



REPUBLIC OF KENYA



Kagambi & 21 others v Gatabaki (Environment and Land Case Civil Suit E012 of 2022) [2025] KEELC 6922 (KLR) (14 October 2025) (Judgment)

Neutral citation: [2025] KEELC 6922 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E012 OF 2022
CA OCHIENG, J
OCTOBER 14, 2025

BETWEEN

TIMOTHY IRIMU KAGAMBI 1ST APPLICANT
HERMAN GICHIRA 2ND APPLICANT
DR. GEORGE NJOROGE 3RD APPLICANT
NAOMI NYAMBURA MBURU 4TH APPLICANT
MARGARET W. GITAU MUCHINA 5TH APPLICANT
VIPUL SHAHIKNAT BHATT 6TH APPLICANT
DANIEL KIMETHU MBURU 7TH APPLICANT
RICHARD MUNDIA KARIUKI 8TH APPLICANT
FREDRICK MWANGI MUCHOKI 9TH APPLICANT
CHARLES MATHAI MATU 10TH APPLICANT
MONIQUE WANGUI MATU 11TH APPLICANT
MARY WAIRIMU MURIUKI 12TH APPLICANT
JOSEPH MUCHINA MURIUKI 13TH APPLICANT
JOHN GACHANJA KAIGANAINE 14TH APPLICANT
JOSEPH KIMANI KARANJA 15TH APPLICANT
GEORGE NJOROGE KIHANYA 16TH APPLICANT
ROBERT KAMAU KIHANYA 17TH APPLICANT
DOROTHY WANJIKU GUCHU 18TH APPLICANT
NGARI KARIITHI 19TH APPLICANT



RACHEL NGARI 20TH APPLICANT
ALICE MERCY NJERI KINYANJUI (SUING AS AN ADMINISTRATOR AND
PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHNSON JOSHUA
KINYANJUI - DECEASED) 21ST APPLICANT
ABBIMAC ENTERPRISES COMPANY LIMITED 22ND APPLICANT
AND
NANCY WANJA GATABAKI RESPONDENT

JUDGMENT

1. What is before the Court for determination is the Applicants' Originating Summons dated 3rd February 2022. They seek a determination of the following questions:
 - a. Whether the 1st Respondent should deliver to the 1st to 17th Applicants, the duly executed transfer instruments, and all other necessary documents necessary for the transfer of the parcels of land known as LR No. 28223/35, LR No. 28223/39, LR No. 28223/41, LR No. 28223/42, LR No. 28223/43, LR No. 28223/44, LR No. 28223/46, LR No. 28223/48, LR No. 28223/49, LR No. 28223/50, LR No. 28223/51, LR No. 28223/54, LR No. 28223/55, LR No. 28223/56, LR No. 28223/57, LR No. 28223/58, LR No. 28223/59, LR No. 28223/60 and LR No. 28223/61 (hereinafter "the suit properties), pursuant to the Deed of Indemnity and Guarantee dated 18.12.2007, within 14 days, or with such other period as this court may deem just and appropriate, and in default, the Deputy Registrar be directed to execute the said transfer instruments, and such other necessary documents and /or instruments therewith.
 - b. Whether the 1st Respondent should deliver to the 18th Applicant the duly executed transfer instruments, and all other necessary documents necessary for the transfer of the parcels of land known as LR No. 28223/38, LR No. 28223/52, LR No. 28223/53 (herein after "the suit properties), pursuant to the agreement for sale dated 11.07.1985 within 14 days, or within such other period as this court may deem just and appropriate, and in default, the Deputy Registrar be directed to execute the said transfer instruments, and such other necessary documents and/or instruments therewith.
 - c. Whether the 2nd Respondent should deliver to the Applicants the Deed plans to the parcels of land known as LR No. 28223/35, LR No. 28223/38, LR No. 28223/39, LR No. 28223/41, LR No. 28223/42, LR No. 28223/43, LR No. 28223/44, LR No. 28223/46, LR No. 28223/48, LR No. 28223/49, LR No. 28223/50, LR No. 28223/51, LR No. 28223/52, LR No. 28223/53, LR No. 28223/54, LR No. 28223/55, LR No. 28223/56, LR No. 28223/57, LR No. 28223/58, LR No. 28223/59, LR No. 28223/60 and LR No. 28223/61 (hereinafter "the suit properties), within 14 days, or within such other period as this court may deem just and appropriate, as in order 1 above.
 - d. Whether the 1st, 2nd and 3rd Respondents should pay jointly and severally, any penalties and/or late fees as may be assessed by the Ministry of Lands and Physical planning, on account of the late registration of the transfers to the suit properties.
 - e. Such other orders and/or directions as this court may deem just and fit, including, but not limited to the costs of this application.



Brief Background

2. The proceedings herein were initially instituted against the Respondent herein as the 1st Respondent, Suraya Property Group Limited as the 2nd Respondent and Jacaranda Holdings Property Limited as the 3rd Respondent. On 31st May 2023 the Applicants' withdrew the initial 2nd and 3rd Respondents.
3. The 19th, 20th, 21st and 22nd Applicants were joined in this suit in July 2024. The 19th and 20th Applicants' property is identified as LR No. 28223/32 (formerly plot No.132). The 21st Applicant's property is LR No. 28223/40 and LR No. 28223/45 respectively while the 22nd Applicant co-owns the property claimed by the 15th Applicant, LR No. 5980/29 now LR No. 28223/57.
4. The claim by the 2nd, 4th, 5th, 9th, 12th and 13th Applicants' was settled by a consent that was recorded by this Court on 3rd December, 2024 in terms that the 2nd, 4th, 5th, 9th, 12th and 13th Applicants' would pay the Respondent the total sum of Kenya Shillings Twenty One Million (Kshs 21,000,000) being consideration for the release of the duly executed transfers for the properties identified as L.R. No. 28223/35, L.R. No. 28223/44, L.R. No. 28223/46, L.R. No. 29223/48, L.R. No. 28223/56 and L.R. No. 28223/60 respectively and transfers in respect to the properties were released to them.
5. What is hence for determination is the claim by the 1st, 3rd, 6th, 7th, 8th, 10th, 11th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st and the 22nd Applicants.

Case for the Applicants

6. The Originating Summons is premised on grounds on its face and on the supporting affidavit of the 1st and the 18th Applicants. The 1st Applicant avers that by various agreements for sale executed between the Applicants' and Jacaranda Holdings Property Limited, the Applicants' purchased the portions of land known as LR No. 28223/35, LR, LR No. 28223/39, LR No. 28223/41, LR No. 28223/42, LR No. 28223/43, LR No. 28223/44, LR No. 28223/46, LR No. 28223/48, LR No. 28223/49, LR No. 28223/50, LR No. 28223/51, LR No. 28223/54, LR No. 28223/55, LR No. 28223/56, LR No. 28223/57, LR No. 28223/58, LR No. 28223/59, LR No. 28223/60 and LR No. 28223/61 (hereinafter "the suit properties) all borne out of the subdivision of LR No. 28223/33 (formerly LR No. 5980/3, originally LR No. 5980), purchased by the said Company from the Respondent and her co-proprietor, Dr. Samuel Mundati Gatabaki vide an agreement for sale dated 11th September 1992. Further, that by a Deed of Guarantee and Indemnity dated 18th December 2007, the Respondent and her co-proprietor undertook and agreed to execute transfers to the suit properties in favour of the Applicants. It was also stipulated that the Applicants were not required to make any payments to them, save for those who had outstanding balances on the purchase price who were required to pay to Harith Sheth Advocates.
7. He avers that at the time the Applicants entered into the agreements for purchase of the suit properties, the title to LR No. 28223/33 (formerly LR No. 5980/3, originally LR No. 5980) was being held by the 8th Applicant who was representing Jacaranda Properties Holdings Limited in the sale and that he released it in good faith to Kimani & Michuki Advocates, at the time representing the Respondent and her co-proprietor as well as Suraya Property Group Limited to enable them undertake amalgamation and subdivision of the parcel and vide correspondences, the said Advocates gave a professional undertaking to register the suit properties in the Applicants' names.
8. He claims that the Applicants' paid Suraya Property Group Limited to facilitate the survey work and subdivision of the mother title but they are yet to receive the duly executed transfers thus they cannot secure registration of the suit properties into their individual names. Further, that he is aware from the



supplementary sale agreement dated 25th February 2009 and correspondences dated 21st February 2012 and 11th December 2012 respectively that the Respondent and her co-proprietor did execute transfers to the Applicants but the Respondent has adamantly refused to release them.

9. He admits knowledge of High Court Civil Suit No. 142 of 2015 filed by the Respondent against Suraya Property Group Limited and Jacaranda Holdings Property Limited where she claims Kshs. 11,655,000/= as the balance of the purchase price and a further Kshs. 12,360,000,000/= on account of twenty-six (26) acres of undeveloped land. She insists that the suit has no bearing on the Applicants' claim.
10. On her part, the 18th Applicant avers that vide an agreement for sale dated 11th July 1985, jointly with her husband Gabriel Kimani Guchu (deceased), they purchased five (5) acres to be hived off LR No. 28223/33 (formerly LR No. 5980/3, originally LR No. 5980) from the Respondent and her co-proprietor, Dr. Samuel Mundati Gatabaki (deceased). She confirms that they settled the entire purchase price and expected that the vendors would release completion documents to enable them secure registration of the property in their name but they failed, prompting her late husband to sue them but there was no compliance with Court's directions. She later learnt that the Respondent and her co-proprietor together with Suraya Property Group Limited hereinafter called 'Suraya', had reached a joint venture agreement to develop LR No. 28223/33 (formerly LR No. 5980/3, originally LR No. 5980), committing the five (5) acres they had purchased to the joint venture.
11. She avers that through an indemnity against liability dated 25th February 2009, and in light of the aforementioned joint venture, the Respondent and her co-proprietor bound themselves to ensure that she would still get the five (5) acres and they issued Suraya irrevocable authority to fully engage with her, to finalize the outstanding bit of her transaction and pursuant thereto, she entered into an agreement with Suraya dated 30th June 2009, on the transfer of the five (5) acres to her. She contends that she decided to take part of the land within the main project, being a total of 3.5 acres and the remaining 1.5 acres to be within what was termed as the former jacaranda area and the same was reduced in an agreement dated 4th May 2020 amending the agreement dated 3rd June 2009 but her titles were not released after the aforementioned subsequent agreements thus she filed HCCC No. 760 of 2012 and during pendency of the suit, 3.5 acres were released to her and registered in her name but the 1.5 acres identified as LR No. 28223/38, LR No. 28223/52 and LR No. 28223/53, which lie in the same area as the rest of the Applicants parcels, are yet to be transferred to her.
12. The suit is opposed vide the Respondent's replying affidavit sworn on 12th January 2022 and her Grounds of Opposition dated 6th December 2022. She contends that the Applicants have no locus standi against her and that the suit is sub judice as the matters in issue are directly and substantially in issue in HC COMM142 OF 2015 consolidated with Case 133 of 2015, 134 of 2015, 135 of 2015, 136 of 2015, 137 of 2015, 143 of 2015, 174 of 2015, 175 of 2015 and 181 of 2015 Nancy Wanja Gatabaki v Suraya Property Group Limited and others; HC COMM 760 OF 2012 Dorothy Wanjiku Guchu v Suraya Property Group Limited & 3 Others as well as HC COMM 272 OF 2017 Nancy Gatabaki v Dr. Mundati Gatabaki and Muga Developers Limited still pending in the commercial division.
13. In her replying affidavit the Respondent confirms that she co-owned LR No. 5980 and LR 4508/01 together with her husband (now deceased) and admits that they entered into the sale agreement dated 11th September 1992 with Jacaranda Holdings property Ltd but the said company has never met its obligations of paying the full purchase price of Kshs.18 million thus she has sued it in Nairobi HCCOMM 142 /15 Nancy Wanja Gatabaki v Jacaranda Holdings Properties Limited and Suraya Property Group Limited seeking the balance of Kshs.11,655,000/=. She contends that the issues for determination in the said suit are the same as those raised herein thus this suit is res judicata.



14. She avers that the suit properties were agricultural land and since Jacaranda Holdings Property Limited did not seek Land Control Board consent, for the sale transaction between them within six (6 months), she cannot be compelled to execute any transfer over the said parcel.
15. She contends that since she did not enter into an agreement for sale of land with the 1st - 17th Applicants thus they have no basis of requiring her to transfer any land to them. Further, that the 4th, 5th, 7th, 10th, 11th, 12th, 13th, 14th and 17th Applicants do not appear in the Deed of Guarantee and Indemnity dated 18th December 2007 and cannot claim any benefit from it. She insists that the said guarantee and indemnity provided for payment of the balances of the purchase price by the purchasers who had not completed paying the entire purchase price and they have never paid to date.
16. She denies ever retaining Kimani & Michuki Advocates to act for her and avers that she did not instruct them to issue a professional undertaking on her behalf. Further, that the agreement dated 19th March 2009 was entered into by Suraya and Jacaranda Holdings Limited without her consent. She reiterates that the agreement dated 19th March 2009 is subject of pending litigation in Nairobi HCCOMM 142 of 2015 Nancy Wanja Gatabaki v Jacaranda Holdings Properties Limited and Suraya Property Group Limited.
17. She denies ever executing transfers to the Applicants and avers that once she is paid the balance of the purchase price and mesne profits for loss of use of the suit property, she will transfer them.
18. With regard to the 18th Applicant's claim, she avers that she wants to change the physical location of her portion of land from the part where they agreed to sell to her, to a different location of her liking, which is half a mile from the five (5) acres sold to her.
19. She reiterates that matters in issue were decided in the Ruling delivered on 13th June 2019 in Nancy Wanja Gatabaki v Jacaranda Holdings Property Limited & Another [2019] eKLR.
20. The 1st Applicant swore a supplementary affidavit in which he contends that since the Respondent and her co-proprietor discharged their responsibility under the Deed of Guarantee and Indemnity dated 18th December, 2007 given that they executed transfers thus as at 11th December 2013 the Deed of Guarantee and Indemnity stood performed and all that remained was the release of the said transfers to the Applicants' hence the cause of action herein is the release of the executed transfers thus the suit was brought within time.
21. He insists that High Commercial Suit No. 142 of 2015 Nancy Wanja Gatabaki v Jacaranda Holdings Property Limited and the instant suit are distinguishable, given that in the former suit lies a claim by the Respondent principally against Jacaranda Holdings Property Limited for sums allegedly owed by the said Jacaranda Holdings Property Limited, whereas the instant suit is a claim by the Applicants' against the Respondent for the release of the duly executed transfers. He reiterates that the Applicants' herein are not parties to the said suit and as such, res judicata does not attach as against the instant suit.
22. He asserts that the 4th Applicant's name appears alongside Mr. Muraya Muiro, as the person entitled to L.R. No. 28223/56, with the 5th Applicant being entitled L.R. No. 28223/46, while the 7th and 14th Applicants being purchasers from the persons entitled to L.R. No. 28223/58 and L.R. No. 28223/59, respectively, with the 10th and 11th Applicants being entitled to the transfer to L.R. No. 28223/39, and the 13th and 14th Applicants being entitled to the transfers to L.R. No. 28223/35 and L.R. No. 28223/60 respectively, thus the Respondent is clearly estopped from denying the Applicants' their dues.
23. The Originating Summons was canvassed by way of written submissions.



Submissions

24. The Applicants' submit that since the Respondent and her co- proprietor, Dr. Samuel Mundati Gatabaki duly executed transfers to them sometime in 2013 as was required of them by the Deed of Guarantee and Indemnity dated 15th December 2007, the cause of action herein arose on the execution of the transfers thus time would start running in 2013, meaning that the instant suit was brought within time.
25. On the Respondent's contention that this suit is Res Judicata, in light of the Ruling dated 13th June, 2019 in High Court Commercial Suit No. 142 of 2015, the Applicants' rely on the case of John Florence Maritime Services Ltd & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others, Henderson v Henderson [1843] 67 ER 313 and Kamunye & Others v Pioneer General Assurance Society Ltd [1971] E.A. 263 to submit that none of the elements of Res Judicata exist as between the instant suit and the said suit as there was no determination on the question of release of transfers to the Applicant. Further, that the said Court was categorical that the said question was not an issue for determination.
26. On whether the 18th Applicant's suit is statute barred on account of High Court Commercial Suit No. 760 of 2012, they submit that the two suits are clearly distinguishable, as having become aware that the Respondent had executed the transfers to the properties identified as L.R. No. 28223/38, L.R. No. 28223/52 and L.R. No. 28223/53, the 18th Applicant instituted the current suit to recover the same from the Respondent as this court has jurisdiction to deal with this question thus Section 6 of the Civil Procedure Act is not a bar to the current proceedings.
27. On the allegation that the 18th Applicant's claim is also Res Judicata on account of High Court Civil Case No. 1736 of 1988; They submit that the 18th Applicant had sued to secure specific performance of a sale agreement but the moment the Respondent executed the transfers, a new cause of action arose, being the release of the said executed transfers.
28. They rely on the case of Wilson Mirangi Wacuka v Peter Mathenge Gitonga (Practicing as Mathenge Gitonga & Co Advocates [2021] KEELC 2749 (KLR), to submit that they have demonstrated that the duty of executing the transfers of the suit properties lay with the Respondent and her co-proprietor by exhibiting the contracts upon which the questions for determination under Order 37 Rule 3 of the Civil Procedure Rules are anchored. Further, that the 18th Applicant has exhibited the Agreement for Sale and subsequent agreements showing the evolution of the relationship between her and the Respondent, in addition to Suraya, culminating in the Respondent executing the transfers to L.R. No. 28223/38, L.R. No. 28223/52 and L.R. No. 28223/53 respectively.
29. They contend that having executed the transfers, the Respondent is estopped from denying their existence and their effect thus the doctrine of estoppel by conduct aptly applies. Further, that owing to the fact that the delay in registration is as a result of the Respondent's action, any additional charges or late fees should be paid by her.
30. On her part, the Respondent submits that there cannot exist an independent cause of action known as release of executed transfers as any demand of release of executed transfers must be anchored on an existing contract and it would be an action for specific performance, which is a contractual remedy that is subject to section 4 (1) (a) of the Limitation of Actions Act, which provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.



31. She argues that the underlying contract herein is the Deed of Guarantee and Indemnity which was executed on 18th December 2007 thus the cause of action arose in 2007 and even if it was assumed that time started running in 2013 after execution of transfers as contended by the Applicants, the suit is still time barred as it was commenced in 2022, eight (8) years after execution of the transfers.
32. She relies on the case of Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] KECA 98 (KLR to submit that the suit is res-judicata in light of the Ruling in HCCOMM 142 of 2025 Nancy Wanja Gatabaki v Jacaranda Holding property Limited and Suraya Properties Group Limited where the prayer before the Court was whether she should be ordered to release transfers which is the same issue currently before this Court. Further, that in the former matter, Jacaranda Holdings Property Limited was the Applicant and she was the Respondent.
33. As regards the claim by the 18th Applicant, she submits that the 18th Applicant sued her husband in Nairobi HCCC No. 1376 of 1988 on account of the agreement for sale dated 11th July 1985 for the sale of five (5) acres of land out of Land Reference No. 5980.40. Further, that a judgment was given in which her husband was ordered to transfer the land to 18th Applicant and her husband. The 18th Applicant proceeded to make an application for execution of the said judgment and an order was given for the Deputy Registrar to sign the relevant documents for transfer. She submits that her claim is res-judicata since she has returned to court now seeking release of transfer by her pursuant to the very same agreement for sale dated 11th July 1985.
34. She reiterates that she did not sell any land to the Applicants thus there exists no privity of contract between them and herself save for the 18th Applicant thus their cause of action is as against the Jacaranda Holdings Property Limited, which sold them land. To this end, she relies on the case of Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR.
35. She submits that even though the Applicants' seek refuge in the Deed of Guarantee and Indemnity dated 18th December 2007, it can only be relied on, by the twenty (21) persons expressly set out therein and points out that only the 1st, 3rd, 6th, 8th, 9th, 15th, 16th and 19th Applicants are listed thus the 7th, 10th, 11th, 14th, 17th, 18th, 20th, 21st and 22nd Applicants have no cause of action against her as they were not enumerated as buyers in the said guarantee and indemnity agreement. She argues that release of transfers involves parting with title to land, touches on the rights guaranteed under Article 40 of the Constitution thus cannot exist in abstract but ought to be anchored on a valid contract.
36. She also submits that none of the Applicants has attached evidence to show that they paid the full purchase price to Jacaranda Holdings Property Limited, or that they deposited their balances with Harith Sheth Advocate as required of them vide the Deed of Guarantee and Indemnity. Further, that they bore the burden of proving that they paid the agreed consideration and without such evidence, she is entitled to hold the transfer as lien for the payment of consideration for her land. She points out that about 5th March 2012, there was an agreement that acknowledged that Kenya Shillings Fifty Million (Kshs. 50,000,000/=) was still owed to her for the land sold to Jacaranda Holdings Property Limited. Further, that the said agreement is one of the central issues for determination in HCCOMM 142 OF 2015 and litigating it in this matter is prejudicial to the pending proceedings before the High Court.
37. She also contends that while she does not dispute that she sold five (5) acres to the 18th Applicant, through agreements entered into between the 18th Applicant and Suraya, the latter undertook to relocate the 18th Applicant on the strength of an indemnity against liability dated 25th February 2009 allegedly executed by her and her late husband giving Suraya authority to undertake such acts. She disputes the said agreement of 25th February 2009 and contends that she cannot be held liable for any



promises or undertakings given by Suraya but she is ready and willing to transfer five (5) acres, in the agreed area, to the 18th Applicant.

Analysis and Determination

38. Upon consideration of the instant Originating Summons, respective affidavits and rivalling submissions, the following are the issues for determination: Whether this suit is statute barred. Whether this suit is res judicata. Whether the Applicants are entitled to the orders as sought.
39. On the first issue, the Applicants contend that their cause of action arises from the Respondent's refusal to issue them with transfers executed pursuant to the Deed of Guarantee and Indemnity dated 18th December, 2007. They claim that since their transfers were executed in 2013, the suit is brought within the statutory timelines. On her part, the Respondent argues that the underlying contract herein is the Deed of Guarantee and Indemnity, which was executed on 18th December 2007 thus the cause of action arose in 2007 and even if it was assumed that time started running in 2013, the suit is still statute barred. In my view, I note the Deed of Guarantee and Indemnity was in respect to transaction on parcels of land and there is nowhere the transfers sought and the land acquired can be separated. Insofar as section 4 (1) (a) of the *Limitation of Actions Act* provides a limitation period for claim under contract to be six (6) years, I hold that since the Applicants are seeking their titles to land, they fall within the exception where limitation on claim for land is twelve (12) years. It is my considered view that the Respondent is the one who was geared to frustrate the deed of Guarantee and Indemnity and even filed a suit against the vendor Jacaranda Holdings Property Limited, to delay process. Further, there is no indication that the Applicants were guilty of laches as there was a process of amalgamation and acquisition of Deed Plans before they were to receive their titles. I note the Respondent had also entered into a consent with some of the Applicants herein where she accepted to hand over the transfer documents to them after they paid certain monies, based on the aforementioned Deed of Indemnity and guarantee, and in that regard, I opine that she is estopped from turning around and claiming this suit is statute barred and I will decline to deem it so.
40. On the second issue, the Respondent contends that the suit is res judicata in light of the Ruling dated 13th June, 2019 in High Court Commercial Suit No. 142 of 2015 and that the 18th Applicant's claim is also res Judicata on account of High Court Civil Case No. 1736 of 1988. On res judicata Section 7 of the *Civil Procedure Act* provides as follows:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
41. Further, on sub judice, the Respondent contends that litigating in this suit is prejudicial to HCCOMM 142 of 2015 pending proceedings in the High Court. Section 6 of the *Civil Procedure Act* provides as follows on sub judice:
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”



42. The Supreme Court stated as follows in John Florence Maritime Services Limited & Another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment);
- “...whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction.”
43. From perusal of the proceedings in the aforementioned High Court case and Ruling in HCCOM 142 of 2015, I note the Applicants were not parties therein. Further, they did not litigate with Jacaranda nor the Respondent in respect to the suit properties. There has been no determination of the suit between Respondent and Jacaranda. I opine that the instant suit touches on the transfers of land and the suit in the High Court is centred around demand for monies owed.
44. Based on the facts before me while associating myself with the cited decision and relying on the legal provisions cited above, I find that this suit is not res judicata nor sub judice as claimed. I opine that the issues raised herein are distinguishable from the issues raised in the High Court case and the parties are also different.
45. On the third issue, the Applicants seek to be issued with their executed transfers from the Respondent. They also seek orders that she pays additional charges or late fees. The Respondent contends that she cannot be compelled to release the transfers as there is no privity of contract between the Applicants and herself save for the 18th Applicant. Further, that the Applicants failed to prove that they paid the entire purchase price as contemplated in the Deed of Indemnity executed on 18th December 2007.
46. It is the Applicants' case that vide various agreements for sale executed between Jacaranda Holdings Property Limited and themselves, they purchased the portions of land known as LR No. 28223/35, LR, LR No.28223/39, LR No.28223/41, LR No.28223/42, LR No.28223/43, LR No.28223/44, LR No.28223/46, LR No.28223/48, LR No.28223/49, LR No.28223/50, LR No.28223/51, LR No.28223/54, LR No.28223/55, LR No.28223/56, LR No.28223/57, LR No.28223/58, LR No.28223/59, LR No. 28223/60 and LR No. 28223/61 all borne out of the subdivision of LR No. 28223/33 (formerly LR No. 5980/3, originally LR No. 5980), purchased by the said Company from the Respondent and her co-proprietor, Dr. Samuel Mundati Gatabaki vide an agreement for sale dated 11th September 1992.
47. It is the Applicants' contention that the Respondent and her co – proprietor executed a Deed of Guarantee and Indemnity dated 18th December 2007, where they undertook and agreed to execute transfers to the suit properties in their favour. Further, that they were not required to make any payments to them, save for those who had outstanding balances on the purchase price who were required to pay to Harith Sheth Advocates. I note the Respondent did not deny executing the Deed of Guarantee and Indemnity.
48. The Applicants further allege that from the supplementary sale agreement dated 25th February 2009 and correspondences dated 21st February 2012 and 11th December 2012 respectively, the Respondent and her co-proprietor did execute transfers to them which the Respondent has adamantly refused to release. The Respondent actually admitted that together with her co – proprietor, they entered into the sale agreement dated 11th September 1992 with Jacaranda Holdings Property Ltd.



49. I note as per annexure 'NWG – 4' in the Respondent's replying affidavit, it contains an agreement dated the 5th March, 2012, where it reads thus:

“Mrs. Nancy Wanja Gatabaki will upon execution of this agreement execute transfer in favour of the Jacaranda Plot purchasers and hand them over to M/S Miller & Co. Advocates”

50. It further read thus:

“.....It is hereby agreed between Dr. Sam Gatabaki and Mrs. Nancy Wanja Gatabaki that Dr. Sam Gatabaki shall pay Mrs. Nancy Gatabaki the sum of Kenya Shillings Fifty Million (Kshs. 50,000,000/=) as compensation for money received from the purchasers of the Jacaranda plots and settlement with Jacaranda Holdings Properties Limited.”

51. Further, the Deed of Guarantee and Indemnity which was annexed to the supporting affidavit provided as follows:

‘We confirm that this Deed shall be enforceable against both of us jointly and severally by each of the said individuals and undertake to indemnify each and every one of them against all proceedings and costs that may arise from their seeking to enforce this Deed against us or any of us.’

52. The requirements for the grant of the remedy of specific performance were set out by the Supreme Court of Uganda in *Manzoor v Baram* (2003) 2 E.A. 580 as quoted by the Court of Appeal in *Licinus Investment Limited v Dalpiaz* [2023] KECA 465 (KLR) as follows:

“Specific performance is an equitable remedy grounded in the equitable maxim that “equity regards as done, that which ought to be done”. As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course.”

53. It is not in dispute that the Respondent together with her co proprietor indeed executed the Deed of Guarantee and Indemnity. The Court takes judicial notice of the fact that the Respondent had on 3rd December, 2024, recorded a consent which partially settled this suit with some of the Applicants, save for the 1st, 3rd, 6th, 7th, 8th, 10th, 11th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st and the 22nd Applicants. The Respondent has argued that except for the 22nd Applicant who she seeks to give a different parcel of land from what they had purchased, there is no privity of contract with 1st, 3rd, 6th, 7th, 8th, 10th, 11th, 14th, 15th, 16th, 17th, 18th, 19th, 20th and 21st Applicants.

54. On perusal of the pleadings, I note Kimani Michuki Advocates who were acting for the Respondent and her co proprietor including Suraya Property Group Limited, had given a professional undertaking vide their letter dated 3rd April 2009, to transfer to the Applicants' their respective parcels of land as the Deed Plans were ready. I hence opine that the Respondent cannot escape from this. Further, she has not indicated whether she took action to set aside the said disputed professional undertaking.

55. The Applicants have explained that the 4th Applicant's name appears alongside Mr. Muraya Muiro, as the person's entitled to L.R. No. 28223/56, while the 5th Applicant is entitled L.R. No. 28223/46. Further, that the 7th and 14th Applicants are purchasers from the persons entitled to L.R. No. 28223/58



- and L.R. No. 28223/59, respectively, with the 10th and 11th Applicants being entitled to the transfer to L.R. No. 28223/39. They further state that the 13th and 14th Applicants are entitled to the transfers to L.R. No. 28223/35 and L.R. No. 28223/60 respectively.
56. I note the 1st, 3rd, 6th, 8th, 14th, 15th, 19th & 20th and the 21st Applicants annexed sale agreements between them and Jacaranda Holdings Property Limited while the 10th and 11th Applicants are listed in the Deed of Guarantee and Indemnity dated 18th December 2007 as purchasers t/a Monique enterprises. The 16th and 17th Applicants are also purchasers while the 22nd Applicant claim under the 15th Applicant who annexed a sale agreement as aforesaid and is also listed as a purchaser in the said Deed of Guarantee and Indemnity. There is also evidence that some of the original purchasers have since transferred their parcels of land, case in point is the 7th and 14th Applicants who purchased from the persons entitled to L.R. No. 28223/58 and L.R. No. 28223/59, respectively.
57. The Applicants further argued that the 18th Applicant exhibited the Agreement for Sale and subsequent agreements showing the evolution of the relationship between herself and the Respondent, in addition to Suraya culminating in the Respondent executing the transfers to L.R. No. 28223/38, L.R. No. 28223/52 and L.R. No. 28223/53 in her favour. To my mind, this led to a fresh cause of action.
58. It is my considered view that the Sale Agreements annexed to the Originating Summons provided for not only purchasers but also applies to their nominees, hence since the Applicants have explained how they came to interact with the suit properties which I have highlighted above, I find that they are entitled to receive the transfer forms from the Respondent. It is worth noting that from various correspondences touching on the transaction herein, the Respondent's late co proprietor had actually signed the sought transfers and I hence find an element of bad faith from the Respondent who refuses to release the said transfer forms and Deed Plans claiming she is litigating with Jacaranda Holdings Property Limited and Suraya Property Group Limited in the High Court Commercial Division of the High Court. I note that the Respondent has not furnished this Court with any affidavit from a representative from Jacaranda Holdings Property Limited to confirm that the remaining Applicants failed to pay the purchase price for the respective parcels. To my mind, since the Respondent seeks monies from Jacaranda Holdings Property Limited for the land, she is estopped from seeking monies from the Applicants as this will amount to unjust enrichment.
59. The Applicants have sought for the Respondent to pay late registration fees but I am unable to grant this prayer as I opine that payment of registration fees is the responsibility of the purchaser and not vendor.
60. The 22nd Applicant has explained that even though there was a suit where the Court had directed the Respondent and other parties to transfer the land to her, but circumstances changed since there were changes in the said contract and the specific land to be given to her. She now seeks a further 1.5 acres. Further, the Respondent has even admitted that she is ready to give her a different portion of land. I hence find her claim to be valid.
61. In the foregoing, I find that the 1st, 3rd, 6th, 7th, 8th, 10th, 11th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st and the 22nd Applicants have proved their claim against the Respondent and will enter judgement in their favour and proceed to make the following final Orders:
- i. The Respondent be and is hereby directed to deliver to the 1st, 3rd, 6th, 7th, 8th, 10th, 11th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st and the 22nd Applicants the duly executed transfer instruments, and all other necessary documents necessary for the transfer of the parcels of land known as LR No. 28223/39, LR No. 28223/41, LR No. 28223/42, LR No. 28223/43, LR LR No.



28223/49, LR No. 28223/50, LR No. 28223/51, LR No. 28223/54, LR No. 28223/55, LR No. 28223/57, LR No. 28223/58, LR No. 28223/59, and LR No. 28223/61 pursuant to the Deed of Indemnity and Guarantee dated 18.12.2007, within 30 days from the date hereof and in default, the Deputy Registrar, Environment and Land Court Milimani, is directed to execute the said transfer instruments, and such other necessary documents and /or instruments therewith.

- ii. The Respondent be and is hereby directed to deliver to the 18th Applicant the duly executed transfer instruments, and all other necessary documents necessary for the transfer of the parcels of land known as LR No. 28223/38, LR No. 28223/52, LR No. 28223/53 pursuant to the agreement for sale dated 11.07.1985 within 30 days from the date hereof and in default, the Deputy Registrar, Environment and Land Court Milimani is directed to execute the said transfer instruments, and such other necessary documents and/or instruments therewith.
- iii. The Respondent be and is hereby directed to deliver to the 1st, 3rd, 6th, 7th, 8th, 10th, 11th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st and the 22nd Applicants the Deed plans to the parcels of land known as LR No. 28223/39, LR No. 28223/41, LR No. 28223/42, LR No. 28223/43, LR No. 28223/49, LR No. 28223/50, LR No. 28223/51, LR No. 28223/54, LR No. 28223/55, LR No. 28223/57, LR No. 28223/58, LR No. 28223/59, and LR No. 28223/61, within 14 days, or within such other period as this court may deem just and appropriate, as in order 1 above.
- iv. Each party to bear their own costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Muturi Njoroge for Respondent

Gichigo for Applicant

Court Assistant: Joan

