for the purchase of the suit land from one Joshua Mariga Orangi and the construction of a house thereon. They particularized the various remittances made between

13/02/2016 and 02/07/2020 which amounted to the said sum. The particulars showed that the remittances were made by one Rogers Akombe, Caroline Nyakundi, Dr. Jeliah Akombe, Eric Akombe, Dr. Roselyn Akombe, Ednah Akombe and Ben Akombe.

18. The Defendants denied knowledge of a love affair between the Plaintiffs or the birth of the baby boy aged 3 years or that the 1st Plaintiff started establishing a matrimonial home for the 2nd Plaintiff on the suit land. It was their case that, contrary to the averment by the Plaintiff (sic) that he deposited materials on the suit premises, sought approval of building plans and erected a house thereon, the 1st Plaintiff and the 1st Defendant's son, one Rodgers, jointly designed a house for which they sought approval, and the construction materials were acquired by funds raised by the children of the 1st Plaintiff and 1st Defendant. Further, that contrary to the averment that the 1st Plaintiff moved the 2nd Plaintiff from Kisii to Trans Nzoia to oversee the construction, it was the 1st Plaintiff nephew who was involved in the construction on the suit land.

19. They pleaded that contrary to the 1st Plaintiff's averment that he and the 1st Defendant established a matrimonial home in Nyamira County over four (4) decades earlier, the home was in Nyagware Village the ancestral seat of the Mosaisi family where the greater Moriasi family and clan resided and established homes for the mature sons of the family and their wives and children. They denied that the said home was restrictively the matrimonial home of the 1st Defendant only since the 1st Plaintiff was obligated to settle thereon any other woman he married, being the ancestral land (land he inherited from his family in Nyagware), but not on the one he and the 1st Defendant established as their home and for her children.

20. The Defendants denied 1st Plaintiff's averment that he and the 1st Defendant lived in separate houses in the same city in New Jersey and stated that they both resided in the same house in New Jersey until January, 2022 when the 1st Plaintiff relocated to a different address upon returning from a month-long visit in Kenya. That it was in the said residence that the family meeting was held. They admitted the issuance of a demand letter but denied that the 2nd Defendant, in the company of about 40 goons armed with crude weapons, entered the premises and mounted their own gate and chased away the Plaintiffs. They denied further any knowledge of a report being made to the Karaus Police Station, ploughing the suit land or blocking the Plaintiffs from accessing the property.

21. They pleaded that the Plaintiffs were not entitled to the injunctive orders sought. They then counterclaimed by reiterating the paragraphs 4, 5 and 6 respectively of the Defence regarding a trust existing on the suit land, a family meeting having been held wherein it was decided to buy the suit land and construct a family home thereon and the seven children having made respective contributions towards the cause, and averred that the suit land was subject to a constructive trust whose particulars they gave as follows:-

    i. the concept of purchase of the suit property was mooted by the children of the 1st Plaintiff and 1st Defendant and culminated in a resolution passed by the Akombe family.

    ii. Remittances made pursuant to the family resolution facilitated the acquisition of the property from one Joshua Mariga Orangi and construction thereon of a house made in execution of the resolution was the consideration upon which the constructive trust in favour of the 1st Defendant as a joint tenant owner was entitled to the registration as such and in favour of the 2nd Defendant and her siblings as having equitable rights to access the family home.

    iii. The registration of the suit property in favour of the 1st Plaintiff rendered him a trustee of the constructive trust with fiduciary obligation to hold the same subject to the rights of the beneficiaries and not to act in any manner that violated their rights over the suit property.

22. The Defendants pleaded further that a declaration of the suit land as the matrimonial home of the Plaintiffs would be a gross violation of the trust and a judicial sanction of unlawful, irregular, improper, egregious and fraudulent conversion by the 1st Plaintiff of trust property in violation of his solemn responsibilities as a trustee holding the property on his behalf and his children and grandchildren. They particularized the fraud as follows:

    i. The 1st Plaintiff was a participant in the Akombe family meeting and the resolution made thereat of which he was aware of the terms thereof since February, 2015.

    ii. The 1st Plaintiff was aware that from the funds raised by the children of the 1st Plaintiff and 1st Defendant the suit property was acquired from the seller and a house constructed thereon in execution of the Akombe family resolution.

    iii. Any purported installation of the 2nd Plaintiff in the suit property and any conferment by the 1st Plaintiff of an interest upon the 2nd Plaintiff would be in violation of the Akombe family resolution and of the equitable rights of the Defendants over the suit property.

23. The Defendants pleaded that the Plaintiffs' conduct of barring them from accessing the property was in brazen violation of the trust aforesaid and of their equitable interests in the property and the Plaintiffs ought to be injuncted permanently from obstructing the Defendants' access of the suit property and prohibited further, by orders of inhibition, from transferring, charging, subdividing, leasing, or otherwise alienating in any way whatsoever the suit land, pending the final orders of the Court. The Defendants having admitted the jurisdiction of the court and averred there was no suit pending or other previous proceedings as between the parties over the suit land, prayed for the dismissal of the Plaintiff's suit. Further, they sought the following reliefs:-

    1. A declaration of a constructive trust as aforesaid over the suit property in favour of the 1st Plaintiff (sic) as a joint tenant and equal co-owner thereof and in favour of the 2nd Defendant and her siblings as the holder of equitable rights to access the suit property as their family home.

    2. Orders compelling the 1st Plaintiff to effect the registration of the 1st Defendant as a joint tenant and co-owner of the suit property failing which all documents necessary to effect the said registration be executed on his behalf by the deputy registrar of this court.

    3. A declaration that the 2nd Plaintiff is a trespasser upon the suit property with no rights of entry, occupation and possession thereof.

    4. An order permanently injuncting the 2nd Plaintiff from entering upon, trespassing on, or otherwise interfering with the suit property.

    5. The costs of this suit both party and party as well as advocate and client together with interest thereof from the date of filing suit and until payment in full.

    6. Any other or further relief as this Court may deem just and fit to grant.

c) Reply to Defence and Defence to Counterclaim

24. Upon the filing and service of the above pleading, on 20/06/2022 the Plaintiffs filed a Reply to Defence and Defence to the Counterclaim dated 13/06/2022. In it they reiterated the contents of the Plaint but admitted paragraph 3 of the Defence and Counterclaim which paragraph was to the effect that both the 1st Plaintiff and 1st Defendant contracted a marriage under Gusii customary law and brought forth seven children of whom the 2nd Defendant was one. The 1st Plaintiff reiterated that he was the

absolute owner of the suit land and denied the existence of a trust over the same in favour of the 1st Defendant or anyone else.

25. The 1st Plaintiff pleaded further that all the seven children who were of the age of maturity (sic), including the 2nd Defendant, had acquired homes of their own in New Jersey State in the USA but the 1st Defendant who no longer resided with him had a matrimonial home in Nyamira County. Further, that it was untrue that a family meeting was held in February, 2015 to conceive acquisition of a matrimonial home in Kitale or Trans Nzoia County for both the 1st Plaintiff and 1st Defendant.

26. The 1st Plaintiff denied receipt of the sum of Kshs. 4,373,475.41 or any other smaller or larger sum on account of the purchase of the suit land or the construction of a house thereon. He pleaded further that if any sums were received by him as pleaded, they were for his upkeep and appreciation for his efforts in raising and paying for the welfare and education of the seven children hence the 1st Defendant should not hang on as a beneficiary any gift granted to him. He averred further that the sum of Kshs. 2,500,000/= allegedly paid between 06/02/2015 and 16/03/2017 by his son Rogers Akombe and Caroline Nyakundi (his wife) was his (the 1st Plaintiff's) money sent from the USA through Dr. Roseline Akombe, his daughter.

27. The 1st Plaintiff averred further that on 20/01/2016 he personally transferred a sum of Kshs. 1,800,000/= from his Kenya Commercial Bank (KCB) account held at Nyamira Branch, being account No. 110XXXX766 to Joshua Orangi's account No. 117XXXX352 on account of the sale agreement over the suit land. He denied that the house constructed on the suit land was designed jointly with his son Rogers and him and alleged that on the contrary it was done by him and his nephew George Gisemba and the 2nd Plaintiff who sought statutory approval of the plans.

28. In regard to the Defendant's averment that the 2nd Plaintiff should be settled in the ancestral home, the 1st Plaintiff pleaded that customs are dynamic hence there was no strict customary requirement that it be so because modern trends are that families may buy land away from their ancestral homes. He denied having resided in in the same house (in the USA) with the 1st Defendant until December, 2021 and stated further that for a long time he lived in his own room separate from the 1st Defendant's until his belongings were thrown into the streets and he was ejected from the said premises.

29. He denied the allegations and particulars of a trust, and fraud and its particulars. He averred that the counterclaim was misconceived, scandalous, not disclosing any reasonable cause of action and should be struck out, and the 1st Defendant was not entitled to the reliefs sought in it. He prayed for its dismissal with costs.

d) Reply to Defence to Counterclaim

30. On 15/07/2022 the Defendants filed a Reply to Defence to Counterclaim dated 12/07/2022. They joined issue with each and every averment in the Plaintiffs' Defence to their Counterclaim. They pleaded that the ages of the seven children and the fact of them owning homes in New Jersey, USA were irrelevant and immaterial to the fact that a family meeting was held in February, 2015 which resolved to buy a property in Kitale and construct a family home for their parents thereon.

31. They pleaded further that the sum of Kshs. 4,373,475.41 was neither a gift for the 1st Plaintiff nor for his upkeep but was for purposes of acquiring the suit property and construction thereon of a retirement home as resolved by the family. Further, they denied that the sum of Kshs. 2,500,000/= sent from the USA to the 1st Plaintiff by his son Rogers and daughter-in-law Caroline was the 1st Plaintiff's and that the Plaintiffs did not offer any details of the alleged transactions by him. They pleaded the Latin maxims, "semper necessitas probandi incumbit ei qui agit" (the necessity of proof always lies with the

person who lays charges) and "affirmanti non neganti incumbit probatio" (the burden of proof is upon him who affirms).

32. Regarding the KCB account No. 110XXXX766, they pleaded that it was a joint account held by the 1st Plaintiff and the 1st Defendant since 2009 and operated on individual mandates and into which the 1st Defendant had been banking monies earned from her shares portfolio, businesses and day-care payments for services she provides in New Jersey, as well as donations received by both account holders from their children.

33. They denied further that George Gisemba had something to do with the design of the house on the suit land. In regard to building the home away from ancestral land they averred that although the Gusii customary law did not bar establishment of matrimonial homes away from ancestral land, the suit land was not and could not have been a matrimonial home for the Plaintiffs because from the family meeting of February, 2015 it was to be a retirement home for both the 1st Plaintiff and 1st Defendant.

34. The Defendants denied, in reply to the 1st Plaintiff's averment that he was living in a separate room from that of the 1st Defendant for a long time until his belongings were thrown out of the residence, that it was only in January, 2022, after making known his marriage with the 2nd Plaintiff, that he (1st Plaintiff) moved out to his own house.

Evidence

35. At the close of the pleadings the parties gave oral testimony in addition to both the written witness statements and documentary evidence as hereunder.

The Plaintiff's Evidence

36. The 1st Plaintiff testified as PW1. He testified that he lived and worked in the USA as a security officer. That before settling there he was a civil servant in Kenya but he retired and migrated. His testimony was that he had a home in Nyagware Village of Nyamira County. That the 2nd Plaintiff was his 2nd wife while the 1st Defendant was his 1st wife and the 2nd Defendant his 1st born daughter through the 1st marriage.

37. He testified further that he wrote a first witness statement dated 11/05/2022, a second one dated 27/06/2022 and a third one dated 02/07/2022 all which he adopted as his evidence in-chief.

38. In the statement dated 11/05/2022 he stated that he was married to both the 2nd Plaintiff and the 1st Defendant. That he and the 1st Defendant and her children lived in New Jersey in the USA but whereas the 1st Defendant and her children lived and worked in the same city he and the 1st Defendant lived in separate apartments within the same city due to irreconcilable differences. Further, that in 2016 he fell in love with the 2nd Plaintiff and finally married her under the Gusii custom and they were blessed with a son aged 3 years.

39. He stated further that he bought the suit land in 2016 from one Joshua Mariga Orangi at a consideration of Kshs. 4,500,000/=. The said parcel was transferred to him as Trans Nzoia/Kipsoen/1903.

40. Further, that the purpose of acquiring the suit land was for him to settle the 2nd Plaintiff away from the 1st family and enjoy a peaceful retirement. That while he was away in the USA the 1st Defendant incited her children, particularly the 2nd Defendant, to gang up against him and take over the suit land. That he raised all the children responsibly hence he did not expect embarrassment and humiliation from them.

41. He stated further that in January, 2022 the 2nd wife informed him of a letter sent to her by his sons and the 2nd Defendant through their learned counsel alleging that the suit land was purchased with their

money as a retirement home for him and the 1st Defendant. That he had put up a four bedroomed bungalow on it. He denied that claim by the children and stated that he bought the suit land with his hard-earned cash. He stated further that recent to the suit the 1st Defendant had changed the security detail in the ancestral home in Nyamira in a bid to deny him access thereto. He stated that the claims by the children were ridiculous and the voice of the 1st Defendant.

42. In the second statement he wrote that he and the 1st Defendant attended the same primary school, namely, Mokomoni. The 1st Defendant became his girlfriend in 1968 when he was in first year of high school and they married under the Gusii customary practices in 1973. As a result of the marriage they were blessed with four (4) boys and three (3) daughters all of whom were currently in the USA.

43. He wrote further that Rogers was the first to migrate to the USA through his (1st Plaintiff's) single handed effort while Roselyn K. Akombe joined him on her own arrangement after she graduated from the University of Nairobi. He paid fees for his other three children, Juliah, Ednah and Bernard in post-secondary school institutions. In 2002 he and the 1st Defendant relocated to the USA. He started working while the 1st Defendant remained at home not doing any gainful work since.

44. His further written evidence was that while in Kenya he placed the 1st Defendant in employment as an untrained teacher. He bought a matatu, registration number KDY 429 which boosted his income to the extent of building a decent home in Nyagware in 1986. That it was after constructing the Nyagware home that the 1st Defendant began showing signs of unfaithfulness and he sensed something was not right.

45. Further, that upon him confronting the 1st Defendant with facts she stated she did not love him and that he did not help her secure a job, that she accused him spending money on women while she educated their children, and that she was the one who built the Nyagware home.

46. He detailed that in the USA they first settled in a property bought jointly by Roselyn and Rogers. Later when Roselyn bought another house and Ednah hers the 1st Defendant moved with them to alternate residence. That things became worse his son bought his property in Poconos and the other daughter in Briarwood the 1st Defendant abandoned the 1st Plaintiff in the residence they settled in first. That when the house in Jersey was rented out, Ednah took him in at 233 FitsPatrick Street while the 1st Defendant moved to 55 Eastern Parkway with Roselyn. That from that time the 1st Defendant got all the freedom she needed hence could travel back to Kenya without his knowledge and reside in the family Kisumu house and not the Nyagware one. That the 1st Defendant built a wall between them and therefore did not attend the 1st Plaintiff's graduation in 2010. The children tried to reconcile them by moving him to Eastern Parkway but it was not possible since the 1st Defendant lived upstairs while the 1st Plaintiff lived downstairs. Then one day they (sic) called police accusing the 1st Plaintiff of planning to hurt himself or someone else. But the police read malice and let him stay on. It was that night that they threw him out of the house with his belongings to the street. Only the grandchildren took him back in.

47. Further, that in 2021 while the 1st Plaintiff was in Kitale and the 1st Defendant in the Kisumu home, his daughter and siblings back in the USA residence removed his belongings to a storage facility and told him never to set foot back in the residence. He obeyed and looked for a place to reside in.

48. That they (sic) hatched a plan to take away the 1st Plaintiff's land in Kitale, his 504 car (sic), his Toyota car, and truck No. KCT 554W but he managed to move them, except the 504 car, to a safe place. That in the meantime he had been "booted" from the Kisumu home.

49. That was how, after 2010, he (1st Plaintiff) came up with a plan to find someone, now one Annah Mokeira (the 2nd Plaintiff), who would love him. He decided to buy the suit land and construct a home

for the two of them. He stated further that he had not been with the children's mother for many years, and there was never a meeting held to plan how to buy land and build a house to live with his estranged wife. And that he was never assisted to buy or develop the land.

50. Regarding the payments his son Rogers Akombe claimed to have made for the purchase of the land he stated that they were his (the 1st Plaintiff's) last three instalments to the land owner and the money was delivered from the USA by his (Roger's) sister Roselyn.

51. Second last, PW1 stated in the witness statement that he no longer had access to the children's properties in the USA, a property in Rongai (Nairobi) which he claimed he bought jointly with his son Steve Moseti Akombe, his land in Kisumu, the residence in Kisumu, the suit land, and also the Nyagware home. He stated that they (sic) had planted goons in the Nyagware home with full instructions to do harm to him. Also, he refuted the statement by his brother John that he (John) was the only one staying at the ancestral home in Nyagware since the 1st Plaintiff's other brothers, Philip Segera and Charles Kenen lived there with their wives. Further, that John did not have instructions of the 1st Plaintiff to access his homestead and plant goons there. Lastly, he stated that he wanted the Nyagware home to be accessible to both him and the 1st Defendant but the Kitale residence (suit land) be free from interference to himself and the 2nd Plaintiff.

52. In the statement of 27/06/2022 the 1st Plaintiff wrote that the money Rogers Akombe claimed to have made for the purchase of the land was the last of his (1st Plaintiff's) three instalments to the vendor. In the Further Statement dated 02/07/2022 clarified that the money he sent to Rogers Mosaisi through his older sister Roselyn Akombe was Kshs. 1,950,000/= (in US Dollars). That on 04/02/2017 his son Rogers released a sum of Kshs. 1,300,000/= and withheld the balance of Kshs. 650,000/= contrary to instructions. After many calls from the vendor about delayed completion of the agreement he (1st Plaintiff) travelled to Kenya and visited Rogers at his Rongai home on 04/03/2017 whereupon Rogers admitted to having not remitted the money but that he had given his wife Carolyn Kshs. 300,000/= and remained with a balance of Kshs. 350,000/=. That on the same date he (the 1st Plaintiff) withdrew a further sum of Kshs. 550,000/= from his KCB Account No. 1100XXXX766 (sic) Rongai Branch in the company of his son. That he gave it to his son with instructions to add to the balance he (the son) was holding with his wife and that this was the money Rogers and his wife Carolyn wired to the seller on 16/03/2017 as Kshs. 900,000/= and Kshs. 300,000/= respectively.

53. Having adopted the evidence in the three statements above, PW1 testified orally, further, that he married the 2nd Plaintiff in 2017 under Gusii customary practice. He refuted the 1st Defendant's claim of the Kitale land being held by him under a trust. He stated that the 1st Defendant did not contribute for the purchase of the suit land or the construction thereon. Further, that she had neither worked in the USA nor filed tax returns but lived as a dependant of the 2nd born daughter Dr. Roselyn Kwamboka A.

54. PW1 denied holding a joint account with the 1st Defendant in Kisii and further that the latter never deposited money into the account. He repeated that there was never a family meeting held in the USA to plan for the purchase of and construction on the suit land for a retirement home. He denied also any contributions by family members towards it. He disclaimed the allegation and the prayer for a joint registration of the property with the 1st Defendant.

55. His further testimony was that by the time he bought the property his relationship with the 1st Defendant had been strained and they were not living together. After buying the suit land he constructed the house that was currently on it with the help of his nephew George Gisemba who was

his manager while the 2nd Plaintiff was in charge of finances. He stated that he used to send money to the 2nd Plaintiff or George who would buy material for construction.

56. PW1 produced in evidence a number of documents, to support his evidence. The first set was contained in the List of Documents dated 07/05/2022. In regard to this List he produced as P.Exhibit 1 a Sale Agreement, dated 20th day of an unknown month of 2016, P.Exhibit 2 a title deed issued in respect of the suit land on 26/07/2019, P.Exhibit 3 a Demand Letter dated 31/01/2022 issued by M/S Kiarie and Company Advocates, P.Exhibit 4 a letter dated 31/01/2022 in reply to the demand letter, P.Exhibit 5 a copy of an approval letter dated 30/04/2022 from the County Government of Trans Nzoia, P.Exhibit 6 a Sketch Plan and P.Exhibit 7 photographs of the house constructed.

57. PW1 also produced as evidence another set of two documents which were listed in the Further List of Documents dated 06/07/2023. These were P.Exhibit 8 a withdrawal Slip dated 04/03/2017 for Kshs. 550,220/= in relation to account No. 110XXXX766, which was stamped as received on 04/03/2017 at the KCB Rongai Branch, and P.Exhibit 9 a certified copy of a KCB Statement of an account number 117XXXX352 in the name of one Joshua Mariga Orangi for the period between 01/02/2017 and 20/03/2017 which contained highlights of the sums of Kshs. 1,300,000/= paid on 08/02/2017, Kshs. 900,000/= on 16/03/2017 and another sum of Kshs. 300,000/= paid to him the same date, of which PW1 stated on oath as follows, "The same day I transferred Kshs. 300,000/=. I explained the details." He ended his evidence in examination in chief that the 1st Defendant was interfering with private property.

58. But on this assertion that he transferred Kshs. 300,000/= to Orang'i this Court notes that from P.Exhibit 9, it is a lie. On the contrary it is clear that the sum was paid on that date by Rogers Mosaisi and not PW1.

59. In cross-examination, PW1 testified that his current address was 233 Fitspatrick, Street, New Jersey, 07205, USA in which he had lived for four or five years. He stated that he arrived in the first USA address which was 71 Bronkerhhoff Street, New Jersey, in February, 2002, which was a home jointly owned by his daughter Roselyn and son Rogers Mosaisi. He stated that he lived in that 1st address with the 1st Defendant for a period of eight (8) years, which was up to 2010. It was in 2010 he moved to the current address (house) owned by his daughter Ednah Kerubo. That he stayed up to about December, 2011 and that the 1st Defendant was not living in the said address. He then moved to 55 Eastern Parkway, Hillside New Jersey which property was owned by Dr. Roselyn, his 2nd born daughter. He stayed there up to December, 2021 or January, 2022 when he was restrained from living there. He stated further that up to that moment the 1st Defendant resided in the same address.

60. Regarding the acquisition of the suit property, he stated that he found it either in late 2015 or early 2016 after scouting for it in the company of his son Steve Moseti and nephew George Gisemba. Then he travelled with his son Steve to Nyamira to meet the vendor. That during the negotiations in Nyamira, his son remained in the car.

61. About the 2nd Plaintiff, he stated that he had written that he met her in early 2016 but in her witness statement she stated that they met in December, 2017. He insisted that the 2nd Plaintiff had met him in 2016 in Nyakoe Hotel. That after that he married her under Gusii Customary law, following all steps, whereof one is that there is the 1st visit to the girl's place. It is known as "Ekerorano" but it does not happen nowadays.

62. He stated that he and the 2nd Plaintiff started living together and later they informed her parents. Then they went through the formal dowry negotiation, known as "okomaana chiombe". They had a party

in the 2nd Defendant's home. In attendance was George Gisemba and James Ndubi. He admitted that the customary marriage had not been registered under the *Marriage Act*.

63. About the financial status of the 1st Defendant PW1 admitted that he was aware she filed tax returns in the USA but through another person. That she did so as a dependant. He admitted though that at no time did the 1st Defendant seek his advice on the filing of tax returns and he did not assist her to do so.

64. Regarding the purchase price of the suit land, he stated in cross-examination that the vendor increased the price twice but it was not discussed in the family. He still denied that there was no family meeting in February, 2015.

65. On further cross-examination about neighbours in the suit land, he stated that he did not know Lucy Namonywa and if she was one. But he recalled visiting the property in October, 2018 after he came for his brother's funeral. He recalled doing the visit in the company of the 1st Defendant. However, he could not recall giving a lift to a neighbour who was going to towards Kapenguria.

66. Cross-examined about the photographs filed by the Defendants, which showed him celebrating social events, including his birthday celebration, with family both in the USA and Nyamira, he admitted that they were taken in 2019 and 2021. He also admitted that the 1st Defendant and her (their children) attended the celebrations.

67. Regarding the transfer payments which were detailed in the written witness statement filed by his daughter Dr. Roselyn, he stated that they had nothing to do with the suit land. He stated further that the statements and remittances were "made up", including those to Mr. Orangi. He also testified in cross-examination that the payments his daughter Jeliah claims to have made were also "made up". Upon being referred to Dr. Jeliah's Statement and cross-examined in it he admitted that she made remittances between 13/02/2016 and 02/07/2020.

68. PW1 admitted further in cross-examination that the remittances of Carolyn Nyakundi and Rogers Mosaisi Akombe contained in the said written statement were a true reflection of what took place but the rest were "made up." However, he stated in further cross-examination that he could not recall whether the remittances shown were in his M-Pesa Statement.

69. He denied that his decision to put up a house for the 2nd Plaintiff on the suit land was made in 2021 way after the land had been purchased. At first, he stated that he could not tell whether or not Dr. Roselyn (his daughter) contacted the seller. But again, he stated that he introduced the seller to her and gave her money in dollars to change to Kenyan currency and give the vendor of the suit land. He again stated that he was unaware if the said daughter, Dr. Roselyn, intervened in the dispute between him and the vendor over the increment of the price of the property.

70. When cross-examined further he admitted that he saw text messages and emails by her over the variation of the price of the suit land. On that he stated that Dr. Roselyn was doing it without his knowledge. He admitted, though, that there was a statement from the vendor on how they (sic) were withholding the money due.

71. In re-examination, PW1 repeated that he scouted for the land in the company of his son, Steve, and nephew, George Gisemba. He stated that Steve's role was to drive the car but he (the 1st Defendant) did not inform him that he was buying land.

72. PW1 repeated having visited the 2nd Plaintiff's home in the company of George Gisemba and one Ndubi whereat he and the others introduced themselves and the purpose of the visit which was that he wanted to marry the 2nd Plaintiff. He stated that he paid dowry in form of money.

73. In regard to the payment of Kshs. 900,000/= on 16/03/2017, PW1 repeated his earlier statement on it. About the payment of Kshs. 1,300,000/= by Dr. Roselyn he stated that he had given the money on 08/02/2017 in US dollars to Roselyn. He repeated that the remittance of Kshs. 300,000/= on 6/03/2017 was from him. That he had given the money to Rogers and he travelled to Kenya to force Rogers to remit the same to Joshua Mariga. So, he (PW1) withdrew Kshs. 550,220/= to give Rogers to top up. That PW1 witnessed Rogers depositing the top up money into his account. Then he asked him on the same date to transfer the money to the vendor of the suit land and he (Rogers) did so. Further, PW1 stated that he asked him (Rogers) to do the same regarding the Kshs. 300,000/= his wife held onto.

74. Lastly, he changed his mind to state that when Dr. Roselyn contacted the vendor over the variation of the purchase price of the suit property she did so on his own authority.

75. The 2nd Plaintiff who then resided in Trans Nzoia testified as PW2. But by the time they filed suit she, PW2 gave the 1st Authority to Plead. It was dated 06/05/2022 but was filed together with the Plaint. She wrote a short statement dated 07/05/2022. She adopted it as her evidence in-chief. In it she stated that she was the 2nd wife of the 1st Plaintiff and that she adopted his statement dated the same date in the parts that were relevant to her evidence. Further she wrote that she had been on the suit land since 2020 when the 1st Plaintiff pointed it out to her as her matrimonial home. She stated further that the 1st Plaintiff and her had a son aged 3 years.

76. She also adopted as her evidence in-chief her other statement dated 27/05/2022. In it she stated that she met the 1st Plaintiff around December, 2017. He proposed to marry her and she accepted but asked him to make his offer to official by paying her parents a visit.

77. She stated further in the statement that on 15/12/2021 she and some of her family members received the 1st Plaintiff at the Jomo Kenyatta International Airport. From there they travelled to her family home in Kitale. The 1st Plaintiff introduced himself to her parents and paid Kshs. 400,000/= as part dowry. Her parents accepted it and blessed their relationship. That they had been lovers since 2017 and she had started playing her role as a wife at the construction site of the property the 1st Plaintiff intended to be their matrimonial home.

78. She confirmed the statement of Gisemba to be true. She stated further that the 1st Plaintiff used to send to both her and Gisemba money for the construction. She gave the example of a payment of Kshs. 337,305/= she made to a hardware in Kitale on behalf of the 1st Plaintiff for iron sheets for the house. She stated that he sent the money to her to pay.

79. Lastly, she stated that she was not married to any other person earlier hence had capacity to marry the 1st Plaintiff.

80. In her oral testimony PW1 stated that she married the 1st Plaintiff in 2017. Her further evidence was that she knew the suit land in 2020 when PW1 pointed the same to her. That PW1 gave her the duty of paying construction workers and buying some construction materials and food for cooking.

81. She stated that on 14/03/2021 she was called by George Gisemba who informed her of the 1st Defendant and her daughter complaining that the suit land was theirs. She did not visit the suit land since and she did not know what the two did thereon. She stated that PW1 had told her that the land was his and he showed her the title thereto.

82. On cross-examination, PW2 admitted that it was true she met the 1st Plaintiff around December, 2017. She also stated that the 1st Plaintiff visited her family in December, 2021. She stated that PW1 did not

inform her that he visited the property in 2018 in the company of the 1st Defendant: that she only heard it from his testimony in Court.

83. She admitted in further cross-examination that since PW1 visited her home in 2021 and paid dowry, they had never tried to register their marriage under the *Marriage Act*. Learned counsel did not re-examine her on any issue.

84. The two Plaintiffs called one Lawrence Sadaka, a neighbour, who testified as PW3. He stated that he wrote a statement on 07/05/2022 which he adopted as his evidence in chief. In it he stated that he knew the 1st Plaintiff (PW1) in 2017 when he bought the suit land which is adjacent to his. Then the PW1 employed him as a watchman on his farm since the time he took possession that year. PW1 used to pay him Kshs. 7,000 per month through one George Gisemba.

85. He wrote further that in 2020 PW1 started constructing a permanent house on the land. In the year 2020 PW1 introduced to him a lady, one Annah Mokeira, as his wife and that he was building the house for her. But this was contrary to the evidence of PW2 about formally marrying PW1 soon after leaving Nairobi on 15/12/2021. He stated further that Annah commuted from Kitale town every day to oversee the construction, and she used to cook for workers and also buy construction materials. She was assisted by one George Gisemba on all matters.

86. He stated further that on 14/03/2022 at 2.00 pm a strange woman in the company of her daughter and over 20 people went to the suit land and alleged she was the 1st Plaintiff's wife. That he came to know the woman as the 1st Plaintiff's wife. The went in three (3) vehicles one of which was loaded with a metal gate. They pulled down the 1st Plaintiff's gate and mounted a metallic one.

87. He stated further that the woman introduced to him as watchmen two men who had accompanied her. She wanted him to work with them but he refused and she ordered him out of the premises. That when he refused to surrender keys, she broke padlocks to the store and temporary house where workers lived. He reported the matter to the Karaus Police Post on that date and it was booked as OB 01/16/2022. That PW3 called George Gisemba and informed him of the issue. Lastly, that he knew the parcel of land belonged to the 1st Plaintiff.

88. In his oral testimony he stated that he was both a worker and caretaker of the 1st Plaintiff since 2017.

89. In cross-examination PW3 repeated that he met the 1st Plaintiff in 2017 and he only knew the 1st Defendant in the recent past when she went to complain about the suit land which neighbours his. He admitted that when the 1st Plaintiff visited the suit land in October, 2018 he met him. That it was a short meeting after which the 1st Plaintiff left without telling him that he had a funeral.

90. On further cross-examination he repeated that he received his salary only through George Gisemba and at no time did he receive through Rogers Akombe. Learned counsel for the Plaintiffs did not re-examine him on anything.

91. Upon the conclusion of PW3's evidence the Plaintiff's called George Gisemba as PW4. He started giving his evidence briefly and adopted his witness statement but he stated that he was not comfortable at all in testifying for his uncle and against his aunt who had raised him up, and against his cousins whom they grew up together. As such he recanted all his evidence, and all parties agreed that his evidence be wholly withdrawn or disregarded. It was so. It means none of the activities the parties alleged about Gisemba which were not corroborated by other evidence could be taken to have happened. Then the Plaintiffs closed their case.

92. The Defendants testified as DW1 and DW2 respectively. Then they called two more witnesses.

93. The 1st Defendant gave evidence as DW1. She began by stating that she resided in 55 Eastern Parkway, Hillside in New Jersey, USA and she worked as a childcare giver. She stated that she is paid per child whom she takes care of. Further, that the 1st Plaintiff had been her husband for over 50 years.

94. She stated that she did not know the 2nd Plaintiff until that day when they met in Court for the hearing of the case. She stated that she recorded and signed witness statements on 26/06/2022 and 12/07/2022. She adopted the two statements as her evidence in-chief.

95. In the statement dated 26/06/2022 DW1 stated that she was the 1st defendant and married to the 1st Plaintiff who was the father of her seven children, including the 2nd defendant who was their first-born child.

96. She stated further that a family meeting was held in February, 2015 at 55 Eastern Parkway, Hillside New Jersey in the United States of America the home of Dr Roselyn Akombe who was the daughter of the 1st Plaintiff and her. In the meeting - "the family meeting" - attended by the 1st plaintiff, herself and all their seven children they had discussions on the matter of the desire of the children to provide a retirement and family home for the 1st plaintiff and her. It was therefore resolved that the seven children would provide funds for the acquisition of land in the Kitale area on which to construct and establish a retirement and family home for them. She referred to the decision as "the Akombe family resolution".

97. Pursuant to the Akombe family resolution their seven children raised, for the purchase of the suit property from one Joshua Mariga Orangi (hereinafter "Mr. Orangi") and the construction thereon of a house, an aggregate sum of Kshs.4,373,475.41. The sum was paid through remittances effected by the 2nd Defendant, also Rodgers Akombe, Caroline Nyakundi (for her husband Rodgers Akombe), Eric Akombe, Dr. Roselyn Akombe, Edna Akombe and Ben Akombe.

98. She stated further that following the purchase of the suit property, a residential house was designed based on a sketch prepared by their son, Rodgers who was an engineer, for which architectural and constructions plans were submitted thereafter for approval and then material was acquired and construction commenced with the funds raised by their children. Her nephew George Gisemba was entrusted to supervise the works because both the 1st plaintiff and her lived in New Jersey, USA. That she also paid a neighbor, Nicholas Shikwekwe Sadaka, for minor jobs he did at their request and direction. DW2 had the opportunity to first visit the property in 2016 and made several visits since then as did children, Roselyn, Rodgers, Steve and Eric.

99. Her further statement was that the family home in Nyamira, established upon our marriage, was in Nyagware Village the ancestral seat of the Mosaisi family. That it was where the greater family and clan resided and homes established by the mature sons of the Mosiasi family for their wives and children. Her evidence was that for the 1st plaintiff to describe it restrictively as only my matrimonial home was disingenuous, because under Gusii customary law he was required to settle any other wife he married on land he inherited from his family in Nyagware Village, separate from where he established a home for her and her children.

100. She stated that the 1st plaintiff and her had for many years both resided in the same house in New Jersey, USA where the family meeting was held. That it was until January, 2022 when the 1st plaintiff relocated to his own address after returning from a month-long visit to Kenya from which he revealed that he had intentions to install the 2nd Plaintiff into the suit property. Further that the said revelation precipitated was the cause and reason for the 1st Plaintiff's departure to his own address.

101. She stated that they used her Kisumu postal rental address or box number, P. O. Box 7014 Kisumu, for the purposes of the acquisition of the suit property. That the postal address was used by the family

purposes for many years and connected to a family home they maintained in Kisumu where the 1st plaintiff and her resided and brought up their seven children.

102. Her further assertion was that sometime in October, 2018 she and the 1st plaintiff travelled to Nairobi from New Jersey, USA and then on to Kitale for the purposes of attending the burial of her late brother-in-law, Christopher Mosaisi, the younger brother of her husband. He sadly passed away on 9th October, 2018. She stated that the burial of her late brother-in-law took place on the 19th October 2018 at the Mosaisi family home in Nyagware and their joint presence in Nyagware and participation was in the solemn observance of Ekegusii cultural rites.

103. They then visited the suit property acquired pursuant to the aforementioned family resolution. Both of then flew on the 14th October, 2018 together from Newark Airport, New Jersey to Nairobi via Dubai and their return trip departed Nairobi on the 28th October, 2018 before which they stayed at the Park Inn by Radisson, Nairobi Westlands from the 27th October, 2018 up to the departure date. She stated that their air-tickets were paid for by their son Rodgers and their hotel stay by their son Ben Akombe.

104. She stated that while in Kenya during the visit she and the 1st plaintiff visited the suit property together, carried out an inspection of the grounds, and discussed and agreed on where they would construct the house and locate the gate, among other issues. While on the suit property, they met Mrs. Margaret Onkanki whom with her husband Mr. Domciano Onkanki, had leased part of the suit property from Mr. Orangi to carry out subsistence farming. She stated that the said lessees' arrangements with Mr. Orangi had been the subject of discussions with her family while still in New Jersey. That Mrs. Onkangi invited them to her home nearby and the 1st Defendant made sure that she was able to conclude her lease arrangements and harvest all her crop before vacating the land. That Mrs. Onkangi remained a neighbour and friend of the family.

105. She stated further that during the said visit to the suit land, they met Lucy Namonywa who had acquired from Mr. Orangi her property adjacent to the suit property and whose arrangements with Mr. Orangi had been the subject of discussions with her family while still in New Jersey. That Lucy was most helpful to then in showing them where they could source material for construction. As they departed, they gave her a lift to a bus stop near Kapenguria where she worked. She too remained a neighbour and friend of the family.

106. She stated further that she did not see, meet, know or become aware of the 2nd plaintiff at any stage of their October, 2018 visit to Kenya, either when they visited the suit property or at the burial of her late brother-in-law. Otherwise, if the 2nd Plaintiff had been married to the 1st plaintiff, her presence and participation in the burial would have been a mandatory requirement as his wife.

107. The party stated that a constructive trust was created over the suit property. She gave the particulars thereof as:

    i. The idea of purchasing the suit property, first mooted by their children, culminated in a family meeting at which they passed the Akombe family resolution.

    ii. The remittances made pursuant to the Akombe family resolution which facilitated the acquisition of the suit property from one Joshua Mariga Orangi and the construction thereon of a house were the consideration upon which the constructive trust arose in favour of the 1st plaintiff and her as the joint tenant owner of the suit property entitled to registration as such and in favour of their children as having equitable rights to access the family home.

    iii. The registration of the suit property in the name of the 1st plaintiff rendered him, a trustee of the constructive trust with a fiduciary obligation to hold the same subject to the rights of

the beneficiaries thereto and not to act in any manner that violated their rights over the suit property. Then she prayed for the reliefs sought in her Defence and Counterclaim.

108. In the second witness statement dated 12/07/2022, the 1st Defendant stated that they found it very distressing that her husband had approached this issue as a matrimonial dispute, exposing their family and especially their children and grandchildren to the indignity of his scandalous allegations of a very personal nature in a court process not protected by the conventions of privacy that a matrimonial dispute guaranteed. That their family had humble beginnings albeit the 1st Plaintiff slanted his account to give the false impression that he uplifted their family alone and through his unilateral effort. On the contrary, the 1st Plaintiff began his career at job group A, the lowest rank, while she worked as an untrained teacher and bore and brought up their seven children and looked after their homes. That they jointly educated all the seven children and were now proud grandparents to sixteen grandchildren.

109. That contrary to the averment that she had never been in gainful employment while living in the United States, she engaged in business while living at their daughter's home and had been a care-giver to both her husband and their grandchildren, enabling their parents to save substantially on the exorbitant costs of child day-care and to achieve financial stability. That as a result of that they have been able to purchase their own homes and houses and feed both she and the 1st Plaintiff for the 20 years they had lived with the children in the United States.

110. She stated further that she and the 1st Plaintiff maintained a joint account at Kenya Commercial Bank Ltd (hereinafter "KCB") which they opened sometime in 2009 when they contemplated of purchasing an apartment through a mortgage. They deposited into the account money from the proceeds of shares she held in Cooperative Bank Ltd and Safaricom Ltd.

111. That when she and 1st Plaintiff visited Kenya together in mid-October, 2018, they deposited into the account Kshs. 1.1 million of which Kshs. 500,000.00 was from their daughter Edna and her husband. She stated that she had received confirmation from the KCB manager that the account was still a joint one held with her husband Peter Akombe Mosaisi. She stated that she had a banking slip confirming that the first deposit of Kshs.1,8000,000.00 made to the vendor of the suit property was by way of a transfer to his account from the joint account of held by her and her husband.

112. She stated that the accusations of unfaithfulness and a litany of complaints by the 1st Plaintiff against her were outrightly false but also offensive not worthy of response and he had nothing to do with the family property other than to state that they are not only untrue but also not right. That they did not accord with her recollection of their lives together and were completely incongruous with the picture of their generally content lives captured in family photographs they had taken in the recent years. Further, the party pointed out as an obvious illustration of the falsehood of these accusations and complaints the 1st Plaintiff's assertion that she failed or refused to attend his graduation in the spring of 2010. She stated that on the contrary his graduation with a BSc Accounting degree was in the Spring of 2009 and she not only attended it but they took a picture together at the graduation.

113. She stated that 1st Plaintiff moved out to his own premises in January, 2022 after marrying the 2nd Plaintiff. She stated further that the 1st Plaintiff had personal choice and was free to marry other wives under the Abagusii customary marriage rites. But he ought to respect the fact that his children bought and paid for the suit property as a retirement home for she and him and he held the title to this property subject to a trust in our favour.

114. Lastly, that the Kisumu property belonged to their daughter Roselyn and she let them used it as her guests.

115. DW1 also produced a number of documents which were filed in two sets. The first one was a List of Documents dated 19/05/2022 which contained three documents. She produced them as D.Exhibit 1 being Facebook printouts of PW2 and alleged manfriend, D.Exhibit 2 being family photos and those of PW1 and DW1 in various events and D.Exhibit 3 being summary of remittances.

116. Then she produced the second set of eight documents which was contained in the List of Documents dated 12/07/2022. These were, D.Exhibit 4 which was copy of Post Box history for Box No. 7104 Kisumu, D.Exhibit 5 photograph of her and PW1 at his graduation, D.Exhibit 6 a shot of WhatsApp by Roselyn to family Nyagware Hills group, D.EXhibit 7 screenshot of WhatsApp messages between vendor and PW1, D.Exhibit 8 screenshot messages of WhatsApp between DW3 and Kennedy Ondieki Advocate, D.Exhibit 9 Emails copies exchanged between DW3 and vendor, and D.Exhibit 10 emails between DW1 and KCB over joint account.

117. Then she stated further in her oral testimony that she had been paying taxes in the USA since 2014 and been filing tax returns since then, which was the year she was given her green Card. She stated that she was 70 years old and was familiar with the Gusii customary rites of marriage. She summarized them that dowry has to be paid. But that the groom's relatives who visit the bride's place are brothers of the groom. They attend the dowry negotiation known as "okomaana chiombe".

118. According to her the custom does not permit a son to the groom or sister to participate in the dowry payment. Only the elder brothers of the groom attend the negotiations. DW2 stated further that George Gisemba was a son to the 1st Plaintiff by virtue of him being a nephew through his sister. Similarly, the said James Ndubi could not have accompanied PW1 to the negotiations because he was not from the 1st Plaintiff's clan. She stated that Ndubi hailed from Bokwege Clan while the 1st Plaintiff hailed from Mwa Nyokowyo clan.

119. Upon being cross-examined DW1 stated that she was born in 1954 and was therefore getting to 70 years old. She stated that she knew the Gusii customs very well. That even though she has lived in the USA for over 20 years the Gusii society had not changed much. She admitted that there used to be elopement which was known as "okobasa". That after a girl's elopement the man's people would, after some time, go to the girl's home do "declare" that their daughter was married to their son.

120. DW1 stated in further cross-examination that even in the USA the Gusii people have been conducting "ekerorano" but there were people who would marry without following the customs. She also admitted that there were instances where money was paid as dowry instead of live cows or animals.

121. DW1 admitted that the Plaintiffs had been married but stated further that she had not heard that the 1st Plaintiff paid dowry. She stated again that she did not have an issue with the 1st Plaintiff marrying another wife if he wished. Further, that if he had decided to marry the 2nd Plaintiff that was not an issue for her.

122. She stated in the testimony that the family held a meeting convened in the USA by Dr. Roselyn Akombe in February, 2015. In the meeting which was attended by all the family members it was resolved to buy land. She stated that prior to the meeting she and the 1st Plaintiff used to have discussions to consider if they would buy land. Finally, the children went on to plan to buy for the two of them land in Trans Nzoia for a retirement home. She stated that she and PW1 had a home in Kisii.

123. She admitted that she did not have minutes of the family meeting of February, 2015. DW1 stated further that the agreement by all was that they buy land for over Kshs. 500,000/=. They did not set a target sum for each to contribute. She also stated that regarding the cost of building the house they did not have a meeting but that was concluded in the meeting of February, 2015.

124. She repeated that they had evidence to show that they contributed to the building of the house. She admitted that the 1st Plaintiff owned a lorry which was used to transport materials to the site. She also admitted that she did not attach document to show that she personally send money as a contribution.

125. Her further testimony in cross-examination was that before they migrated to the USA she and her husband held a joint account in KCB, Kisumu branch. She stated that she did not have any evidence to show she contributed money to the said account.

126. DW1 testified that further that she had been paying taxes in the USA although she had not brought any document to Court to evidence that. Referred to the photographs she taken of her and PW1, she stated she was the one feeding her husband (the 1st Plaintiff). She admitted that under Gusii customs a husband was free to and would marry another wife even without there being differences between him and the 1st wife.

127. Regarding the money the children gave to the 1st Plaintiff, she stated that it was joint for them as husband and wife. It was her evidence that there was a family meeting in February, 2015. That she and the children, as a family, trusted the 1st Plaintiff as the head of the family that he would do right. She stated that there was no need to write the family minutes.

128. It was her further evidence in cross-examination that the 1st Plaintiff committed fraud. She stated that having been a wife to the 1st Plaintiff for many years she saw no need of writing down the minutes of the family meeting as though she and they did not trust him. She stated that he had since changed and decided to give the land to the other woman (the 2nd Plaintiff). It was her testimony that the 1st Plaintiff ought to respect the property she and her bought for themselves. She stated that it was that act of him giving the land to the 2nd Plaintiff that was the problem and not his marriage to her. She strongly object to him having her on the land where their children bought for the two of them. But that he was free to have the 2nd Plaintiff settled on the ancestral land in Kisii.

129. The 2nd Defendant who was a nurse by profession testified as DW2. She stated that she too resided in the USA. She acknowledged the PW1 and DW1 as her parents but did not know PW2. She adopted as her evidence in-chief her written witness statement dated 12/07/2022.

130. In her written witness statement, she stated that the 1st plaintiff and 1st defendant were her parents and those of her siblings, all of them being seven children. That they contracted their marriage under Gusii customary law on the 3rd February, 1973.

131. She stated also that the registration of the suit land known as Title No. Trans Nzoia/Kipsoen/1903 in the name of the 1st plaintiff was subject to a trust over in favour of the 1st defendant as joint tenant. That she and her siblings had equitable rights to access the family home. That the trust arose due to a family meeting in February, 2015 at the home of Dr Roselyn Akombe, in Hillside New Jersey in the United States of America. In the meeting both parents and all their seven children attended and discussed the plan to buy land in the Kitale area and construct a retirement and family home for their parents. That the seven children would provide funds for that purpose.

132. Her further statement was that pursuant to the Akombe family resolution the seven children raised an aggregate sum of Kshs.4,373,475.41 paid through remittances effected by Rodgers Akombe, Caroline Nyakundi, Eric Akombe, Dr. Roselyn Akombe, Edna Akombe and Ben Akombe and herself for the purchase of the suit property from one Joshua Mariga Orangi and the construction thereon of a house. She gave particulars of remittances made on various dates in US dollars and their equivalent in Kenyan currency from each of them to the 1st Plaintiff. They ran from the 13/02/2016 and ran chronologically to 02/07/2020. They were contained in documents which she produced as D.Exhibit 3.

133. She stated that their brother Rogers designed a residential house for which constructions plans were submitted for approval, material acquired and construction commenced with the funds raised by the children of her parents (siblings). A nephew to her father, that is her cousin, involved in the construction on the suit property of the retirement and family home. Further, that upon marriage her two parents established a family home in Nyagware Village in Nyamira, which is the ancestral seat of the Mosaisi family where the greater family and clan resided and homes established by the mature sons of the Mosiasi family for their wives and children. She stated that contrary to the 1st plaintiff's description of the Nyagware home restrictively as only the 1st defendant's matrimonial home, under Gusii customary law the 1st Plaintiff was required to settle any other wife he married on land he inherited from his family in Nyagware Village separate from that he established a home for the 1st defendant and her children.

134. Her further statement was that for years both the 1st plaintiff and 1st defendant had resided in the same house in New Jersey, USA. That was where the family meeting was held. That the 1st Plaintiff relocated to his own address in January, 2022 after returning from a month-long visit to Kenya. She stated that the demand letter was written to the 2nd plaintiff by the Advocates of both her and her mother in the exercise of our equitable rights in the suit property and in preparation of planting thereon, and that the Plaintiffs were not entitled to reliefs they sought.

135. The witness repeated word for word the statement of her mother (the 1st Defendant) regarding the creation of the constructive trust over the suit land. She listed the particulars thereof as:

    i. The idea of purchasing the suit property, first mooted by their children, culminated in a family meeting at which they passed the Akombe family resolution.

    ii. The remittances made pursuant to the Akombe family resolution which facilitated the acquisition of the suit property from one Joshua Mariga Orangi and the construction thereon of a house were the consideration upon which the constructive trust arose in favour of the 1st plaintiff and her as the joint tenant owner of the suit property entitled to registration as such and in favour of their children as having equitable rights to access the family home.

    iii. The registration of the suit property in the name of the 1st plaintiff rendered him, a trustee of the constructive trust with a fiduciary obligation to hold the same subject to the rights of the beneficiaries thereto and not to act in any manner that violated their rights over the suit property. Then she prayed for the reliefs sought in her Defence and Counterclaim.

136. She stated further that they (defendants) had a counterclaim. Her further statement was that the 1st Plaintiff had committed fraud whose particulars she gave which were similar as those she gave for the constructive trust. Then she stated that the plaintiffs' conduct barring them from accessing the suit property was in violation of the trust created and their equitable interests in the suit property. She asked the Court to issue an injunction against the Plaintiffs and other reliefs as sought in the Counterclaim and prayed for the dismissal of the suit.

137. The 2nd Defendant then referred to and adopted as part of her evidence the documentary evidence contained in the List of Documents dated 19/05/2022 which DW1 produced already. She produced documentary evidence contained in the Supplementary List of Documents dated 25/05/2022. The documents D.Exhibit 12, 13, 14 and 15 being letters all from Sendwave Compliance Officer to Jeliah, Rogers, Ednah and Benard respectively with statements dated 18/05/2022, 17/05/2022, 18/05/2022 and 18/05/2022 for money transfers from the respective individuals to the 1st Plaintiff. D.Exhibit 16, 17 and 18 being Cooperative Bank SWIFT/RTGS Applications dated 08/02/2016 for Kshs. 1,300,000/= by Rogers Akombe to Joshua Mariga's KCB Account No. 117XXXX352, also one

dated 16/03/2017 for Kshs. 300,000/= by Carolyne Moraa Nyakundi to the same recipient and another dated 16/03/2017 for Kshs. 900,000/= by Rogers Akombe to the same recipient. D.Exhibit 19 a copy of the title deed for the suit land, D.Exhibit 20-32 being Bank of America Remittances Advice documents, dated 3/06/2018 for US$ 100, another dated 24/08/20218 for US$ 100, another dated 05/11/2018 for US$ 50, one dated 23/02/2019 for US$ 500, one dated 25/02/2019 for US$ 500, another dated 30/03/2019 for US$ 100, another dated 25/05/2019 for US$ 50, another dated 03/07/2017 for US$ 60, another dated 03/08/2019 for US$ 50, another dated 17/12/2019 for US$ 50, another dated 20/03/2020 for US$ 50, another dated 06/06/2020 for US$ 100, and the last one dated 02/07/2018 for US$ 100. All were sent by Bernard Akombe to the 1st Plaintiff.

138. On cross-examination DW2 stated that the only remittances shown in the statement and documents relied on that she made as an individual were seven only. She specified them as being for Kshs. 110,660/= on 13/06/2016, Kshs. 202,000/= on 13/02/2017, Kshs. 4897/= on 18/04/2018, Kshs. 29,475/= on 18/010/2018, Kshs. 9713/= on 05/03/2019 and Kshs. 5031/= on 19/10/2019. Her evidence was that the other remittances were from her siblings. She stated that besides these, she would, when in the USA give her father money several times for the construction of the house. Each would be as much as an equivalent of Kshs. 5,000/=. She stated that she could not tell the total sum she gave him and there was no need to record all the moneys they gave him for the purchase of the land.

139. On further cross-examination DW2 stated that on 14/03/2021 she accompanied the 1st Defendant to the suit land. They had with them a gate to erect and someone to assist them to do so. She stated that they did not chase away the watchman. Her further evidence was that before going to the suit land she informed the 1st Plaintiff by way of texts but he did not respond. She stated that he was aware of their visit to the suit land but he cut communication with her.

140. DW2 too stated further that she did not have an issue with the father marrying another wife or many but the suit land was the problem.

141. In re-examination she stated that the footnote to her statement referred to the documents produced which were dated 19/05/2022 and 25/05/2022. She clarified that the remittances appearing on the List dated 25/05/2022 did also appear on the List dated 19/05/2022 but the seven (7) she was referred to were not part of those in the two Lists.

142. Upon the Court seeking clarification about the meeting said to have been held in February, 2015, she testified that it was a family meeting whose agenda was to buy land and build on it. That the house was meant for both her mother and father. About the Kshs. 1,300,000/=, Kshs. 900,000/= and the Kshs. 300,000/= DW2 clarified that the truth was that those were contributions by her together with her five siblings excluding their brother Steve Akombe.

143. The Defendants called Dr. Roselyn Akombe who testified as DW3. She too stated that she resided in the USA in 55 Eastern Parkway Hillside New Jersey and that her current job then was a Chief of Peace Building with the United Nations. She testified as DW3. She stated that the 1st Plaintiff and 1st Defendant were her father and mother respectively while the 2nd Defendant was her elder sister. She adopted as her evidence in-chief her witness statement which she wrote on 12/07/2022.

144. In the statement she stated that she was the second-born daughter of both the 1st plaintiff and the 1st defendant who bore seven children all together, following their marriage under Gusii customary law on the 3rd February, 1973. Her further statement was that their parents raised them in a home where honesty and integrity were always upheld. That her parents worked as civil servants and lived an honest life, which they instilled in the children. She stated that her father's statements were inconsistent with his character due to incorrect representation of issues.

145. She stated that her father stated correctly that she moved to the United States in 2000 without his assistance. She stated further that her father was retrenched by the Government of Kenya in 1995 at the age of 46 years, as part of the Structural Adjustment Programmes imposed by the Brettonwood Institutions. Her mother continued with her job as a primary school teacher. As a result, she and her siblings, Dr. Jeliah Nyakerario, and Rodgers Mosaisi joined her mother as the breadwinners of the family. Therefore, she organized for her parents to travel to the United States in 2002 to a property she co-owned with Rogers at 71 Brinkerhoff Street, Jersey City, NJ. Their father remained with them in the United States.

146. Her statement was that they (sic) always had utmost respect for their parents and provided for them, for instance by she taking up the father to live with her or her sister Edna in the United States for 20 years. That they supported their father from his age of 46 years after retrenchment. That even after assisting him to secure a job, they continued to pay all the bills, without his assistance.

147. The witness refuted father's statement that they moved from 71 Brinkerhoff Street and abandoned him at that property. She denied her father's statement of mistreatment stating that they were untrue. Further, that she repurposed her property at 55 Eastern Parkway, Hillside NJ to have a self-contained floor for her parents and not the basement. That to show how they loved and respected their father they surprised him with a car as a gift for his birthday in January 2021 as evidenced in the photos D.Exhibit 2 photos 008 and 009.

148. She stated that she and her siblings decided that their parents deserved a bigger piece of land to farm and keep cattle, away from the small parcel of land in their ancestral home in Nyamira County. Thus, in February, 2015, she asked her siblings to join her and her parents at her home at 55 Eastern Parkway to discuss the issue of buying property for them. They settled on Kitale as the appropriate place since her youngest brother had his in-laws in that region, and she too had recently acquired property there. Her father added during the conversation that that would get him closer to her children and her brother's. He also added that they build a big house to accommodate the rest of her siblings' children whenever they visited their grandparents.

149. Further, that the children started putting money together and transmitting it to her father and some through her brother Rodgers. They tasked their brother Steve Akombe to assist in scouting for the property. They all understood that their father as the head of the larger Akombe family according to Gusii customs would hold the property in trust for the family. They trusted him to do right for his family as he had consistently shown love and honesty to it.

150. She stated further in the statement that since the property is not far from her home in Kitale Town she had the opportunity to visit the property on many occasions, her first visit being on 25/04/2016. She stated that at the time, Lawrence Sadaka aka Shikwekwe informed her that there was an issue with part of the land since he claimed part of it. He showed her the graves of his family members. She informed the family in a family WhatsApp group about her visit and urged them to put money together quickly to complete pay for the land and start building the retirement home for the parents, as evidenced by D.Exhibit 6.

151. In another family meeting convened by their father around May, 2016 he informed them that they had reached an impasse with Orangi (the seller). That the seller had unilaterally increased the sale price contrary to the sale agreement. She and Rodgers intervened. They got in communication with the seller. They advised their father to keep records of all his audio and written communication with Mr. Orangi and share with them so that they could compile the information in anticipation for a lawsuit should Mr. Orangi breach the contract. Their father provided them with the information which she produced as D.Exhibits 7, 8 and 9.

152. She stated further that the witness statement by Advocate Orangi intentionally failed to give a full picture of the events including the fact that he refused to formally transfer the property to her father. It prompted her to retain legal services through Ondieki Orangi & Associates to follow up the matter on behalf of the family. She exchanged text messages with Kennedy Ondieki of the aforesaid law firm, as evidenced by D.Exhibit 8. She paid for the legal services and the stamp duty required for processing the land title deed. That she personally met Mr. Orangi in Kisii Town in 2017, and in addition to phone calls, they exchanged email which she produced as D.Exhibit 9.

153. Regarding her father's averment that he sent Kshs. 1,950,000/= through her to her brother Rodgers Akombe, she stated that it was not factual at all. That instead it was her siblings and her who sent money to their father consistently. She stated that her father needed to show proof of the transaction. She stated again that it was untrue as the father stated of in an addendum to his statement to make up a story to match the false allegations against Rodgers that it was evidence of the inconsistency of character of her father.

154. Lastly, she stated that having lived with her father in her home for more than 18 years, she could attest that this change of character was a recent development which started in December, 2021 when he visited Kenya. She stated that she was still intending to take care of the father as she always did since his retirement and her interest was to ensure that her parents retained their retirement home and they rebuild the strained bonds of an otherwise loving and harmonious family.

155. Learned counsel for the Plaintiffs did not cross-examine her on her evidence.

156. DW4, one Lucy Naliaka Namonywa, stated that she was a neighbour who was then working as a nurse in Kapenguria Hospital. She adopted her witness statement which she wrote and signed on 04/07/2022 but file it on 15/07/2022. In the statement she stated that she was a resident of Kaisagat Location of Kwanza Sub-county in Trans Nzoia. She worked in Kapenguria. She knew the 1st Plaintiff and 1st Defendant, who lived in the USA with their children, as her neighbours in Kaisagat. They owned a property which was next to hers. She and the two parties bought their properties from one Joshua Orangi.

157. She recalled meeting the two parties in October, 2018 when they both visited Kenya and travelled to Kaisagat to see their property. On her way on foot from her home to work the two parties were leaving in their car, from another neighbour's home, one Domciano. They met her at the road and gave her a lift to the bus stage on her request.

158. She concluded her statement that as they travelled in the car they engaged in a conversation during which the parties shared with her their plans to develop a family home on their property. They inquired from her where she sourced her construction materials for her house from. She informed them that she got sand from West Pokot and stones from Thika, Eldama Ravine or Moi's Bridge but she advised them to make own bricks.

159. On cross-examination DW4 stated that she met the 1st Plaintiff and 1st Defendant in October, 2018, on her way from her home. They two gave her a lift along the rough road to the Kesogon Road which was a distance of about one and half (1½) kilometres. It took them 10-15 minutes. While in the car the 1st Plaintiff asked her "mama unaishi wapi?" (interpreted as: "mum where do you live?"). Then DW4 gave them the directions to her home.

160. She stated further that it was during the ride that the two informed DW4 that they had bought the suit land from the Orangi's. DW4 too informed them that she had bought a parcel from the Orangi's.

She stated further that she did not know whether the 1st Plaintiff knew where he would get building materials from.

161. DW4 admitted that she was a witness in another case where the Akombe's were involved. She was a prosecution witness. It was a matter where Mr. Sadaka, PW4, and another person had been accused of assault a lady who was expectant. She stated that when the complainant ran to her house complaining of the assault, she took her to the hospital.

162. In re-examination she stated that she was summoned by the prosecution in the case against Sadaka because she (DW4) had taken the victim to hospital after she complained after the assault that she (the complainant) was not feeling the foetal kicks in her tummy. She said she took the complainant to hospital because she (DW4) had concern for her neighbours.

163. At the close of the Defence case parties submitted on the matter.

Issues, Analysis and Determination

164. I have carefully considered the pleadings, the law, the evidence of the parties, the rival submissions and the authorities relied on. I am alive to the legal position that submissions are not evidence but a tool available to parties to use to convince the Court on their point of view and if possible make it find in their favour. This was held by the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR where it stated:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

165. This was the similar view by the same Court in Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997 when it stated that no judgement should be based on written submissions and if so, that judgement is a nullity because written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the Civil Procedure Rules [now Order 18 Rule 2 of the Civil Procedure Rules, 2010]. Thus, in view of the above and for reasons that the parties herein made lengthy ones, I will not summarize them separately but will consider them by infusing them into or commenting on simultaneously with my analysis of the pleadings, evidence and the law, and reasoning. Therefore, I am of the humble view that a number of issues lie before me for determination. I have broken them down to as many as possible and also analysed them in as near sequence as it can be in order to simplify their determination. They are:

1. Whether there was a family meeting held in February 2015 in Dr. Roselyn Akombe's home in New Jersey which the 1st Plaintiff and 1st Defendant and all their children (herein: "the Akombe family") attended

2. Whether, if the Akombe family held a meeting, it passed a resolution for the children (herein: "the Akombe children") to raise funds to acquire land for their parents and construct a retirement home thereon

3. Whether, if the answer to issue No. 2 above is in the affirmative, the Akombe children and the 1st Plaintiff contributed money pursuant to the resolution

4. Whether, if the answer to issue No. 4 above is in the affirmative, the money the Akombe children gave to their father between 13/02/2016 and 02/06/2020 was for his upkeep and appreciation for raising them well

5. Whether by the time the 1st Plaintiff entered into the agreement dated 20/01/2016 the 1st Defendant and children had contributed any money for buying the suit land

6. Whether, in light of issue No. 5 and 6 above, the suit property was registered in the 1st Plaintiff's name as a sole proprietor or subject to a trust in favour of the 1st Defendant as their family home

7. Whether there was fraud in the transfer and registration of the 1st Plaintiff as proprietor of the suit premises

8. Whether the 2nd Plaintiff has a right to and an interest in the suit land

9. Whether the Defendants, on 14/03/2022, trespassed upon the suit property

10. Whether the home in Nyagware in Nyamira County is the 1st Defendant's matrimonial home or ancestral place for the 1st Plaintiff where he can settle any other wife he marries

11. Whether the Plaintiffs and the Defendants proved their case and counterclaim respectively

12. Who to bear costs of the suit and of the counterclaim

166. I will consider the issues sequentially. As I do so, it is worth noting here with emphasis that since the issues I have set out to determine are closely intertwined and the evidence thereto intricately intertwined, I will go back and forth in its application to the issues. Thus, it may appear that the Court is repeating itself in one or other parts of the judgment, which is not the case.

Whether there was a family meeting held in February 2015 in Dr. Roselyn Akombe's home in New Jersey which the 1st Plaintiff and 1st Defendant and all their children (herein: "the Akombe family") attended

167. It is common ground that the 1st Plaintiff and 1st Defendant are husband and wife, having, as per their pleadings and evidence (matters to be proved before a family court), contracted their marriage under the Gusii customary marriage practices on 03/02/1973. This is a fact both the Plaintiff and 1st Defendant not only averred in their pleadings, being paragraph 3 of the Defence and Counterclaim together with paragraph 3 of the Reply to Defence and Defence to Counterclaim where the 1st Plaintiff admits to the averment, and their respective evidence and those of DW2 and DW3. It is common ground also that the 1st Plaintiff is registered singly as the owner of all that parcel of land known as Trans Nzoia/Kipsoen/1903 measuring approximately 2.30 hectares with effect from the 26/07/2019 on which there is a partially constructed house (bungalow) which is near completion. It is not in dispute that the said parcel of land (suit land) is the subject of this suit, with the 1st Plaintiff laying claim to it as the sole proprietor to the exclusion of the 1st Defendant and her children who include the 2nd Defendant while the 1st Defendant lays claim to it an owner by virtue of a constructive trust arising allegedly due to the acquisition and development of the same through contributions made by the two parties' children. This now turns me to the analysis and determination of the first issue.

168. The Defendants pleaded that the Akombe family held a meeting in February, 2015 at the home of Dr. Roselyn Akombe, at Eastern Parkway, Hillside in New Jersey in the United States of America in which all the family members attended. On his part, the 1st Plaintiff pleaded, in the Reply to Defence and Defence to Counterclaim that it was untrue that a family meeting was held in February, 2015 to

conceive acquisition of a matrimonial home in Kitale or Trans Nzoia County for both the 1st Plaintiff and 1st Defendant.

169. The starting point on analysing this issue is for this Court to determine whether there could have been a possibility that a meeting would be held in the New Jersey, USA by the parties herein. In cross-examination the 1st Plaintiff, PW1, stated that his address at the time of the testimony was 233 Fitspatrick, Street, New Jersey, 07205, USA where he had lived for about five years upon moving from 71 Bronkerhoff Street, New Jersey whereat he resided since February, 2002. On her part the 1st Defendant, DW1, testified that her address was in 55 Eastern Parkway, Hillside in New Jersey, USA. She stated that she and the 1st Defendant had lived with their children in the USA for about 20 years. Further, none of the two parties denied being in the USA in February, 2016.

170. Moreover, it is common ground for all the Akombe children that they live in the USA for a while now. In his further witness statement of the 1st Plaintiff he gives details of how some of the children migrated to the USA and he and the 1st Defendant joined them in 2002. Moreover, the evidence of DW2 and DW3 is clear that all the Akombe children were residing in the USA by then. Thus, there was a possibility that a meeting could be held in the USA. The only contention in relation to that time was whether or not a meeting was held in February, 2015 in one of the children's home, being that of Dr. Roselyn Akombe's as alleged by the Defendants.

171. DW1 stated in her written statement that the Akombe family held a meeting in February, 2015 in the USA address specified above and that all the children attended it but there were no minutes thereto. In cross-examination she stated that the meeting was convened by her daughter Dr. Roselyn Akombe. DW2 also stated that the family held a meeting in the said address in February, 2015 and its agenda was to buy land and build on it. DW3 stated that she was the one who asked her siblings to join her and their parents in the said address to issue of buying property for them.

172. The 1st Plaintiff submitted that there was no such meeting or any evidence thereof. On their part the Defendants submitted that there was a meeting held in February, 2015 where the agenda was to acquire land for the 1st Plaintiff and 1st Defendant. That this was evidenced by the evidence of the two defendants and DW3 whose evidence was unchallenged.

173. Further, the Defendants submitted that family meetings of this nature are not characterized by the strict application of the law of meetings or of formality. That it is therefore not unusual that there were no minutes kept or details recorded of land acreage, construction budgets or individual contributions and that of there could have been minutes it would be contrary to how informal family meetings are held. They gave the example, as evidenced by another decision by the Akombe family in the US in which they made a similar family resolution to gift the 1st Plaintiff of a brand-new car. They evidenced it by D.Exhibit 2, being three photographs of PW1, DW1 and the family at various times between 2013 and 01/01/2021 (being part of the set of photographs). That the 1st Plaintiff conceded that it was true and that the decision was reached and he did not raise questions as to the date when it was made, whether there were minutes to record the price, model or colour of car and who were contributing what amount for its acquisition. It is upon this that the Court makes the following finding.

174. First, this Court notes that DW3 was not cross-examined by the Plaintiff's learned counsel. Thus, there was no re-examination of her. The purpose of cross-examination of a witness cannot be over-emphasized. In particular, Section 154 of the *Evidence Act* brings out the purpose of cross-examination of a witness. It provides that:

> " When a witness is cross-examined he may, in addition to the questions hereinbefore referred to, be asked any questions which tend-

(a) to test his accuracy, veracity or credibility;

(b) to discover who he is and what is his position in life;

(c) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture."

175. The instant situation where DW3 presented herself for examination in court, took an oath and gave evidence in examination in chief but the adverse side elected not to cross-examine her should be contrasted with that where a witness gives evidence and absents himself or herself from the Court on a date when required to be cross-examined and eventually succeeds never to be cross-examined. The latter which is "the missing witness problem" imports the "empty chair doctrine" which resolves the issue of how to deal with the evidence of such a witness easily.

176. In Jacinta Wanjala Mwatela v. IEBC & 3 Others [2013] eKLR, Prest v. Petrodel Resources Limited & Other [2013] UK SC 34, he Court held:-

> " I do agree with Counsel for the petitioner that the court will eventually be at liberty to draw an adverse inference from the failure of these witnesses to avail themselves for cross-examination. In the United Kingdom case of Wisniewski v. Central Manchester Health Authority 1997 PIQR 324, the Court of Appeal held as follows:-
>
> "In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in any action."

177. In the article by Robert H. Stier JR. 'revisiting The Missing Witness Inference – Quieting The Loud Voice from the Empty Chair', 44 MD. L. REV. 137 [1985], it is observed:-

> " The doctrine that has evolved over time to handle the missing witness problem is sometimes called the "empty chair doctrine", because it holds that "a litigant's failure to produce an available witness who might be expected to testify in support of the litigant's case, permits the fact finder to draw the inference that had the witness chair been occupied, the witness would have testified adversely to the litigant."

178. In essence it means, in the instant case, that if there were any misgivings by the Plaintiffs as to the veracity and credibility of the evidence of DW3 then they squandered the opportunity to bring them out and that cannot be blamed on the witness or the party who called her. It would be an unfair trial for the Court not to take as it is (unshaken or solid) the evidence of a witness who was available for cross-examination in Court but was not examined just as it would be an unfair trial for the Court not to draw a negative inference that the evidence of a witness who fails to avail himself in court for cross-examination was to be unfavourable to the party who called him/her. While it is not compulsory to cross-examine each and every witness in all circumstances it is advisable for a party to properly weigh the effect of failure to cross-examine before avoiding to do so. The only time the evidence of a witness not examined may not be of any avail to the court is when even without that cross-examination it is so worthless, contradictory in itself or to that of the other witnesses or the party who called him/her that it would not salvage anything even when left to stand as it is. But regarding the instant case, in essence it means that the entire testimony of DW3 was and is unshaken. It means further that since her evidence was clear, cogent and corroborative on all the issues or facts it touched on, including the fact that she

convened the meeting in her address where the parents lived and its agenda was to buy property was and remains unshaken or solid. This Court has no reason to doubt it.

179. Specifically, in regard to the instant issue, it is also instructive that although the 1st Plaintiff denied in his pleadings, the meeting being held, it was a bare denial. Of course, it is trite law that he who alleges a fact has the onus of proving it hence the 1st Plaintiff did not have the burden to lead evidence prove the non-existence of the meeting. However, once the Defendants proved it, the burden of discounting the evidence or disproving it then shifted to him.

180. The 1st Defendant placed heavy reliance on the admission by the Defendants that they did not take minutes of the meeting. That absence of minutes of the meetings meant that none was ever held. In my humble opinion this submission is misconceived and I reject it for a number of reasons, but I give one. From the evidence of the parties, except that of the 1st Plaintiff which I find untrue as I will highlight elsewhere in this judgment, this was a meeting called "in good times" of the family, that is to say, when there was no tension, distrust or disharmony in the family. In such circumstances, as of any natural family especially in African society setting, the family operates in love, harmony and mutual trust: in such a family, rarely is there suspicion of or by any member so as to elicit in any a thought of turning the meeting formal and taking down minutes thereof. In my humble view, to reduce African society family meetings to mechanical meetings where each one of them has to have minutes taken, recorded and approved (in subsequent ones) would destroy the African values of trust and ubuntu which are the family's fabric. That would make family meetings cosmetic and wholly un-African.

181. The Court takes judicial notice of the fact that in the AbaGusii traditional and even modern family meetings, matters were discussed and agreed upon orally and in mutual trust and honesty, and where there were disputes in the family, still it that was not recorded. Once a while, where there was need to firm or bind everyone to the decision (arrived at in a disagreement) it was done by asking a party to bind himself or herself at a sacred tree, "omotembe". Either way, it was oral. As Akama writes in J. S. Akama (2017). The Gusii of Kenya: Social, Economic Cultural, Political & Judicial Perspectives, Nsemia Inc. p. 131,

> "All members of the homestead were supposed to abide by the orders and guidance provided by the family patriarch on various aspects of Gusii life including the judicial, economic, social and political issues... The family patriarch was, however, not an autocratic leader... In most issues...Gusii people generally applied egalitarian principles of equity, consensus building and the law of natural justice."

182. For the above reasons and those below, I do not agree with the overstretched imagination of the 1st Plaintiff that whenever his mother or father met him and his siblings to discuss any issue, including subdivision of their ancestral land, they took down minutes. If it were true, then nothing would have been easier for both he and the 2nd Plaintiff, as I will point out further below, to give Minutes of him tasking the 2nd Plaintiff to be in charge of the construction of the house. Additionally, he admitted in cross-examination that there were no minutes of the family meeting that gifted him the birthday car as evidenced in D.Exhibit 2 photos 7, 8 and 9 receipt of which he acknowledged.

Whether, if the Akombe family held a meeting, it passed a resolution for the children (herein: "the Akombe children") to raise funds to acquire land for their parents and construct a retirement home thereon

183. I have found, on the preceding issue, that the Akombe family held a meeting some time in February, 2015. The Defendants averred that in the family meeting the main agenda was to discuss and agree on how the Akombe children would raise funds for the purpose of acquiring land for the parents to build

a retirement home. On their part, they pleaded that following the meeting held in February, 2015 at the home of Dr. Roselyn Akombe, in New Jersey in the United States of America it was resolved that the seven children provide funds for buying a parcel of land in Kitale for construction of a retirement and family home for the 1st Plaintiff and 1st Defendant. In their Counterclaim they repeated the claim that a family meeting was held and decided to buy land and construct a family home thereon as stated. On his part, the 1st Plaintiff denied these allegations, terming the claim as untrue and that no such a meeting was held to conceive the idea of acquisition of a matrimonial home in Kitale or Trans Nzoia County for him and 1st Defendant.

184. In his evidence PW1 stated he had not been with the Akombe children's mother for many years, and denied repeatedly that the Akombe family ever held a meeting to plan how to buy land and build a house to live with his estranged wife. Related to this was his evidence in cross-examination wherein he denied that the increment of the purchase price by the vendor was ever discussed by the family.

185. The Defendants on their part insisted that the Akombe family held the meeting and the children resolved to raise funds to buy land for their parents and build for them a retirement home. DW1 stated in examination in-chief and repeatedly in cross-examination that "the family meeting" was held in the home of DW3 where the children expressed a desire to provide a retirement and family home for the 1st plaintiff and her. She referred to the resolution as "the Akombe family resolution". By it the seven children committed to provide funds for the acquisition of land in Kitale area, construct and establish a retirement and family home for them. DW1 stated further that prior to the meeting she and DW3 used to have discussions about considering to buy land for then and finally the children made a decision to buy for the two of them in Trans Nzoia. The 1st Defendant's evidence on this issue was supported by that of DW2 and DW3 both of whom confirmed that in the meeting held in the home of DW3 in February, 2015 it was resolved that the children buy land for their parents and construct a home for them. Although they both stated that they did not make minutes of the meeting, they were firm that the resolution was duly arrived at. DW2 insisted that the agenda of the family meeting was to buy land and build on it.

186. DW3' whose evidence was not challenged by way of cross-examination or otherwise gave a detailed account of how the resolution was conceived. It was her evidence that she and her siblings decided that their parents deserved a bigger piece of land to farm and keep cattle, away from the small parcel of land in their ancestral home in Nyamira County. Therefore, in February, 2015, she called on all her brothers and sisters to join her and their parents at her home at 55 Eastern Parkway, Hillside, New Jersey. That the purpose was to discuss the issue of buying property for them. After discussions, they (children) settled on Kitale as being appropriate for a number of reasons. One was that her youngest brother's in-laws resided in that region. Two was that DW2 had acquired a property there just before the meeting. Her further evidence was that during the conversation their father added such a step would get him closer to the children of DW3 and her brother's. She stated that they decided to build a big house to accommodate the rest of her siblings' children whenever they would visit their grandparents.

187. DW3 added in evidence that after the resolution and the transaction began it did not progress well. Therefore, the 1st Plaintiff convened another family meeting convened around May, 2016 in which he informed them that the vendor and him had reached impasse when the seller unilaterally increased the sale price, contrary to the sale agreement. She stated that she and Rodgers intervened and they started communicating with the vendor. That due to that they advised their father to keep records of all his audio and written communication with the vendor and he shares with them for compilation in case there was arose a lawsuit of the vendor breached the contract. She stated further that the 1st Plaintiff provided them with the information. She produced as D.Exhibit 7 which were three pages of screenshots of WhatsApp messages which were exchanged between PW1 and the vendor.

188. This Court analysed keenly the screenshots. Indeed, at page 1 is shown the starting message whose number is not give but it refers to the sender saying he had bought land in Kitale from him (Orang'i) and saying he was waiting to hear from Orang'i but meanwhile he (sender) had put on hold his travel plans to Kenya. On 13/06/2016, Orang'i replies advising the buyer to hold on until he informs him since "If she becomes difficult" he would refund the money rather than Orang'i breaking his family. On 22/06/2016 Orang'i writes again, but says the family is now agreeable to transact at Kshs. 1,000,000/=, and that with there would be a balance of Kshs. 4 million since 2 million had been paid. The sender tells him he cannot raise the balance within a short time hence he leant towards a refund.

189. Later, on 28/06/2016 the sender asks for a refund but on 14/07/2016 Orang'i replies to he is not likely to be ready to refund the money by 03/08/2016 hence proposes the price of Kshs. 850,000/= per acre. On 21/07/2016 the sender proposes Kshs. 750,000/= per acre and Orang'i replies he has noted it and says the contract has been frustrated by family concerns. On 27/07/2016, the sender replies telling Organg'i that much as he understands his situation his family is questioning where the money he took the money he paid him. He texts, "In my case, my family is questing where I took the money that I already paid you..."

190. Then Orang'i writes a message that if his wife does not sign the documents he will not be able to transact with the sender. Then on 03/11/2016 there are messages from a number +254728XXX414 asking to know how soon they ("we") finalise the transaction. He added that when "Rose was here, we agreed that I remove the caution and she... (next message) she said that if the caution was removed she had no problem transacting at Kshs. 850,000/= per acre." He asked when he would receive the balance of Kshs. 3,100,000/=. He also added that the recipient asks her to get in touch with him.

191. On the issue of the existence of a resolution, the Plaintiffs submitted that there was no evidence to show that the Akombe (first) parents had made any request to their children to buy land and build them a retirement home in Trans Nzoia County. Further, that there were no specifics such as the size of the land to be bought, its cost or a family budget to guide the rate of each family member's contribution towards the project of the land purchase.

192. On their part the Defendants submitted that they had proved that there was a resolution by the Akombe family to buy land and build a retirement home for the parents, and that the decision was mooted by the children. Their learned counsel referred to the evidence of DW1, DW2 and DW3 which they argued was consistent and unequivocal. They pointed out that the evidence of DW3 was not challenged when the Plaintiff's elected not to cross-examine her. They also submitted that the insistence of the 1st Plaintiff that the issue was never discussed was undermined by number of documentary evidence, being, D.Exhibits 4, 6, 7, 8 and 9. They argued that apart from a feeble statement by the 1st Plaintiff that DW3 was involved in resolving the impasse with the vendor without his knowledge, he had no explanation at all of the evidence of the Akombe children's deep involvement in the transaction to acquire the suit property.

193. I have considered the issue and facts thereon. Contrary to the denial by PW1 that he had been with the 1st Defendant up to December ,2021 or thereabouts and his insistence that the latter was his estranged wife since 2010, I am of the view that the correct position is that PW1 and the 1st Defendant enjoyed a happy life until the end of 2021. This was evidence by the many photographs, D.Exhibit 2, which the 1st Defendant, DW1, produced to show that indeed the family celebrated PW1's birthday on D.Exhibit 2 photos 007, 008 and 009 it bought him a surprise gift of a new car as a show of love and it was given to him on D.Exhibit 2 photo 007-009 as shown in the next photograph. Such photographs evidencing (and) moments of happiness where even the 1st Defendant is seen feeding PW1 with a cake do not demonstrate estrangement but love and harmony.

194. Again, I found the evidence of PW1 to be untrue because contrary to the assertion that DW1 did not attend his graduation in 2010 in the USA, DW1 produced as D.Exhibit 5 a photograph of her and PW1 at the graduation. She stated that the graduation was in Spring of 2009 and not in 2010 as PW1 stated. For reason of this and other contradictory evidence as stated elsewhere I found that the witness was an unreliable one.

195. Regarding the engagement of George Gisemba to oversee the construction, PW1 stated as much and DW1 stated that she engaged him to do so while she assigned one Sikwekwe Sadaka, a neighbour, from time to time to help in light work. She stated that it was Sadaka who would later inform them that a part of the land had graves of the family members of the vendor.

196. Moreover, this Court finds that there was ample evidence that right from the nascent stages of the transaction between the 1st Plaintiff and the vendor, on Joshua Mr. Orangi through to the end, as summarised above at paragraphs 185-188, that DW3 was actively engaged in the progress of the acquisition process of the suit land, albeit its ultimate registration in the name of the 1st Plaintiff. Particularly, as demonstrated by D.Exhibit 6, on 26/04/2016 she reported to the family that she had visited the suit land and it was a good one. She asked them to tighten their belts and do their best to raise funds towards its acquisition even if the economic times were hard. If indeed, PW1 had conceived it individually or without a family resolution that he buys the suit land hardly would have DW3 known or been informed of its existence and even location. Again, D.Exhibit 8 and D.Exhibit 9 show that DW3 was actively involved in the renegotiation from the new price of Kshs. 1,000,000/= per acre to Kshs. 850,000/= and the extension of time of completion including the negotiations about the quarter (¼) an acre. Although PW1 denied his authority to DW3 to renegotiate the price, the WhatsApp messages between her and the lawyer, Ken Ondieki and the vendor himself, and the emails she and the vendor exchanged all show that DW3 played a big role in the transaction. In Re-examination PW1 admitted that she did the renegotiation with his authority. This evidence contradicts the submissions by the PW1 but accords with that of the Defendants and I agree with it. Thus, while the completion date was on 31/12/2016 it never happened. It was as a result that Dr. Roselyn was involved in the renegotiation of the price, as per D.Exhibit 7. This evidence of her involvement demonstrates that the suit land was not bought by PW1 singly but with the knowledge and involvement of the family. The fact of PW1 denying on oath at first that he never involved her in the process only to admit later shows he lied on oath and this in addition to many other instances he contradicted himself shows that he was an unreliable witness. Thus, this Court finds on a balance of probabilities that the Akombe family resolved to buy the suit land and construct a retirement home on it for the parents of the Akombe children who participated in the resolution.

Whether, if the answer to issue No. 2 above is in the affirmative, the Akombe children and the 1st Plaintiff contributed money pursuant to the resolution

197. The third issue to consider is dependent on the answer to the first two issues. And this is the issue that entails the longest of the analysis in this judgment. Having found that the Akombe family held a meeting in February, 2015 and that in it the family resolved to buy land for the 1st Plaintiff and 1st Defendant the next issue is whether the children actualized their plan and desire of contributing funds for the purchase of land for the parents and construction of a house on it.

198. The details fact of how the Akombe family raised the money used for the acquisition of the suit land and the construction thereon was pleaded first by the Defendants. In his pleadings, the PW1 had pleaded in the Plaint only that he was registered owner of "the suit land" and had deposited materials and constructed a matrimonial house for him and the 2nd Plaintiff thereon to near completion before the Defendants interfered with his process.

199. The Defendants countered the claim by averring that the suit land was held by him in trust for the 1st Defendant and her children having an equitable right of access as their parents' home, and that they had contributed Kshs. 4,373,475.41 for its acquisition and materials for the construction thereon. In answer to this claim the 1st Plaintiff denied receiving the said sum or any other sum, smaller or larger, for the purchase of the suit land or the construction of a house thereon. It was on that basis he pleaded further that if he received any money as claimed by the Defendants it was for his upkeep and appreciation for his efforts in raising and paying for the education and welfare of the seven children and for that reason the 1st Defendant should claim as a beneficiary any gift granted the children gave him. Put in the simplest way, the 1st Plaintiff's case is that neither the 1st Defendant nor her children, including the 2nd Defendant, contributed towards the family resolution. For the above reason, I now break into two sub-issues. These are whether DW1 ever made any contribution towards the acquisition of the land and construction of a house thereon and whether the Akombe children ever did the same of which I begin with the latter. Of these I will still look at it in other sub-issues, namely, the payments, if any, of the Akombe children, by who the sum of Kshs. 1,800,000/= was paid, and who made the payment of Kshs. 2,500,000/=.

200. I have carefully evaluated the pleadings, the evidence before me and the submissions thereon. In countering the 1st Plaintiff's claim that he was the sole registered owner of the suit land and that the remittances amounting to Kshs. 4,373,475.41 was made up or fake and, if any, a gift or for his upkeep and appreciation for bringing up the Akombe children well, and supporting their claim that it was for purposes of acquiring the suit property and construction thereon of a retirement home, the Defendants pleaded that the 1st Plaintiff was well aware of the remittances and they led evidence detailed evidence on them. They gave evidence that pursuant to the Akombe family resolution the seven children raised Kshs. 4,373,475.41 for the purchase of land in Kitale.

201. In support of the claim that the remittances made between 13/02/2016 and 02/06/2020 whose particulars they gave in the pleadings, the Defendants, adduced evidence through DW1, DW2 and DW3. Starting with the evidence of DW3, she stated that after the Akombe family meeting the children started putting money together and transmitting it to her father and some through her brother Rodgers. It was these transmissions that DW1 produced as D.Exhibit 3 and DW2 produced as D.Exhibit 12-32, which I have carefully analysed below.

202. On this, DW1, the 1st Defendant, stated pursuant to the resolution their seven children raised sum stated, for the purpose agreed on. The family agreed that they buy land for over Kshs. 500,000/= but did not set a target sum each was to contribute. It was her evidence that the money the children gave to the 1st Plaintiff was joint for them as husband and wife. She went on to state that the sum of Kshs. 4,373,475.41 was used to buy the suit property from Joshua Mariga Orangi (hereinafter "Mr. Orang'i") and the construction of a house on it. It was through remittances effected by the 2nd Defendant and the other Akombe children whom she named as Rodgers, Caroline Nyakundi (for her husband Rodgers), Eric, Dr. Roselyn, Edna and Ben, all with a second name of Akombe.

203. The evidence of DW2 supported that of DW1. She stated that pursuant to the Akombe family resolution the seven children raised Kshs. 4,373,475.41. These was through remittances by Rodgers, Caroline Nyakundi, Eric, Dr. Roselyn, Edna, Ben and herself. With the money they purchased the suit property from Mr. Orangi and for the construction of a house.

204. DW2 gave the particulars of remittances to the 1st Plaintiff made on various dates in US dollars and their equivalent in Kenyan currency from each of them of which she testified that the 1st Plaintiff was well aware of. These ran chronologically from 13/02/2016 to 02/07/2020, as contained in D.Exhibit 3 which was a summarized tabulation of the remittances all totalling to the said sum. Other than the

remittances made between 13/02/2016 and 08/02/2017 and the two made on 16/03/2017, DW2 led evidence by way of D.Exhibit 12, 13, 14 and 15, being letters dated 18/05/2022, 17/05/2022, 18/05/2022 and 18/05/2022 sent from Sendwave Compliance Officer annexing copies of transaction statement details of each remittance both in US Dollars and Kenya Shillings. The four exhibits were addressed and sent to Jeliah, Rogers, Ednah and Ben Akombe respectively to show money transfers from the respective individuals to the 1st Plaintiff's M-Pesa account.

205. It is worth of note that the production of D.Exhibit 3 in evidence as an exhibit for proof was consented to by all the parties herein. This was done on 18/07/2023 when the entire trial took place. After that the Defendants testified on them to prove their content. It contains, among others, the remittances made by Rodgers and his wife Carolyn on 18/02/2017 and 16/03/2017 respectively, of which the 1st Plaintiff admits to be true. That, together with the oral testimony of DW1, DW2 and DW3 proves the content of the Exhibit is proved. Thus, the submission by the Plaintiffs that the Defendants gave no admissible evidence of payment of the sum of Kshs. 812, 533/= in 2016 is incorrect. When PW1 admitted that part of the content of the document was true it became incumbent upon him to show how the remaining of the content was untrue. All he would say was that it was made up yet the rest remittances referred to payments made into his M-Pesa account. He failed to prove that they were not paid into his M-pesa account.

206. Further, DW2 produced documentary evidence in form of D.Exhibit 20-32 being Bank of America Remittances Advice documents, dated 3/06/2018 for US$ 100, another dated 24/08/20218 for US$ 100, another dated 05/11/2018 for US$ 50, one dated 23/02/2019 for US$ 500, one dated 25/02/2019 for US$ 500, another dated 30/03/2019 for US$ 100, another dated 25/05/2019 for US$ 50, another dated 03/07/2017 for US$ 60, another dated 03/08/2019 for US$ 50, another dated 17/12/2019 for US$ 50, another dated 20/03/2020 for US$ 50, another dated 06/06/2020 for US$ 100, and the last one dated 02/07/2018 for US$ 100. All were sent by Bernard Akombe to the 1st Plaintiff. The sets of the documents were supported by the electronic evidence certificates as required by the *Evidence Act*, Chapter 80 of the Laws of Kenya

207. DW2 stated in cross-examination that her remittances shown were on seven only. She specified them as Kshs. 110,660/= on 13/06/2016, Kshs. 202,000/= on 13/02/2017, Kshs. 4897/= on 18/04/2018, Kshs. 29,475/= on 18/010/2018, Kshs. 9713/= on 05/03/2019 and Kshs. 5031/= on 19/10/2019.

208. For PW1, his evidence was that the transfer payments detailed in the written witness statement filed by Dr. Roselyn Akombe had nothing to do with the suit land. Further, that the (payment) statements and remittances including those to Mr. Orangi were "made up". In cross-examination he added that the payments Dr. Jeliah claims to have made were also "made up". However, he admitted in further cross-examination on Dr. Jeliah's Statement that she made remittances between 13/02/2016 and 02/07/2020. But he stated in further cross-examination that he could not recall whether the remittances shown were in his M-Pesa Statement.

209. The 1st Plaintiff submitted that the evidence of the 2nd Defendant in her statement dated 19/05/2022 which listed payments made by her siblings, Edna Akombe, Bernard Akombe, Rodgers Akombe and Erick Akombe by M-Pesa was inadmissible because she was not competent to testify with regard to payments allegedly made to the 1st Plaintiff by M-Pesa Sendwave in U.S.A. to the 1st Plaintiff. Regarding DW2's evidence about the payments made to the 1st Plaintiff by six siblings on 13/02/2016 and by two siblings on 06/11/2016, they submitted that there was no evidence of acknowledgment of the alleged cash payment nor was there evidence of any kind to show the 1st Plaintiff received the money or the purpose of the payment, whether a contribution towards the alleged project or for the support and upkeep of the 1st Plaintiff in his capacity as a parent of the alleged donors.

210. The Defendants submitted that the testimony of DW2 laid out the particulars of the remittance of an aggregate sum of Kshs. 4,737,475.41. That it was supported by similar accounts given by DW1 and DW3 of the collective effort by all the Akombe children in the US to raise the funds required for the acquisition of the suit property and the construction of a house thereon. Further that documents of remittances made by DW2 and her siblings were produced as Defence Exhibits 2, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32. Again, that of these remittances, three, shown in Exhibit 16, 17 and 18 were made directly to the vendor Joshua Mariga Orang'i with the rest all made directly to the 1st plaintiff. The remittances were proved by the documents of electronic remittances properly produced in accordance with the requirements of the *Evidence Act*, to no objection by counsel for the plaintiff. Belated objections purportedly made in submissions at the conclusion of the trial ought to be disregarded as the documents properly form part of the record of the trial.

211. On careful evaluation of the evidence of the three witnesses, I find it consistent and credible. I do not agree with the 1st Plaintiff's submissions that the evidence on the payment was inadmissible, that there was no evidence of acknowledgement of the money, and that if received it was for upkeep. First, by testifying that he did not receive the money and later that if he did it was for upkeep, and submitting so, the 1st Plaintiff blew hot and cold. Either he received the money or he did not. That fact was not a game of chance: it is either it happened or it did not. By the 1st Plaintiff blowing hot and cold it means he had something to hide from the Court regarding the truth on the money.

212. On the other hand, the submissions of the Defendants tallies with the evidence adduced. Moreover, there was evidence that the children made contributions or remittances to the father consistently. From the evidence as given by DW1 through D.Exhibit 4, as early as 26/04/2016 DW3 made a clarion call on the family forum, the "Nyagware Hills" for the siblings to contribute towards the purchase of the land and construction thereon. She continued with negotiations on the price of the land and toward the completion of the transaction. It is my view that DW2 and DW3 knew about the remittances they coordinated as children of the family and therefore competent to testify thereon. In any event, the Plaintiffs admitted or consented to the production of the documentary evidence of DW1, DW2 and DW3 on the remittances. They are bound by the admission. Their objection to it at this stage is an afterthought aimed at watering down the evidence but I disallow it and proceed with the analysis of the evidence.

213. Starting with that of DW3, she stated that the Akombe children made remittances. DW2 gave the detailed evidence of the remittances. The Plaintiffs' argument that Rogers and the other children were the ones who should have given evidence on the payments is misplaced. The parties consented to the production of the evidence. As shown from the analysis above, DW2 then gave both oral and documentary evidence to support the fact of numerous remittances having been made by the children of the Akombe to either the father (PW1) or the vendor of the suit land, and during the relevant period. By the relevant period I mean that they made remittances between the time the transaction began and ended, and after it ended but before the construction of the house thereon would be completed, as the institution of the instant suit caused it to be put on hold. With that cogent evidence this Court finds that the children indeed contributed to the acquisition and development of the suit land.

214. Thus, contrary to the evidence by PW1 that the remittances made to him had nothing to do with the purchase and development of the suit land, it is the finding of this Court that from the evidence of DW1, DW2 and DW3 the payments were for those purposes. His assertion that they were for his upkeep does not accord with any oral or documentary evidence from any of his family members that it was so. In any event, there was ample documentary evidence, including WhatsApp messages that showed that the family got together to purchase and develop the suit land for both the PW1 and DW1 for a retirement home.

215. PW1 submitted that DW2 was not competent to testify on the evidence about the remittances. Competence of a witness is a matter of substantive law, the *Evidence Act*. The "Competence" is defined In Bryan Garners' Black's Law Dictionary (2019, 11th Edition, Thompson Reuters, St. Paul MN, p. 354 as:

> " A basic minimum ability to do something; adequate qualification, especially to testify. The capacity to do something."

216. Further, "Competency" is described in the same Dictionary on the same page, as:

> " The mental ability to understand problems and make decisions."

217. Section 125 of the *Evidence Act*, Chapter 80 then provides on competency generally as follows:

> "(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.
>
> (2) A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them."

218. In my view, DW2 did not in any way fall short of the standard or requirements of the provisions above. The Plaintiffs did not prove that she was mentally disordered or prevented from understanding any questions they put to the witness or gave not rational answers. Moreover, she was of extreme age and not so aged as to her reasoning to be affected by age. Actually, she was younger that both PW1 and DW2 but old enough to, in the evidence of PW1, have completed college: she was actually a nurse by profession. Perhaps the Plaintiffs meant something else by their submissions on that issue.

219. Furthermore, PW1's oral testimony was that the remittances, except the three of which two were made by Rogers and one by Carolyn Nyakundi, which I analyse elsewhere were "made up'. That means they are untrue, cooked up and "fake" as submitted by his learned counsel. The oral evidence of PW1 sharply contrasts with the documentary evidence given by DW1 as summarized elsewhere. Furthermore, all the remittances through Sendwave were shown to have been by four (4) children to either the PW1 to his Mpesa No. +254727XXX082. Thus, this Court does not agree with him. It finds that he was selective it admitting the truth in that where there were huge sums of remittances by the children and the bank statements showed that the money was paid by the children to the vendor directly he became hard pressed to explain why the children would pay money directly to the vendor.

220. With regard to remittances made to his M-Pesa line or account which he termed as "made up" it is this Court's view that with the evidence the Defendants gave, the 1st Plaintiff lied about them. If indeed the sums were never received by him, nothing was easier for him to obtain his bank statement or his Mpesa statement to show that none of the transactional remittances said to have been made up did not reach his account or Mpesa. The burden did not lie on him to disprove the Defendants' evidence on that. He was only required on a balance of probabilities to show that he never received the sums. He did not. Nevertheless, the moment he asserted that the remittances were all made up, by virtue of Section 107 of the *Evidence Act*, the burden lay on him to prove that that they were "made up".

221. Put differently, PW1 did not avail any iota of evidence that the family or his children used to constantly send to or give him such huge amounts of money at short or quick intervals prior to the alleged family

meeting of February, 2015 so that it would show that there was a custom or family practice that would support his assertion. In the alternative, the PW1 did not avail any corroborative evidence to support the fact or assertion that suddenly, and without any other purpose than the acquisition and development of the suit land, his children had decided to give him the large sums of money for upkeep and appreciation for having raised them up well as he testified. It is unusual that children, however rich or benevolent, decide to constantly and continuously give their earnings to one parent and to the exclusion of the other during the life of that other, or even after the death of the other. The only conclusion this Court can draw is that such numerous remittances to the PW1, some of which were made directly to the vendor during the process of the transaction on the acquisition of the suit land, had all to do with the acquisition and development (seen or already) on the suit land. Of course, the burden lay on the Defendants to prove that the sums they alleged to have paid to the PW1, were actually paid. This court finds on a balance of probability that the sums were paid.

222. Therefore, I do not agree with the 1st Plaintiff's submissions that the Defendants exhibited a list of contributions they termed "fake'". He could not explain why he chose to accept some payments as true while he left others out. Further, contrary to the submissions by the 1st Plaintiff that the Defendants did not mention that the 2nd Plaintiff (sic) and her siblings had jointly put funds together and remitted to Rodgers Akombe for onward payment to the seller of the land, the evidence of DW2 and DW3 on the fact that children contributed is consistent and clear. Thus, I reject his version of events on the issue and find his evidence as untrue.

223. Regarding the 1st Plaintiff's claim that the Kshs. 2,500,000/= paid by his son Rogers Akombe and Caroline Nyakundi (his wife) between 06/02/2015 and 16/03/2017 his, the Defendants denied this claim vehemently stating that it consisted of contributions by the Akombe children. In support of his case on that, the 1st Plaintiff stated that the money Rogers Akombe paid for the land was the last of his (1st Plaintiff's) three instalments to the vendor. He clarified that he sent the money to Rogers Mosaisi through Rogers' older sister Roselyn Akombe and it was Kshs. 1,950,000/= (in US Dollars). But this Court finds that the 1st Plaintiff has not given any evidence of sending the money to his daughter Roselyn. Thus, when his evidence is weighed against that of DW2 and DW2 I am of the view that it is absolutely untrue.

224. Later PW1 added that he had given the money to Roselyn on 08/02/2017. He clarified that on 04/02/2017 Rogers released Kshs. 1,300,000/= and withheld the balance of Kshs. 650,000/=. Then he, the 1st Plaintiff, travelled to Kenya and met Rogers at his Rongai home on 04/03/2017. That Rogers admitted he had given his wife Carolyn Kshs. 300,000/= and retained Kshs. 350,000/=. So, on the same date he, the 1st Plaintiff, in the company of Rogers withdrew Kshs. 550,000/= from his KCB Account No. 1100XXXX766 (sic) Rongai Branch, of which he produced P.Exhibit 8 being the withdrawal slip of same date. Later he stated that withdrew Kshs. 550,220/= and give Rogers to top up and with the money his wife held. That he witnessed Rogers depositing the top up money into his account. And that he asked him on the same date to transfer the money to the vendor of the suit land and he (Rogers) did so.

225. PW1 testified that the payments were the last of three instalments by him to the vendor. If the evidence of the 1st Plaintiff is anything to go by then, in terms of his evidence that he bought the land at Kshs. 4,500,000/= (also as shown by the Sale Agreement that he produced as P.Exhibit 1, dated 20th day of an unknown month of 2016, a balance of Kshs. 200,000/= would remain unpaid to the vendor to this day. This is because, he would have paid him Kshs. 1,800,000/= plus Kshs. 1,300,000/=, Kshs. 900,000/= and Kshs. 300,000/=. If not, who paid the balance of Kshs. 200,000/=?

226. Additionally, PW1 testified that the sum Rogers and his wife paid into the account of Organg'i in 2017 was money he (PW1) had given his daughter Roselyn in US dollars for her to give Rogers to pay the vendor. This was denied by DW2, and more so DW3 whose evidence is solid, as found elsewhere. That being so, it was incumbent on PW1 to adduce other evidence to support his assertion that indeed he gave the money to Rogers.

227. Again, if the evidence of PW1 is that the Rogers and wife payments to the vendor was the last set of instalments, the question that remains is, was there an increment in the purchase price, of which PW1 admitted in re-examination, that Dr. Roselyn Akombe and son intervened with his permission? What was the outcome of the negotiations on the increased purchase price? The 1st Plaintiff did not have evidence to answer these questions. But the Defendants supplied the answers, as can be seen in D.Exhibits 7, 8, 9 and 10, being screenshots of the WhatsApp communications between DW2 and the vendor (Orangi'), the 1st Plaintiff's lawyer, the 1st Plaintiff also, and emails between DW3 and the vendor.

228. As I have stated above,it is not proved that this sum of Kshs. 550,220/= was given to Rogers and deposited in his account. DW3 disputed that the sum of Kshs. 900,000/= deposited by Rogers into Orangi's account was PW1's given through her. She stated that it was contributed by the siblings. Moreover, PW1 contradicted himself by saying that he withdrew the money, gave it to his son to add to the Kshs.350,000/=and pay it to Orangi (vendor) and he (son) did so in his presence the same date (emphasis mine). But from the dates on the withdrawal slip, P.Exhibit 8 and P.Exhibit 9 being 04/03/2017 and the transfer on 16/03/2017 respectively, it is clear that 12 days passed between the withdrawal and the deposit.

229. If, indeed, the transactions referred to above were done by both the 1st Plaintiff and his son Rogers, and if the evidence of the 1st Plaintiff that Rogers had refused to remit the sum he already sent to him by Dr. Roselyn hence (he PW1) being forced or compelled to travel from the USA to Kenya to compel him to pay the sum is anything to go by, it beats both reason and logic that the 1st Plaintiff could once again give a difficult son a further Kshs. 550,220/= to pay the vendor and not him to pay it directly given the fact that, according to PW1, he (PW1) was buying the land for him and another woman other than the mother to Rogers.

230. Further, it does not accord with any reason for PW1 to have withdrawn the money, which was as a result of delayed payments (which evidently led to an increase in the price of the suit land), give the money to Rogers and wait for twelve (12) days before a payment was made by Rogers while there was pressure from the vendor about delays. For this finding, it is noteworthy that in terms of P.Exhibit 1, the sale agreement for the suit land, the completion date was 31/12/2016 yet the withdrawal was made on 04/03/2017 and payment on 16/03/2017. Also notable is that there is no evidence at all that this sum of Kshs. 550,220/= was ever handed over by PW1 to Rogers.

231. The 1st Plaintiff produced P.Exhibit 9, a certified copy of a KCB Statement of an account number 117XXXX352 in the name of one Joshua Mariga Orangi for the period between 01/02/2017 and 20/03/2017 which contained highlights of the sums of Kshs. 1,300,000/= paid on 08/02/2017, Kshs. 900,000/= on 16/03/2017 and another sum of Kshs. 300,000/= paid to him the same date. On these, he stated as follows, "The same day I transferred Kshs. 300,000/=. I explained the details." I have stated elsewhere that this oral testimony is untrue given the circumstances of the transactions for the purchase of the suit land.

232. On this, the Defendants, through DW2, gave evidence that the money was not the 1st Plaintiff's but sums they contributed and remitted through two of the Akombe children, Rogers and his wife

Carolyn. About the Kshs. 1,300,000/=, Kshs. 900,000/= and the Kshs. 300,000/= DW2 she stated that the truth was that they were contributions by her together with her five siblings excluding Steve Akombe. That the averment by PW1 that he sent Kshs. 1,950,000/= through her to her brother Rodgers Akombe, was not factual at all. That instead she and her siblings sent money to their father consistently.

233. She produced D.Exhibit 16, 17 and 18 were a Cooperative Bank SWIFT/RTGS Applications dated 08/02/2016 for Kshs. 1,300,000/= by Rogers Akombe to Joshua Mariga's KCB Account No. 117XXXX352, another one dated 16/03/2017 for Kshs. 300,000/= by Carolyne Moraa Nyakundi to the same recipient and another dated 16/03/2017 for Kshs. 900,000/= by Rogers Akombe to the same recipient.

234. The Plaintiffs submitted that the 1st Plaintiff explained how he gave some money to Roselyn to deliver to Rogers, which finally was the Kshs. 2,500,000/= wired to the Co-operative Bank in favor of Joshua Mariga but in terms of the rules of evidence, the 1st Plaintiff has not discharged the burden of proof. They also submitted on the withdrawal of Kshs. 555,000/= on 4th March, 2017 and its relationship with the payments Rogers made. That the 1st Plaintiff confirmed that the Kshs. 900,000/= made on 16/03/2017 and Kshs. 300,000/= held in Caroline Nyakundi's account was part of his money and the remittances were done on his behalf. They argued that that the evidence by Dr. Roselyn Akombe that the children had collected Kshs. 2,500,000/= and given to Rogers to pay it over was outright lies.

235. They submitted also that the Kshs. 2,500,000/= paid to Joshua Mariga Orangi between 8th February, 2017 and 16th March 2017 was his own money he sent to Kenya through Dr. Roselyn Akombe. He submitted again that Rodgers Akombe nor Carol Nyakundi (his wife) were called as witnesses to deny the Kshs. 300,000/= remitted to Joshua Orangi as the Plaintiff's money. He submitted further that the RTGS for the 3 payments being Kshs. 1,300,000/= and Kshs. 900,000/= all showed that the payments were "Land Payments" on account of Peter Akombe Mosaisi, land parcel No. Trans-Nzoia/Kipsoen/569. He submitted that he had no reason to lie against his own son about the deposit he made. But this Court points out that the right parcel number is not what is in dispute but whether or not the money for purchase was given by the 1st Plaintiff yet it showed clearly that it was given by the individuals who gave it, allegedly on account of property to be acquired for the family.

236. The Court does not agree with the 1st Plaintiff that he had no reason to speak lies regarding his dealings with his own son in order to accept the 1st Plaintiff's version about the deposits made by Rogers as the truth. The reason for disagreeing with him is that on a number of instances PW1 has shown that he is an unreliable witness. From the contradictions in various parts of his evidence, both written and oral, this Court cannot be prepared to agree with the submission, absent of independent supporting evidence to confirm the oral assertions. In any event, PW1 was keen to convince the Court, at all costs, including the point of lying that he had not been living with the 1st Defendant since 2010 when there was ample evidence as shown by D.Exhibit 2 that the family lived happily through 2013 up to as late as 2021.

237. This Court analyses D.Exhibit 2 to ascertain whether indeed both PW1 and DW1 were estranged through the period between 2010 and 2021 and determine whether with or without the circumstances demonstrated by the Exhibits (photographs) PW1 could have no reason to lie against the evidence about his son and DW1 specifically. DW1 in a set of family photographs, being, 001 of PW1 and DW1 (all smiles) in 2013, 002 of PW1 and DW1 and the Akombe children and their children (all smiles) in 2013, 003 of PW1 feeding DW1 a cake in a function of welcoming their newly wed son and daughter-in law in Nyagware home in 2015, 004 of PW1 (smiling) and DW1 sharing a cake with family members in 55 Eastern Parkway, Hillside NJ during PW1's birthday on 01/01/2019, 005 of PW1 being fed a cake in presence of DW1 and other family (all smiles except babies) on same birthday on 01/01/2019,

006 of PW1 (smiling) and DW1 (smiling) during the said birthday, 007 of PW1 being presented a car key by his children (almost all smiles) for a new car on his birthday on 01/01/2021, 008 of PW1 and DW1 (on the left) upon PW1 being given a new car as a birthday gift on 01/01/2021 and, lastly, 009 of PW1 in the birthday gift of a new car on 01/01/2021.

238. It is this Court's finding that D.Exhibit 2 demonstrates clearly PW1 as a very happy man with DW1 (doing things together always), which acts leading to happiness included, presentation to him of a new car in the presence of DW1 on 01/01/2021. If what the Court sees from the pictures is sadness and estrangement covered in happy smiles, activities and celebrations then indeed the human heart is deceitful above all else because everybody else can only see happiness and joy in the Akombe family up to 2021. Thus, in the face of this clear evidence, for PW1 to convince the world that the money his son Rogers remitted to the vendor in that behalf was PW1's and not his (Rogers)'s, it must take a reason to lie.

239. On the 1st Plaintiff's averment that he personally transferred a sum of Kshs. 1,800,000/= on 20/01/2016 from his account No. 110XXXX766 held in Kenya Commercial Bank (KCB) account, Nyamira Branch Joshua Orangi's account No. 117XXXX352 for the sale agreement over the suit land, he produced P.Exhibit 1 and P.Exhibit 8 to support it. On their part the Defendants adduced evidence to contradict the 1st Plaintiff's case.

240. It was the 1st Defendant's case that the KCB account No. 110XXXX766 was a joint account held by both the 1st Plaintiff and the 1st Defendant since 2009 and operated on individual mandates. She stated that she had been banking into it monies she earned from her shares portfolio, businesses and day-care payments for services she provides in New Jersey, as well as donations received by both account holders from their children. That she and the 1st Plaintiff maintained a joint account at Kenya Commercial Bank Ltd Kisumu Branch (hereinafter "KCB") which they opened sometime in 2009 in contemplation of buying an apartment through a mortgage. They deposited into the account money from the proceeds of shares she held in Cooperative Bank Ltd and Safaricom Ltd.

241. Upon considering the evidence I find that, on his part, PW1 stated that he paid to the vendor from the said account the sum stated. Indeed, an examination of the bank transfer produced by DW1 as D.Exhibit 9 shows that it was in PW1's name. PW1 stated that it was his money in the account. Other than the account name reading as his, PW1 did not produce evidence to show that it was a personal account. On her part, DW1 stated that it was a joint account. She stated that she and PW1 used to deposit money into the account. She stated orally that in mid-October 2018 when she and PW1 visited Kenya together, they deposited into the account Kshs. 1.1 million of which Kshs. 500,000.00 was from Edna and her husband. It was a deposit allegedly made after many years of the initial transfer of 20/01/216 made to the vendor Joshua Orangi. This assertion was not denied by PW1.

242. Thus, this Court draws two conclusions from here: first, that since the latter deposit was done jointly with the knowledge of PW1 and without any objection to it, this supports the earlier assertion that she deposited funds into the account earlier. Two, that the account must have been operated as a joint one between PW1 and DW1 from it was opened. This is because, DW1 produced as D.Exhibit 13 which were emails dated 01/06/2023 with an attachment headed "Letter to KCB" sent from the email address, nyanchama34@gmail.com addressed to kcbcapital@kcbgroup.com and two dated 08/07/2023 the first (below) being from nyanchama34@gmail.com to Retailmgrksm@kcbgropu.com headed Account Statement, and the second from Retailmgrksm@kcbgropu.com to nyanchama34@gmail.com. In the last email which refers to a letter (attached to it) dated 08/07/2022 written by DW1 to the KCB, Kisumu Branch in reference to Account Number 110XXXX766 the email reads, "Kindly note that this is the account

that was stated in your letter, and it is a joint account (for Peter and yourself) with a signatory mandate of either to sign..."

243. Again, before I move further on this issue, the documents produced by PW1 and DW1 regarding the withdrawals and transfers from same account number reveal a lot about the account. PW1 produced P.Exhibit 1, the copy of agreement to show that the sum of Kshs. 1,800,000/= was paid to Mr. Joshua Orangi, upon execution. This was the sum PW1 would submit that it was paid on 20/01/2016 way before the Akombe children began making contributions. He produced P.Exhibit 8, a copy of a withdrawal slip dated 04/03/2017 for the sum of Kshs. 550,220/=. It was withdrawn from account No. 110XXXX766. P.Exhibit 8 reads at the top left as follows, "KCB Ongata Rongai, Account at KCB Kisumu Mortgage Centre." Incidentally, this inscription is on all fours with the evidence of DW1 that they opened a mortgage account in KBC Kisumu, and that was supported by the emails produced as D.Exhibit 13.

244. In any event, the contents on P.Exhibit 8 as discussed above differ with the PW1's averment in his Reply to Defence and Defence to Counterclaim at paragraph 9 where he pleaded that he personally transferred Kshs. 1,800,000/= on 20/01/2016 from his account No. 110XXXX766 Kenya Commercial Bank (KCB) account, Nyamira Branch. The above evidence is clear that the account was not held at Nyamira Branch but Kisumu. Perhaps PW1 did not even know the account and its location.

245. Additionally, it is surprising, if the evidence of PW1 is true that the account was his alone and by the time he bought the land their relationship was already strained, to note that it was DW1 who held or produced the transfer/banking slip issued by the Nyamira Branch for the sum of Kshs. 1,800,000/= from account No. 110XXXX766 in the name of Peter Akombe Mosaisi to account No. 117767352 in the name of Joshua Mariga Orang'i. How did she come into possession of a document which, if the account was being operated solely by PW1, was to be in possession and power of PW1 only? It was signed by PW1 but DW1 was the one who produced it as D.Exhibit 11.

246. With the above evidence, I do not therefore agree with the Plaintiffs' submission that the 1st Defendant's assertion that she was a signatory to the account the money was transferred from was untrue because of neither proving contribution nor involvement in any joint venture with the 1st Plaintiff to show that any money from it and deposited was jointly owned. Further, my finding, then, does not place her far from the fact of some of her monies being used in the initial deposit for the purchase of the suit land on 20/01/2016.

247. From analysis above, and the admission by PW1 through his pleading that if he received any money from his children it was for his upkeep and appreciation, the question is was the sum of Kshs. 1,800,000/= paid out initially for the suit land the Plaintiff's only or it may have been other sums contributed into the account by the wife, or even children? Whether or not he deposited those sums into the account this Court does not know. But what is clear to me is that this Court finds that there was no evidence by PW1 as to how, if the Court would agree with his evidence, he alone raised the sum of Kshs. 1,800,000/= in the account just around the period of the alleged Akombe family meeting, and also the specific contributions DW1 made into the account. It would be an erroneous assumption to make that only a holder of an account deposits money into it.

248. The evidence that puts counters the 1st Plaintiff's assertion that the Kshs. 1,800,000/= was his money and not that of the Defendants together with the Akombe children is his own statement to the vendor, Mr Orangi when PW1 sent a WhatsApp message to him about failure to refund or complete the transaction. That was, as evidenced in D.Exhibit 7 at page 2, as follows, "In my case, my family is questing where I took the money that I already paid you..." If the money was his, and by this time he had not met PW2 as a girlfriend or married her so as to be part of family, that is to say, so that she

could be the one questioning the whereabouts of its (family) money, which other family then was it than the Akombe family?

249. And if the Kshs. 2,000,000/= only already paid to the vendor was not raised jointly as family and for the purchase of the suit land, what business did the family have to do with how the PW1 spent his money? Why would the family be concerned as to where the money PW1 had already paid the vendor went? How could the family know about the said sum being paid to a third party or non-member if indeed it was not their money as one unit? Why would PW1, even, use in the agreement the family address, as contained in D.EXhibit 4, controlled by the 1st Defendant if she and him had been estranged or had strained relations? These are questions whose answers lead to the only conclusion that the Kshs. 1,800,000/= was raised from the joint contributions of the family.

250. Moreover, the PW1 pleaded that he used to actively receive money for upkeep and appreciation. It is hardly incredible that a man who was basically dependent in terms of accommodation and on upkeep funds and other monies from his children would all at once raise such a huge sum of money as Kshs. 1,800,000/= on his own. Related to that this Court proceeds to find that both the evidence of PW1 and submissions that DW1 neither worked in the USA nor filed tax returns but was a dependent of DW3 so as to convince the Court that she could not have paid money into the account is neither here nor there. In any event, PW1 did not himself show that he filed tax returns for the relevant period (of acquisition and development of the suit land) equally as much as DW1 who testified that she too filed returns from 2014 onwards. Be that as it may, I find both PW1 and DW1 to be in the same boat about deposits into the same account: that both were actually taken care of by and in the same house their children up to 2021.

251. The Defendants pleaded that the sum paid out from the account was partly their contributions as children and their mother. For this reason, this Court finds that the initial sum of Kshs. 1,800,000/= paid out to the vendor of the suit land was as a result of the joint effort of the 1st Plaintiff and the 1st Defendant with the assistance of their children. It is not lost to this Court of the fact that in families living in happy times, as I have found of the Akombe family elsewhere in this judgment, monies to a common pool or goal can be pooled together by members without necessarily keeping track of the transactions thereof. This was the evidence of DW2 and DW3 which I agree with.

252. The totality of the analysis of the evidence (as) above leads me to the conclusion that the Akombe children and the 1st Defendant contributed money towards the acquisition of the suit land and the construction of the house that is standing on it.

Whether, if the answer to issue No. 4 above is in the affirmative, the money the Akombe children gave to their father between 13/02/2016 and 02/06/2020 was for his upkeep and appreciation for raising them well

253. It was the 1st Plaintiff's case that the money his children gave him between 13/02/2016 and 02/06/2020 was for his upkeep and for raising them up well. The Defendants denied the averment. They, instead, stated that the money was pursuant to the Akombe family resolution of February, 2015. Specifically, that it was for the purchase of land for the Akombe children's parents and construction of a home for retirement. As stated above, the 1st Plaintiff stated in evidence that remittances he received from the children, if any, were for his upkeep and appreciation for raising them up well. But he did not provide any documentary evidence to that effect. He did not call any corroborative evidence to support his claim.

254. As for the Defendants they led evidence, particularly, through DW2 and DW3 that the money was pursuant to the Akombe family resolution. On the issue, the Defendants' evidence was unshaken both in examination in chief of both and cross-examination of the DW2.

255. Contrary to the 1st Plaintiff's submission which repeated the testimony that the remittances were for upkeep and appreciation, I agree with the Defence submissions that the various remittances were for the purpose that the Akombe family resolved. To clarify the analysis, this Court finds that the fact that the 1st Plaintiff resided in the home of DW3, being 233 Fitspatrick Street, NJ, USA, 07205, up to December, 2021 or early January, 2022 when, according to him in cross-examination, his belongings were thrown out of the house and he had to look for a place of his choice, while on the other hand the evidence of DW1, DW2 and DW3 too confirmed that fact of the 1st Plaintiff residing in the said address up to that time but differed only, as given by DW2 and DW3, on the fact that it was the 1st Plaintiff who voluntarily moved out of the premises upon marrying another wife, the 2nd Plaintiff, he was under the care of the Akombe children materially. Moreover, DW3 indicated in her evidence that gave him all the provisions including accommodation.

256. For the reasons above, it is inconceivable that the children would accommodate their father and mother and at the same time give him (PW1) such huge sums of money for his upkeep and appreciation of him having brought them up well, and still surprise him with buying him a new car as a gift in D.Exhibit 2 (see photos 007, 008 and 009) and his admission in cross-examination. Additionally, if the 1st Plaintiff's claim were to be taken to be true, since the two parents resided in the same address, being accommodated by their children, what explanation would he have for him being the only parent who was being given such large sums of money for appreciation and upbringing of their children to the exclusion of the 1st Defendant?

257. Moreover, if indeed the money was for his upkeep and appreciation, the fact that all of it was given during the period the Defendants and the family, through the evidence of DW3, argue that it was pursuant to the Akombe family resolution and the desire to fulfil it, that proximity in time and situation or events leaves this Court with little doubt that the money was not for the purpose the 1st Plaintiff wants this Court to believe but for the one the Defendants claim it was.

258. Lastly, since the 1st Plaintiff asserted that the money was for his upkeep and appreciation but the donors or those who contributed insist that it was for a different purpose, the burden lay on the 1st Plaintiff to show that it was for the purpose he asserted. It is not automatic that siring and bringing up children leads to compulsory upkeep and appreciation of parents by them. Lastly, on this, it was incumbent on the 1st Plaintiff to show, if he needed to dislodge the Defendants' claim that the money was pursuant to the Akombe family resolution, to bring evidence to the effect that in the periods before or after the one which is in issue, the children used to give him as nearly much money as they did during the period. That would have led the Court to make a finding by the comparison of remittances to him in the periods.

259. Therefore, I reject that evidence and claim of the 1st Plaintiff on the issue.

260. Lastly, this finding does not in any imply that the 1st Plaintiff did not contribute any money towards the acquisition of the property or its development. On the contrary, he did: he must have paid some money, which he did not specifically proof; also, he must have used his resources such as lorries to transport materials to the site and so on. Actually, his testimony was that used his lorries to transport material to the site. Were this Court to be a family court wherein the issue of division of matrimonial

property was be legally determined such are the issues it would have grappled with. Suffice it to say that the Court of Appeal in P N N v Z W N [2017] EKLR held that:

> " Our new constitutional dispensation is no safe haven for those spouses who will not pull their weight. It cannot be an avenue to early riches by men who would rather reap from rich women or women who see in monied men an adieu to poverty. What the *Matrimonial Property Act* has done is recognize at Section 2 that contribution towards acquisition of property takes both monetary and non-monetary forms which essentially opens the field of contribution to both spouses without distinction on the basis of remunerative employment, especially so in an urban setting."

261. The above holding in essence is to lead to a finding in the proper court at the right time, if it will get there, on the contributions of each of the spouses. As the Supreme Court of Kenya held in JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & Another (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment),

> " We are persuaded by the above reasoning and should only add that the equality provision in article 45(3) does not entitle any court to vary existing proprietary rights of parties and take away what belongs to one spouse and award half of it to another spouse that has contributed nothing to its acquisition merely because they were or are married to each other. To do so would mean that article 40(1) and (2) of *the Constitution* which protect the right to property would have no meaning..."

262. Thus, as of now it is not my duty to find who contributed how much and in what manner to the acquisition and development of the suit land. I have only to, and I hereby, find that PW1 and DW1 jointly with the assistance of the Akombe children acquired and developed the suit land, to the exclusion of PW2. If by any chance PW2 put her effort into the development of the property, she did so to what was not her own. Her efforts were in vain, at best misdirected and misapplied.

Whether by the time the 1st Plaintiff entered into the agreement dated 20/01/2016 the 1st Defendant and children had contributed any money for buying the suit land

263. The 1st Plaintiff claimed that by the time he entered into the agreement in 20/01/2016 neither the 1st Defendant nor the children had contributed any money for the purchase of the suit land. That for that reason he acquired the suit land by his own funds. His learned counsel submitted as much. It was their argument that that the contributions by the Akombe children started on 13/02/2016 and by that time PW1 had already paid Kshs. 1,800,000/=. But on the above submission this Court notes that elsewhere it has found that the sum transferred on 20/01/2016 was from an account held jointly by both the 1st Plaintiff and the 1st Defendant and that the 1st Defendant had made some payments into the same account prior to that time: being from 2009 when the account was opened.

264. The 2nd Defendant did not claim to have contributed money by the time. But the 1st Defendant did by claiming that she and the 1st Plaintiff held a joint mortgage account in KCB and that she deposited money into it through her shares she held in Cooperative Bank and Safaricom Limited. That it was the money in the account since 2009 that the 1st Plaintiff as an alternate signatory transferred at the time of execution of the sale agreement, D.Exhibit 1.

265. The only sum of money that comes into focus under the issue is Kshs. 1,800,000/= which the 1st Plaintiff transferred to the vendor on 20/01/2016. Regarding this, the analysis of the evidence herein under issue No. 4 is key. I have found in it that on 21/07/2016 PW1 himself raised the concern with

the vendor that family had issues as to where the money he had paid on the land transaction went. By that time the vendor had received only Kshs. 2,000,000/= which he was willing to refund but had challenges of doing so within a short time. It is the money that would later be taken into account when the purchase price was varied upwards to Kshs. 850,000/= per acre and the vendor required the balance of Kshs. 3,100,000/= paid.

266. Of the Kshs. 2 million, Kshs. 200,000/= seems to have been paid to the vendor on or before 11/02/2016, in terms of D.Exhibit 1. That fact being clear, it is my view that since the Court has found that the account was jointly held by PW1 and DW1, and that DW1 had stated that when she and PW1 opened the account to take a mortgage she deposited some money into it from her shares and other sources, and that in 2018 they deposited into the account monies given to them by their children, it is my finding that both PW1 and DW1 had jointly contributed money to the acquisition of the property before 20/01/2016. But the Court has not found for a fact that the Akombe children, each in person or as a group, deposited money directly into the account from which the initial purchase price was transferred from before the execution of the agreement.

Whether, in light of issue No. 5 and 6 above, the suit property was registered in the 1st Plaintiff's name as a sole proprietor or subject to a trust in favour of the 1st Defendant as their family home

267. I must start my analysis on this issue by saying that it is settled law that fraud must be pleaded as required by procedure and proved to a standard which is above a balance of probabilities it should not be beyond reasonable doubt. According to the Bryan A. Garner's Black's Law Dictionary, 11th Edition, 2019, Thompson Reuters, St. Paul MN, fraud is defined as follows;

> "A knowing misrepresentation or know concealment of a material fact made to induce another to act to his or her detriment."

268. In Vijay Morjaria vs Nansingh, Madhusingh Darbar & Another [2000] eKLR the Court of Appeal held as follows:

> "It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act 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."

269. This was the similar holding in Kinyanjui Kamau v George Kamau [2015] eKLR when the Court:

> "It is trite law that any allegations of fraud must be pleaded and strictly proved. see Ndolo vs Ndolo [2008]1KLR (G & F) 742 wherein the court stated that "... we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases..."

270. In the instant case the Defendants pleaded fraud against the 1st Plaintiff. They gave the particulars of fraud as summarized above. They also led evidence to that effect. But the 1st Plaintiff denied the allegations and stated in evidence that he was properly registered as owner.

271. The evidence of the Defendants, as I have summarized it before is that the family agreed to purchase land for PW1 and DW1 for the purpose of building a home for retirement. Although not expressly stated, the totality of the evidence is that they left it to PW1 to enter into the agreement of purchase and register himself as owner, but in trust for the family. The Defendants have led evidence to the effect that they trusted that the PW1 would be registered as owner but for them as both husband of DW1 and the father of DW2 and siblings. From my analysis of the evidence the process of registration of the 1st Plaintiff as owner was open and consented to by the Akombe family. As at the time of registration, PW1 did not conceal any material fact or make any misrepresentation to the family to induce it to raise money for the project. Things only changed in 2021 when he changed his mind to bring another party, PW2, into the scene.

272. Additionally, I find that the particulars of fraud pleaded do not measure up facts that can demonstrate any fraud on the part of PW1. Therefore, I do to find that PW1 committed any fraud. The registration of the suit land in his name was in good faith to him but in trust for the family but the fact that his actions changed in the cause of time it does not amount to fraud. They can only amount to something else, breach of (family) trust.

Whether there was fraud in the transfer and registration of the 1st Plaintiff as proprietor of the suit premises

273. Just as before, I proceed to determine this by using the simple four-step legal tool of Issue, Rule, Application and Conclusion (IRAC). What is the issue? The Defendants alleged that the 1st Plaintiff committed fraud by having registered himself as the owner contrary to the family resolution. The 1st Plaintiff denied the allegation. The Defendants gave the particulars of fraud as follows:

274. What is the Rule? The rule is the law. For this, Section 14 of the *Matrimonial Property Act*, Act No. 14 of 2013 is the applicable law. It provides:

> " Where matrimonial property is acquired during marriage-
>
> (a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
>
> (b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal."

275. For the reason that the suit land was not registered in the joint names of the disputants herein it means that Section 14(2) is not applicable herein and needs no consideration. This turns me to the Application of Section 14(1) which is the provision relevant to the facts herein or vice versa. In the instant case, it is common ground now that the suit land was acquired in a process that began in earnest on 20/01/2016 when the agreement of sale was executed the first time between PW1 and the vendor. The evidence of DW2 and DW3 show, through D.Exhibit 9 that at a later stage, about 15/01/2018 after another draft agreement was sent on WhatsApp by the Vendor' lawyer to Dr. Roselyn there might have been another execution that was made which may have been for taking care of the change of price and others circumstances. The bottom is that the initial transaction in the sum of Kshs. 1,800,000/= was effected on the date stated above. Then, from the P.Exhibit 2 the registration was completed on 26/07/2019 when the title was issued in favour of PW1.

276. The 1st Plaintiff claims that he is married to two women, being, PW2 and DW1, with their marriages, according to him in 2016 and 03/02/1973 but according to PW2 it was in mid-December, 2021 when dowry. And for want of jurisdiction as stated before, refraining from making a determination

as to whether the parties were married or not this Court can only agree with PW2's evidence that, if indeed there was a part payment dowry, in mid-December 2021 according to the AbaGusii customary law there may be a possibility (subject to proof in a family court) that was the point in time the Plaintiffs intended to be married from: issues of "okobasa" or registration of their marriage are therefore irrelevant in this determination.

277. That notwithstanding, for purposes of ascertaining the position of PW2 and DW1 in relation to the acquisition of the property, this Court clarifies further its understanding of the evidence herein although as stated earlier this is not a determination on whether or not a marriage existed between the parties. The oral testimony of PW1 (1st Plaintiff) during cross-examination was soon after meeting the PW2 he married under Gusii customary practices yet the PW2 contradicted that to say it happened in mid-December, 2021 in accordance with Gusii customs. In my view PW1 wanted to 'situate' the alleged marriage with PW2 in the time of acquisition of the suit land in order to suit his narrative. This Court finds that to be incorrect. This is because elsewhere again in cross-examination PW1 stated that they "started living together" and later they informed the PW2's parents. But it was the evidence of PW1 and even as confirmed by DW1, DW2 and DW3 that he lives in the USA. Thus, this Court highly doubts the evidence of PW1 about living together with PW2.

278. Evidence was led by PW1 about Gusii customary practice on marriage and its dynamism. More so, about "Ekerorano", "Okomaana Chiome" and in cross-examination of DW1 about "Okobasa". The parties too submitted on the same, and relied on a number of authorities to prove or disprove the same. I repeat, this Court does not have jurisdiction to pronounce itself on the validity or otherwise of the marriages said to be existing between the parties herein, and it will not do so. Thus, as to whether elopement ("okobasa") is and when, under the Gusii customary practices, it translates to a marriage this Court shall not pronounce itself on it. It therefore follows that whether the 2nd Plaintiff took the step of "okobasa" or marriage soon after meeting the PW1 is neither here nor there in this judgment. What is important for the Court to determine is when actions would have taken place which would have made both Plaintiffs to have a common action, unless expressly written separately as such, towards purchasing a property for building a matrimonial home. This Court finds that it would been only soon after they (PW1 and PW2) knew or started 'seeing' each other. According to the written statement and oral testimony of DW2 it was in December, 2017 which was long after PW1 acquiring the suit land.

279. Be that as it may, the further evidence by PW2 was that she started taking her roles as a wife when PW1 started sending her to the suit land to cook for workers and take construction materials to the site. And when was that? PW2 gave oral evidence that to demonstrate that PW1 gave her money to buy materials to take to the site on 12/12/2021. There was no other evidence of her involvement earlier than this date in the construction site, in her role as a wife. In any event such involvement does not in any way constitute a process of formation of a marriage. But granted that she was involved in the construction as a wife as she stated in her statement, then both the formalisation of her marriage under Gusii customary law and involvement in the construction (as wife) happened long after the suit land had been acquired and registered in the name of PW1.

280. Having so found, the next issue fact I need to establish is whether 'estrangement' of DW1 as asserted by PW1 is enough to determine make this Court to reach a finding that the suit land was acquired outside of his marriage with the DW1. PW1 pleaded and testified that he was married to DW1 since 1973. He gave evidence that both lived in the USA in the same address, and at one time he was put out in the street and the grandchildren took him back and resided in there, up to about January, 2022 when his items were thrown out of the house. The evidence of the Defendants was that it was PW1 who moved out of the address when he made known to the family that he had another wife, and that was in early 2022.

281. The separation of the two from residing in the same address seems to me to the outward manifestation of estrangement which PW1 referred to. Again, upon this Court considering D.Exhibit 2 being the photographs of the family between 2013 and 01/01/2021 found out that, absent of any other evidence to the contrary, the Akombe family lived happily all along up to the time or soon after. Furthermore, this Court has not been given any evidence to the effect that to date PW1 and DW1 are not husband and wife through a divorced hence staying apart or estrangement as the Court was informed is neither here nor there regarding finding how to treat the suit land.

282. This then leads this court to draw a conclusion that the suit land was acquired during the subsistence of the marriage between PW1 and DW1. With that, the question the Court is required to answer is, what does the evidence of PW1 that any monies the children gave him was a gift which was to the exclusion of DW1 which she should not lay claim to. Whether the money given to him was the sum used to acquire the suit land or his own money as a person or from resources jointly out together with the involvement DW1, the bottom line is that the suit land was acquired when PW1 and DW1 were married, and the only ones for that matter in relation to any known marriage between any other person and the 1st Plaintiff.

283. PW1 stated that the reason DW1 should not be considered as having an interest in the suit land is that he acquired it with PW2 in mind as to put up a matrimonial home for her and him. I have found that such a step could not be possible since PW2 was not in the life of PW1 as a wife.

284. Section 14(1) imports an obligation of rebutting the presumption that property acquired during the subsistence of a marriage is not matrimonial. Who has the onus of proof? To ascertain upon whom the burden is placed one needs to understand the presumption. When property is acquired during the subsistence of a marriage it is presumed that it belongs to the spouses at the time of marriage unless, in the event of a man having more than one wife, there is an express agreement between them that the property belongs to one wife to the exclusion of others. Thus, the burden lies on he/she who asserts that the property is not matrimonial. In such a case, it was incumbent on PW1 to prove that the suit land was not matrimonial property of both he and DW1. I find that PW1 has not discharged that burden.

285. Of importance to note is that this finding does not imply that a marriage gives an automatic right to acquisition of an interest in the property held in the name of or owned by a spouse, in the case an issue of division or matrimonial property arises. Far from it, there has to be proof by he who lays claim to it how they acquired interest and in what nature and to what extent in terms of contributions.

286. Besides the above, this Court has found that the Akombe children contributed money through which the suit land was acquired and registered in the name of the 1st Plaintiff. This was in addition to that which the 1st Defendant contributed. Their intention having been made known and actualized in trust that the 1st Plaintiff would hold the property for himself and in favour of the 1st Defendant and owners the question this Court asks is: was a constructive trust created by such a relationship?

287. The first step is to understand what amounts to a constructive trust and how is results. I would rely on the holding in the Court of Appeal case of Archer & Another v Archer & 2 Others (Civil Appeal 39 of 2020) [2023] KECA 298 (KLR) (17 March 2023) (Judgment). In it the Court held:

> "A constructive trust is therefore generated by circumstances where through some prior agreement or bargain, a trustee takes a fiduciary role which he or she cannot be allowed to disavow, and where the assertion of absolute beneficial ownership thereby becomes unconscionable as a result of his or her previous dealings and actions. This Court upheld this view in Twalib Hatayan & another vs. Said Saggar Ahmed Al-Heidy & 5 others (supra) as follows:A constructive trust is an equitable remedy imposed by the court against one

who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled.

Therefore, while the resulting trust focuses on monetary contribution towards purchase of a property, a constructive trust is concerned with the bargain or common intention of the parties relating to ownership of the subject property. It is also notable that the focus in resulting trusts is on the unilateral intention of the provider of the purchase money, while constructive trusts are rooted on the bilateral intentions of the relevant actors. The House of Lords in Stack vs Dowden (supra) held that a common intention is recognised as relevant, only if one party alters his or her position in detrimental reliance upon some form of bargain that would confer upon them a sufficiently defined beneficial interest in the subject property, and an unconscionable denial of rights would result if the legal estate owner tries to evade the bargain. As regards the timing of the bargain, this can precede, be contemporaneous with, or occur after the acquisition of title...

In Oxley vs Hiscock (supra), LJ Chadwick of the English Court of Appeal, held as follows:

> 68. "…..The first question is whether there is evidence from which to infer a common intention, communicated by each to the other, that each shall have a beneficial share in the property."

288. In Yaxley - vs- Gotts & Another, (2000) Ch 162, an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract was overridden by the oral agreement which was still enforceable on the basis of a constructive trust or proprietary estoppel. Thus, as was held by the Court of Appeal in Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR:

> [A] "Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in Steadman – vs- Steadman (1976) AC 536, 540,
>
> "If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable".

289. The Halsbury's Laws of England, 4th Edition, Volume 48 at paragraph 690 states as follows on constructive trusts:

> " A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant

has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.

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

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

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

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

290. Further, of a constructive trust, The United States Supreme Court in Harris TR. & SAV. Bank v. Salomon Smith Barney INC., 530 U.S. 238, 250–51 (2000) citing Moore v. Crawford, 130 U.S. 122, 128 (1889) stated thus:

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

291. Similarly, in Canada, the Supreme Court in Soulos v. Korkontzilas, [1997] 2 S.C.R. 217, clearly gave the purpose of constructive trust as follows:

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

292. Coming back home, the Supreme Court of Kenya in Arvind Shah & 7 Others V. Mombasa Bricks and Tiles & 5 Others, Supreme Court Of Kenya, Petition No. 18 (E020) of 2020 held recently that:

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

293. In the Arvind decision (supra), the Supreme Court went on to hold that "A constructive trust can be imported into a land sale agreement to defeat a registered title therefrom;". From the learned opinions of the authorities above it is my view that even though the 1st Plaintiff was duly registered as owner of the suit land, the facts herein lead me to find that his title can be defeated by virtue of the constructive trust created. But given that the Defendants have not sought the relief of complete cancellation of the title then only am amendment should be effected to reflect the true position.

294. In essence, by holding a family meeting and agreeing to raise funds towards the acquisition of the suit land and construction thereon, and the act of actualising it while having caused the land registered in the plaintiff's name, there was a common intention by the Akombe family. A number of actions or steps that point to the intention of the family to acquire the property for joint ownership of PW1 and DW1 was the involvement of the children, apart from making contributions thereto, in the process of acquisition, as the evidence of DW1, DW2 and DW3 shows.

295. From there the family met in February, 2015 and agreed on purchasing and developing a retirement home for the parents. The documentary evidence that they gave, as analysed above, shows a number of financial activities from a period soon after that, which were made by the Akombe children towards the vendor and PW1 respectively. They also show a number of steps that involve the children in the process of acquisition of the suit land. For instance, in terms of D.Exhibit 6 (a screenshot of a WhatsApp text sent on 24/05/2016 to the Akombe family Group Forum called "Nyagware-Hills") it shows that Roselyn Akombe communicated to the family urging them to put some money together to build a retirement home. She wrote "Hi guys. I have just left the plot in Kitale that fathe alinunua. It is a very good piece of land. I know you are constrained. But it would be really nice to put some money together in the next few months and help them build their retirement househere. It is a very good location." Jeliah Akombe replied, "Ok. That is good." Agusa Akombe commented, "Sounds good." Another screenshot, D.Exhibit 7, of communication or series of messages between the PW1 and the vendor shows that on between 13/06/2016 and 03/11/2016 shows that the vendor increased the purchase price to Kshs. 1,000,000/= per acre from Kshs. 750,000/= of which Kshs. 2 million had been acknowledged as paid and there were disagreements on the change; on 22/06/2016 the vendor expressed a desire to refund the sum already received; on 28/06/2016 the PW1 expressed willingness to receive the refund since the completion of the transaction at the agreed price had been declined by the vendor's family; on14/07/2016 the vendor proposed a revised purchase price per acre at Kshs. 850,000/=; on 21/07/2016 the PW1 complained that the vendor kept changing the terms of the agreement and still wanted his refund; on the same date the vendor wrote stating that the transaction was being frustrated by family concerns; on 27/07/2016 the PW1 sent a message "...At least for you, you still have the land. In my case, my family is questioning where I took the money that I already paid you..."; the following day the vendor wrote that if his wife did not sign the documents he would refund the money; on 08/09/2016 the PW1 wrote that the money would be deposited in the vendor's account soon. Further, on 03/11/2016, the vendor sent another text in which he mentioned Rose as having accepted the revised price. He wrote at 10:16 PM, "(some two sentences in Ekegusii and then in English)... I wish

to know how soon we can finalise the land transaction. When Rose was here, we agreed that I remove the caution and she ... a2". At 10:19 PM he wrote again, "She said that if caution was removed, she has no problem transacting at KShs. 850,000/= per acre... I urgently need to send my son to college..." At 10:35 PM he wrote again, "Ask her to reach me on WhatsApp if you can please. The man who had put caution claimed I hadn't paid Kshs. 50,000/= which I did." According to DW3 these were screenshots shared by PW1 with them (children) on their advice, in anticipation of a law suit if the vendor breached the contract.

296. After that were a series of WhatsApp messages, D.Exhibit 8, between Rose Akombe and someone referred to as Advocate Ondieki, between 13/09/2017 and 30/11/2018 which touched on the balance of Kshs. 200k (understood as Kshs. 200,000/=) and the advocates fees of 50k (understood to be Kshs. 50,000/=) excluding government fees, and message send by Roselyn Akombe on 24/10/2017, being a photograph of a cheque for Kshs. 250,000/= drawn by Roselyn Kwamboka Akombe in favour of the Advocates on 16/10/2017. Another message sent by the lawyer on 31/10/2017 that he was not reaching the vendor; another one by Roselyn, giving the lawyer her mother's contact in the USA and one from the lawyer on 15/01/2018 forwarding the pdf version of the agreement, another acknowledging receipt of the agreement, another one of 15/03/2018 by Rose Akombe expressing concerns about the delay in finalizing the transaction.

297. This Court has carefully analysed the WhatsApp messages referred to above in relation to the emails between the vendor and Roselyn Akombe. The first one sent on 24/11/2017 at 7:21 PM whose subject was "Request for bank account for your father" was from [particulars withheld]@gmail.com to [particulars withheld]@me.com. In it the vendor complains that the recipient's father had no intention of buying the remaining quarter (¼) of an acre because it had a grave on it and that the father had sent people to occupy the land and fence it without letting the vendor point out beacons to him. He indicated he had rescinded the contract and wanted the recipient to give him her father's account so that he refunds him his money.

298. The second one whose subject was the same was sent on 25/11/2017 at 9:22 from [particulars withheld]@me.com to [particulars withheld]@gmail.com and copied to Ken Ondikei of [particulars withheld]@skynet.co.ke. She stated Dear Joshua, Thank you for your message below. I am copying my dad's lawyer herein who has instructions to handle all matters related to the Kitale land (6 acres) ..." The third one whose subject was the same was sent from the recipient [particulars withheld]@me.com to the sender [particulars withheld]@gmail.com and was sent on 27/11/2017 at 2:54:05 GMT+3. In it she wrote, "I spoke to mzee and I am sure he will brief you on what we have agreed on. In case of any changes I will update you."

299. Further, I have carefully considered the emails also with the evidence of PW1 in cross-examination and re-examination. In cross-examination PW1 denied authorizing Roselyn to communicate with the vendor. In re-examination he admitted to have authorized her. Dr. Roselyn (DW3) in her evidence states that PW1 was fully aware of her negotiations over the change of price of the suit land. While PW1 is an unreliable witness since he blew hot and cold on a number of issues, the email communication between the vendor and Roselyn Akombe show that indeed the latter was actively engaged in the negotiations on the acquisition of the suit land and with the permission of the father (PW1). Further, the emails and the WhatsApp messages between the vendor and Roselyn and the lawyer, one Ken Ondieki, and more so, the payment of the balance of the purchase price and the lawyer's fees by Roselyn Akombe on 16/10/2017 all demonstrate that the land was acquired by the joint efforts of the 1st Plaintiff, the 1st Defendant and their children for an on behalf of the two parties (1st Plaintiff and 1st Defendant) for the purpose of building their retirement home and therefore the registration in the name of one of them (PW1) was in trust for the other (DW2). By the time the transaction was competed

about the end of October, 2017, the 2nd Plaintiff was nowhere in the picture of the lives of the two parties hereinabove mentioned and their family. She cannot therefore be found rightly to have a claim to the suit land and any developments thereon.

300. Once the registered owner changes his mind to treat the property acquired under a common intention for purpose of a joint ownership as his own to the exclusion of those who contributed towards its acquisition and development he is said to acted inconsistently with the common intention. If a party by his conduct causes another to change his position and act in a certain manner believing that the conduct of that other is genuine and as presented to him and thereby the party who has acted in that belief to his detriment, the party whose conduct influenced that other to act to his detriment cannot be permitted to resile to his original or take other position than as his conduct was. A constructive trust will have arisen. Put succinctly in regard to the instant suit, since the 1st Plaintiff agreed to receive funds from the Akombe children and the 1st Defendant on diverse dates between February, 2015 and the date of suit and be registered as owner of the suit land and construct thereon using those funds and including his and by so doing he made the children and their mother to believe that by giving him the funds and he acting by registering himself as owner and constructing the house standing on the suit land as actualization of their intention and he did so to their change of their financial positions he cannot now resile to his original position or change to a different one than agreed: a constructive trust was thereby created. Therefore, I can only reach one conclusion: that the 1st Plaintiff was registered as owner of the suit land and in trust for the 1st Defendant as a spouse. That being so, I find that a constructive trust was created in favour of the 1st Defendant as a joint tenant and co-owner.

Whether the 2nd Plaintiff has a right to and an interest in the suit land

301. I have found that the suit land was acquired by the Akombe family pursuant to the family resolution of February, 2015. Further, that the contributions to the project were undertaken between the 20/01/2016 and the time when the suit was instituted but the remittances towards it seem to have stopped when the 1st Plaintiff declared to the family that he had another wife. That the said party (PW2) might have been married soon after the 1st Plaintiff came to Kenya in mid-December, 2021 and thereafter visited the home of the lady and paid a sum of Kshs. 400,000/= as a deposit for dowry. This is because, contrary to the evidence of PW1 that he married her in December, 2017 she was clear that it was that PW1 met her in 2017 and that he paid dowry after she picked him from the Jommo Kenyatta International Airport in December, 2021. Actually, the oral evidence of PW2 was contradictory to the written statement but in cross-examination she clarified it. She testified orally that she met the 1st Plaintiff in December, 2017, she also stated that he married him in December, 2017. But she wrote a statement that it on 15/12/2021 when the 1st Plaintiff came into the country and afterwards introduced himself to her parents and paid part of the bride price. If that was to be so, then the steps of the Gusii customary marriage practices like "okomaana chiombe" must have been done around the time. But since, as the 1st Plaintiff testified culture is dynamic, he and the 2nd Plaintiff must have been dynamic indeed because they do not indicate when "okomaana chiombe" happened. This is because it always precedes dowry payment, whether part or in full. Even so, I leave that finding to be made by the family Court if and when need will arise.

302. This Court makes a finding that if PW1 and PW2 got married, if it will be an issue before a relevant court, then it was long after PW1 and the Akombe family acquired the suit land and commenced construction thereon moved to an advanced stage. This is because in his statement PW3 indicates that construction of the house started in the year 2020 and that was when PW1 introduced PW2 to him. By that time PW1 already had the tittle to the suit land issued to him. That being so, by that time the

2nd Plaintiff was not in picture as a wife of the 1st Plaintiff, given her own testimony regarding payment of part dowry.

303. Given that the 1st Plaintiff pleaded and led evidence that the suit land and the house constructed thereon was to be a matrimonial home, and DW1 and her children had in mind the suit land that would be bought and the house built on it to be a retirement home for PW1 and DW1, it is clear to me that the 2nd Plaintiff and child(ren) cannot have an interest in the (matrimonial) home built for another woman and should be excluded from it.

304. While on that, it should be noted that this Court is not involved in, and it does not have jurisdiction on, the distribution of the property so as to determine the shares of the contribution of PW1 and DW1 since Sections 7 and 8 of the *Matrimonial Property Act* deal with such matters upon divorce in relation to property acquired during a marriage.

Whether the Defendants on 14/03/2022 trespassed upon the suit property

305. I start this analysis of this issue by first defining trespass. According to Bryan A. Garner (2019), Black's Law Dictionary 11th Edition, Thompson Reuters, St. Paul MN, p. 1810, trespass is,

> " an unlawful act committed against the person or property of another; especially wrongful entry on another's real property."

A further definition of the term is rendered by Clark & Lindsell on Torts, 24th Edition on page 923 as:

> " any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason".

306. In this matter, I have found above that by a resolution made in February, 2015 by the Akombe family it embarked on a journey of buying the suit land from the parents of the Akombe children one of whom is the 2nd Defendant and the other being, Dr. Roselyn Akombe in whose house the resolution was arrived at. The family actualised the resolution, acquired the land and started a construction of a house on it. Further that even before the full acquisition was made, the 1st Defendant being the mother (of the Akombe children) visited the land not once but specifically in October, 2018 inspect the property. The children such as Dr. Roselyn and Rogers not only took part in the negotiations but also in the inspecting the same from time to time.

307. From the pleadings and the evidence of both the 1st Plaintiff, his witness, one Lawrence Sadaka, PW3 and both Defendants, it is true indeed the 1st and 2nd Defendants visited the suit land on the material date, being the 14/03/2022. While the version of events by the PW1 and PW3 differs slightly in their evidence by which they state that the Defendants came in the company of 40 goons and another one that the alleged goons were about 20, and further that the Defendants pulled down the main gate and erected theirs and stationed two new watchmen, among other actions, it is clear to me that the events point to a family squabble in which one side wishes to paint the other negatively in order to achieve its end. The bottom line is, did the defendants have any justifiable cause to get onto the property and carry out the (lawful) actions they did? Put differently, did the defendants intrude another's property without just cause? In the alternative, would DW1 trespass onto her matrimonial property? Not so. This becomes clear when the definition of matrimonial property as given under the next issue is compared with the analysis I now make below.

308. The suit land was acquired before the marriage to the 2nd Plaintiff but during the marriage with the 1st Defendant. Since it is clear from the testimony and admission of the 1st Plaintiff that the suit land was to be a matrimonial property, and from the evidence of DW1, DW and DW3 that it was intended to be a retirement home for the PW1 and DW1, then this Court makes a finding that indeed it was to be matrimonial property. That being so, the question is for which of the two marriages (wives) was it to be matrimonial property? Certainly, for the marriage subsisting at the time of acquisition and development. And from the evidence before me it is beyond peradventure that it was acquired and developed during the marriage between the PW1 and DW1 only.

309. To make it clear about the above finding, the totality of the numerous remittances by the children of the 1st Plaintiff to him and to the vendor of the suit land directly towards the acquisition of the suit land and development thereon, the visits by PW1 and DW1 to the suit land in 2018 as evidenced by PW1, DW1 and DW2, the presence of the 1st Plaintiff's son Steve Akombe in the process of scouting or looking for the land, as PW1 testified and it was stated by DW2, the participation of Dr. Roselyn in price renegotiation as evidenced by the screenshots of the WhatsApp messages, D.Exhibit 7, and admitted by PW1 in both cross-examination and re-examination, and the fact that there was a family meeting in February, 2015 all point to the inevitable conclusion that the acquisition and development of the suit land was for the purpose of the joint ownership and use by the PW1 and DW1 and their children (the seven issues of the marriage).

310. While on that, this Court finds it difficult to believe the 1st Plaintiff that his son and him would travel with him and driving him all the way from Nyamira to Trans Nzoia, and take him round to various places while he looked for land, and drive him all the way back to Nyamira and take him to the vendors home and he (the son) was unaware of or uninformed of the reason why he was driving his father around. It is hardly possible that the son would remain or sit in the car waiting for the father to inquire about parcels of land and vendors and negotiate prices in his absence and then drive him to another location and repeat the same exercise without inquiring of the father what he was doing in those places.

311. Further, this Court finds that it certainly could not have been in contemplation of the 2nd Defendant who was not in picture at the time these events took place but only showed up in or about 2021 when she started being involved in buying materials and paying workers out of monies given to her by the 1st Plaintiff. This Court has already made a finding that most of the funds, as have been shown were coming into the hands of the PW1 on behalf of the family of the 1st Defendant but towards the joint project. Thus, whether the money found its way into the hands of the 2nd Plaintiff (for disbursements towards the project as she stated in evidence as confirmed by the 1st Plaintiff, it still was the 1st family's joint contribution with the 1st Plaintiff towards the same cause - acquiring the suit land and building a retirement home for the 1st Plaintiff and 1st Defendant. It does not by any stretch of imagination make the 2nd Plaintiff a joint owner.

312. My finding does not mean in any way that if the PW1 and PW2 acquire any property jointly upon their marriage (if legal) with the intention of their sole use to the exclusion of the first family it will be wrong or illegal. Further, and as admitted in evidence by DW1 and DW2 it does not exclude the 2nd Plaintiff from being given a share or part of the ancestral home in Nyagware of Nyamira County if she is married to the 1st Plaintiff.

313. I have found above that though the 1st Plaintiff was registered as owner of the suit land the registration was in trust for himself and the 1st Defendant as husband and wife and parents of the Akombe children who made a resolution to buy the property in that behalf. For that reason, the entry and occupation

and use of the property by the 1st Defendant and the 2nd Defendant could not and does not amount to trespass.

Whether the home in Nyagware in Nyamira County is the 1st Defendant's matrimonial home or ancestral place for the 1st Plaintiff where he can settle any other wife he marries

314. The 1st Plaintiff pleaded that the land in Nyagware Village was the matrimonial home of the 1st Defendant hence she should settle there and leave him to settle the 2nd Plaintiff in the suit land since customs are dynamic and in modern times people can buy land and build matrimonial homes away from the ancestral parcel of land. It was the Defendants' case that the 1st Plaintiff should settle the 2nd Plaintiff in the Nyagware place and not the suit land, which the children had bought for the 1st Plaintiff and 1st Defendant.

315. The issue then is whether the Nyagware village ancestral land claimed by the parties to be in existence and the matrimonial home for PW1 and DW1 should be a matrimonial home limited to only DW1 to the exclusion of PW2 or any other wife or wives PW1 may marry.

316. A matrimonial home is defined under Section 2 of the *Matrimonial Property Act* as:

> " 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."

317. Under Section 6 matrimonial property is defined as:

> " a. the matrimonial home or homes;
>
> b. household goods and effects in the matrimonial home or homes; or
>
> c. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage."

318. I refrain from making a determination that the 1st Plaintiff owns land in the Nyagware home because no material has been placed before me to that effect. Without evidence of an existing part of earth in Nyagware Village registered in either the 1st Plaintiff's or both the 1st Plaintiff's and 1st Defendant's name(s), I am unable to pronounce myself as such. Both the 1st Plaintiff and the 1st Defendant together with the 2nd Defendant testified that there is a parcel of land somewhere in Nyagware village in Nyamira County where the PW1 and DW1 have put up a home. Further that the land ancestral. However, their evidence differed after that in the sense that PW1 stated that it is the matrimonial home he had put up for the 1st wife and her children and on it is settled the larger Mosaisi family hence DW1 and her children should not interfere with his plan of putting another home in the suit land in Kitale but for him and the 2nd Plaintiff. While the 1st Defendant, and DW2 and DW3 agreed that there indeed was a home in Nyagware Village which home was a matrimonial home for her, they stated that being ancestral land that was the place where if the PW1 marries another wife or wives he could settle her/ them also. It was their further evidence that PW1 should not settle the 2nd Plaintiff or any other woman on the suit land because it was been acquired specifically for PW1 and DW1 as their retirement home and for the (Akombe) children and children's children.

319. PW2 stated in evidence that the AbaGusii customs and practices requiring that men settle their wives in the ancestral home as matrimonial homes. While I agree that the customs are dynamic, and bearing in mind that Section 6 of the *Matrimonial Property Act* refers to matrimonial property as matrimonial home or homes, it is clear to me that spouse can have more than one matrimonial home. Therefore,

the fact that the PW1 and DW1 had a matrimonial home in the Nyagware Hills did not preclude them from having another one in Kitale, specifically the suit land. In any event that was why, due to the dynamism of the culture, PW1 wanted to and did establish another matrimonial home on the suit land. But he can settle the 2nd Plaintiff on the ancestral land or elsewhere if he wishes to.

Whether the Plaintiffs and the Defendants proved their case and counterclaim respectively

320. While I did not find any fraud to have been committed by the 1st Plaintiff in his act of being registered as the owner of all that parcel of land known as Trans Nzoia/kipsoen/1903 I found that he held it also in trust for the 1st Defendant as his spouse at the time of acquisition and development. And for that reason, since from the totality of the evidence before me, the trust seems to have waned to the lowest the 1st Plaintiff cannot be trusted to keep holding the title as was registered without inclusion of the name of the other spouse as a co-owner. The upshot is that I find not merit in the Plaintiffs suit and I dismiss it while I find, on a balance of probabilities, that the counterclaim has merits and succeeds in terms of the reliefs I give below.

Who to bear costs of the suit and of the counterclaim

321. Under Section 27 of the *Civil Procedure Act*, Chapter 21 Law of Kenya, subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force the award of costs is at the discretion of the judge or magistrate who will determine by how much or to what extent and by whom they are to be paid. However, as per the provision, costs will follow the event and will be so awarded unless for reasons to be recorded the court decides to make a different order thereto. It is in my considered opinion that owing to the circumstances of this case, especially that the families herein have gone through agony and pain as they battled this case, although it is clear that the Plaintiffs have lost their claim and the Defendants have succeeded in their counterclaim against them, it would be a forever painful reminder to the parties who have lost if this court awards costs to the successful party and they (the successful party) starts to demand payment or executes. It may bring more disharmony in the family. For those reasons that I exercise discretion and order that each party bears its own costs.

322. As I exercise the discretion, I revisit the issue I started with in this judgment: The Biblical story of the decision of King Solomon and the live baby who was being claimed by two women. While he took the baby in his arms and lifted the sworn as a sign of intending to split the baby into two to give half to each woman he did not intend to kill the baby. Instead he wanted to ascertain who would care to let the child live. I believe this is what I have done in this judgment and by not ordering costs to be borne by any party: the parties now have a living 'baby'.

323. Accordingly, I enter judgment in favour of the Defendants against the Plaintiffs as follows:

    a. The Plaintiffs' suit is hereby dismissed in entirety.

    b. A declaration is hereby issued that there is a constructive trust over all that parcel of land known as Trans Nzoia/Kipsoen/1903 in favour of the 1st Defendant as a joint tenant and equal co-owner thereof and the developments thereon, as a matrimonial home of both the 1st Plaintiff and the 1st Defendant, and the 2nd Defendant and her siblings hold of equitable rights of access to the said property as their family home.

    c. An order be and is hereby issued compelling the 1st Plaintiff to effect the registration of the 1st Defendant, as a joint tenant and co-owner of the suit property immediately, failing which all documents necessary to effect the registration shall be executed on his behalf by the deputy registrar of this court.

d. A declaration that the 2nd Plaintiff is a trespasser upon the suit property and has no rights of entry, occupation and possession thereof.

e. An order permanently injuncting the 2nd Plaintiff from entering upon, trespassing on, or otherwise interfering with the suit property.

f. Each party shall bear the costs of both this suit and the counterclaim.

324. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE ELECTRONICALLY VIA THE MICROSOFT TEAMS ON THIS 18TH DAY OF JANUARY, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE

Present online

Miss Nafula holding brief for Samba for the Plaintiffs

Mwesigwa holding brief for I. Okero for the Defendants

Parties: The 1st Plaintiff and the Defendants and most of the Akombe children.