

**IN THE COURT OF APPEAL
AT NAKURU**

[CORAM: WARSAME, MATIVO & GACHOKA

JJ.A] CIVIL APPEAL NO. NAK E023 OF 2022

BETWEEN

**KENYA UNION OF DOMESTIC
HOTELS, EDUCATIONAL
INSTITUTIONS, HOSPITALS AND
ALLIED WORKERS
(KUDHEIHA).....APPELLANTS**

AND

**TEA HOTELS LIMITED.....1ST
RESPONDENT THE MANAGEMENT OF TEA HOTEL.....
2ND RESPONDENT RAVJI DEVJI CHHABADIA
KANJI DEVJI CHABHADIA
CHANGRAKANT DEVJI
CHHABADIA
SHASHIKANT KANJIBHAI PINDORIYA.....3RD RESPONDENT
YASANGWAN HOLDINGS LIMITED.....4TH RESPONDENT**

**CONSOLIDATED WITH
CIVIL APPEAL NO. E028 OF
2022**

**RAVJI DEVJI CHHABHADIA.....1ST APPELLANT
KANJI DEVJI CHABHADIA.....2ND
RESPONDENT CHANDRAKANT DEVJI
CHABHADI.....3RD RESPONDENT SHASHIKANT
KANJI BHAI PINDORIYA.....4TH RESPONDENT**

AND

**KENYA UNION OF DOMESTIC
HOTELS, EDUCATIONAL
INSTITUTIONS, HOSPITALS AND
ALLIED WORKERS
(KUDHEIHA).....1ST RESPONDENT
THE MANAGEMENT OF TEA HOTEL.....2ND RESPONDENT
TEA HOTELS LIMITED.....3RD**

**RESPONDENT YASANGWAN HOLDINGS LIMITED. 4TH
RESPONDENT**

*(Being an appeal from the ruling of the Employment
and Labour Relations Court of Kenya at Kericho
(Wasilwa, J.) dated 18th January 2022*

in

ELRC Cause No. 10 of 2016

JUDGMENT OF MATIVO, JA.

1. This judgment determines two consolidated appeals, namely Civil Appeal No. **E023 of 2022** and **E028 of 2022**. Both appeals seek to overturn the ruling delivered by *Wasilwa, J.* on 18th January 2022 in Kericho Employment and Labour Relations Court (ELRC) Cause No.10 of 2016 in which the learned judge determined four applications.
2. The first application dated 26th April 2021 was filed by **Tea Hotels Limited** seeking the following orders: (a) the sale and transfer of **L.R. No. Kericho Municipality Block 4/295** to **Ravji Devji Chhabadia, Kanji Devji Chhabadia, Changrakant Devji Chhabadia** and **Shashikant Kanjibhai Pindoriya**, the purchasers, (collectively named as the 3rd respondent in the said suit and in this appeal) be set aside; (b) a mandatory injunction do issue compelling the respondents to file in court true and just accounts including but not limited to the exact amount of money paid by the said purchasers and the amount paid to each of the employees pertaining to the

sale of the said land; (c) a mandatory order compelling **Hezron**

Getuoma Onsongo T/A Hegeons Auctioneers to file in Court details pertaining to the public auction, (d) revocation of the said auctioneer's license; (e) the court exercises its disciplinary powers under section 56 of the Advocates Act and punish **Kemboi Gilbert Kiprono** advocate for misconducts committed in the course of the proceedings; (f) such other orders as the justice of the case permits; and, (g) costs of the application be awarded to the applicant. The application is premised on the grounds listed on its face and the supporting affidavit sworn by Mr. Musa Koech, the applicant's director, also dated 26th April 2021.

3. Briefly, the grounds in support of the application are: (a) the applicant has erected on two plots, namely; (a) **L.R. No. Kericho Municipality Block 4/295** and **LR No. Kericho Municipality Block 4/ 313** ; (b) the respondent's counsel **Mr. Kemboi Gilbert Kiprono** colluded with the auctioneer in conducting a fraudulent auction aimed at divesting the applicant of his property; the duo obtained a forged and incomplete title deed for **L.R. No. Kericho Municipality Block 4/295**; (c) unaware of the fraudulent transfer, the respondents wrote to the applicant

demanding payment of

Kshs.5,791,882/=; (d) the said advocate failed to avail records pertaining to the auction; (e) the purchasers purported to transfer the entire **L.R. No. Kericho Municipality Block 4/295** measuring 5.831 valued at Kshs.423,512,500/= instead of one acre from Block 4/313 which the purchasers had valued at Kshs.100,000,000/=; (f) no public auction ever took place but the property was sold to the purchasers at a figure lower than its value; (g) prior to the sale the respondents only valued Block 4/313 but they sold Block 4/295; (h) no notification of sale for Block 4/295 was issued; (i) the purchasers did not pay the 25% of the price at the fall of the hammer.

4. The purchasers opposed the application basically maintaining that it was *res judicata* having been previously determined in a previous application dated 14th June 2018 which was dismissed on 9th October 2018 and an application dated 16th March 2021 which was withdrawn. It was their case that the execution followed due process, therefore, the orders sought against the advocate lack basis. Further, the claimant and the respondent had entered into a consent pursuant to which it was agreed that

Kshs.5,000,000/= was for settling the salary

arrears, and Kshs.2,856,028/=, being terminal dues, would be paid to retirees at Kshs.155,000/= per month with effect from end of August 2016. Further, the applicant undertook to pay the claimant's members monthly salaries as they fall due. However, the consent was never implemented and the claimants' members were instead declared redundant.

5. It was also contended that Tea Hotels Ltd failed to pay the decretal sum necessitating execution and the property was valued by a valuer appointed by the applicant. Also, vide a report dated 16th December 2019 the Government valuer independently valued the property at Kshs.110,000,000/=.
6. It was also argued that applicant through its advocate procured a prospective purchaser, which culminated in the sale of **LR No. Kericho Municipality Block 4/295** via private treaty and **Block 4/313** was to be spared. Subsequently, Hegeons auctioneers were given the green light to sell part of the **Block NO.4/295** and the auctioneers advertised it for sale in the Daily Nation of 23rd August 2018 and also in the Star Newspaper on 9th January 2019. Thereafter, the public auction was held at Uhuru Gardens opposite Kericho law Court on the 24th January

2019. That out of nine bidders, the

purchasers were the highest and the land was sold at the fall of the hammer. A report of the auction was filed in Court on the 7th February 2019. Lastly, 25% of the purchase price was paid at the fall of the hammer which amount was used partly to pay the claimant's employees and the applicant's directors, namely, Kimalel Chumo and Edgar Mutai who were also beneficiaries.

7. The second application was filed on 14th July, 2021 by Kemboi Chamber Advocates seeking the following orders:
 - (a) the respondents do appear and state the nature and particulars of their claim after claimant's members have been paid Kshs.51, 463, 694.30/=;
 - (b) the honorable Court do issue directions on whether the applicant should remit Kshs.6.898.677.78/= to Ndege Chai Savings and Credit Cooperative Society being the loan deducted at source by the respondent for former retirees with loans but never remitted;
 - (c) the Honorable Court do issue directions on whether the applicant should remit Kshs. 3,800,000/= to the firm of Migiro & Company Advocates being Advocates Client Bill of costs dated 26th March 2021 as consented by Nelson Migiro and the directors of the 1st & 3rd respondents

on 3rd May 2021 vide Miscellaneous Application

No. 14 of 2021; (d) The Honorable Court do issue directions on whether the applicant should remit Kshs. 10,716,435.13/= to the claimants being the final payment of monies owed by Kenya Revenue Authority after deduction at source but never remitted as PAYE; (e) The Honorable Court do issue directions on whether the applicant should remit the net balance of the purchase price to the 1st, 2nd and 3rd respondents, or Yas angwan Holdings Limited and/or in the alternative, deposit the monies held by the applicant into the Court account for their claim and collection.

8. The application was based on the following grounds: (a) the claimant's claim was for arrears of Kshs.4,662,314/= for regular employees and Kshs.230,520/= for casuals; (b) On 25th July 2016, a consent was reached to the effect that the respondents were to pay the amounts claimed with effect from the end of August, 2016; (c) the respondent failed to honor the said consent and an order was issued 31st May 2018 authorizing the sale of the 1st and 3rd respondents property being LR No. Kericho Municipality Block 4/313; (c) the sum claimed had increased from Kshs.33,142,600/= to

Kshs. 47,980,306.55/= and later to Kshs.52,463,694.30/=,
upon

addition of the loan deducted by the respondents from the claimants and never remitted to the lender; (d) a decree dated 4th June 2018 was signed by the Court authorizing the sale of **LR No. Kericho Municipality Block 4/313**, followed by a notification of sale dated 5th June 2018 where the Court sanctioned execution; (e) on 19th March 2016 the 1st and 3rd respondents declared the employees redundant with effect from 1st April 2018 and on 27th June 2018 a payment schedule was released to Barclays Bank for payment of worker's dues which was Kshs.47,980,306.55/= which amount was later enhanced to Kshs.51,463,694.30/= because the 1st and 3rd respondents used to deduct loans for Ndege Chai Savings and Credit Co-operative Society but it failed to remit to the lender. Also, the respondent failed to remit PAYE deducted for KRA amounting to Kshs.10,716,435.13/=; (f) the respondent's advocates Mr. Orina pleaded with the claimant not to sell **LR No. Kericho Municipality Block 4/313** and instead offered for sale **LR No. Kericho Municipality Block 4/295** by private treaty vide a letter to Hegeons auctioneers dated 16th July 2018 to realize the Kshs.51,463,694.30/=; (g) The claimant considered the sale of the offered title for the reason that

the

lease in **LR No. Kericho Municipality Block 4/313** was registered under Kenya Tourism Development Corporation with an expired lease while the lease **LR No. Kericho Municipality Block 4/295** had a renewed lease of 50 years from 1st January 2009 and registered under Brook Bond Limited. Further that the two titles had been released to Tea Hotel Limited but they were yet to be transferred into their name; (h) The Court on 24th November 2019 issued orders for the transfer of lease to the purchaser to facilitate the release of the balance of the purchase prices of 75% to the workers. The purchaser was handed over the title in **LR No. Kericho Municipality Block 4/295**, Official search and green card issued on 6th January 2020, certificate of sale issued by the court dated 6th November 2019 together with beacon verification certificate dated 6th December 2019. The land rates were borne by the respondents. Subsequently the National Land Commission gave green light for the transfer and issued letter of no objection on 7th May 2020; (i) several applications were filed in court seeking to reverse the sale, however Courts sitting in Kericho, Nyeri, and Nairobi dismissed the applications therein; (j) The applicant does not have any

interest in the said sale save for the decretal sum, of Kshs. 51,463,694.30/= inclusive of Ndege Chai Savings and Credit Corporative Society loan, legal fees for the firm of Migiro and Company Advocates, PAYE payable to KRA, the Advocates party and bill of costs both for the Court of Appeal and High Court and supported expenses; (k) **LR No. Kericho Municipality Block 4/295** was valued by Prime land limited at Kshs.110,000,000/= and it was sold via public auction to the highest bidder (s) who paid 25% being Kshs.28,000,000/= at the fall of hammer while the sum of Kshs.22,000,000/= was paid to the claimant and the balance paid to the respondent's directors and professionals who conducted the sale; (l) the applicant also averred that during remittance of the net residue he will factor in Kshs.6,348,102/= being the unpaid accumulated land rent owing to the County Government of Kericho that had not been paid by the respondents and Kshs 514,103/= additional land rent together with subsequent supported expenses; (m) he denied colluding with the claimant and asserted his willingness to transfer the balance of the purchase price after deductions stated above or as the Court may direct.

9. The purchasers opposed the application filed by Kemboi Chambers Advocates vide a replying affidavit sworn by Chandrakant Devji Chhabhadia on his behalf and on behalf of the other purchasers maintaining that: (a) they are innocent purchasers of value; (b) they paid the entire purchase price aggregating to Kshs.114,680,000/=; (c) they charged their property being **Kisumu Municipality Block 4/136** to secure a loan of Kshs.95,000,000/= from I & M Bank to purchase the said property; (d) they paid land rent in respect of the said property to allow transfer of the same which was the responsibility of the vendors; (e) they agreed to pay the sums due to Ndege Chai Savings and Credit Cooperatives Society but declined to pay the firm of Migiro and Company advocates because it had been instructed to act in relation to **LR No Kericho Municipality Block 4/313** which was not the subject of the application; (f) they objected to the payment of PAYE owed to Kenya Revenue Authority because KRA has powers of recover unpaid taxes under the law.
10. The third application dated 21st July 2021 was filed by Migiro and Company Advocates seeking to be enjoined in

the case as an interested party and leave to file its pleadings within 7 days

once joined. The application was premised on the grounds that they were instructed by the applicants to defend them, that the case was resolved by consent on 26th July 2016, that their legal fees was not paid, they filed a bill of costs dated 26th March 2021 which was settled by consent to be Kshs. 3,800,000/= which remained unpaid hence the need for them firm to be enjoined in this suit.

11. The 1st respondent, (the management Tea Hotel, opposed the application vide a replying affidavit sworn on 14th September 2021 by Musa Koech, one of its directors, who maintained that the application is misconceived and their presence will not add value to the proceedings. He denied signing the consent that settled the legal fees of Migiro at Kshs.3,800,000/=. He only learnt about the said consent when the Migiro Advocates filed the instant application and in any event, the payment of legal fees can be dealt with without joining the advocate in these proceedings. Further, the presence of the said advocates in these proceedings will not aid in any way in the just and expeditious determination of this suit. Conversely, joining them will embarrass and delay the case.

12. The fourth application dated 20th September 2021 was filed by Ndege Chai Sacco Limited seeking to be joined in the proceedings as an interested party. The application was opposed by the management of Tea Hotel vide its affidavit dated 23rd November 2021 sworn by Musa Koech, its director. The salient averments are that the applicant will not add value to the proceedings and that he has a separate recourse to pursue his claim.
13. In the impugned ruling dated 18th January 2022, the learned judge dismissed the application dated 21st July 2021 by Migiro & Co. Advocates seeking to be joined in the proceedings and the application dated 20th September 2021 filed by Ndege Chai Sacco Ltd seeking also to be joined in the proceedings. The learned judge also dismissed the application dated 14th July 2021 by the firm of Kemboi & Co. Advocates seeking variation orders to the benefit of Ndege Chai Savings Credit Corporative Society and Kenya Revenue Authority holding that the Court had no jurisdiction to handle tax matters.
14. Regarding the application dated 26th April, 2021, the learned judge after reevaluating the grounds in support

and in

opposition to the application and the history of the litigation stated as follows:

“113. On 4/6/2018, the claimant applied to execute the court Judgment. The amount owing was 33,142,600/=. The execution was allowed to proceed.

114. The claimant sought to execute by sale of the respondent’s immovable property being Kericho Municipality Block 4/313. The execution was to be through Hegeons Auctioneers and the amount executable was 33,142,600/=. The notification was apparently served upon Nancy Kosgei on 5/6/2018.

115. The applicants, respondents herein have argued that this sale was invalid and should be set aside. They argue that there was no decree capable of execution, no letter of instruction to auctioneer, no notification of sale, no certificate of service, misleading newspaper advert in size of block 4/295; contradicting list of bidders, no payment of 25% of purchase price, etc.

116. As to whether the sale was valid or not this court makes reference to Order 22 Rule 57 which states as follows;

[Order 22, rule 57.]

(1) Where any property is ordered to be sold by public auction in execution of a decree, the court shall cause public notice and advertisement of the intended sale to be given in such manner as the court may direct.

(2) Such public notice shall be drawn up after notice to the decree-holder and the judgment-debtor, and shall state the time and place of sale, and specify as fairly and accurately as possible—

- (a) the property to be sold;***
- (b) any encumbrance to which the property is liable;***

(c) the amount for the recovery of which the sale is ordered; and

(d) every other thing which the court considers material for a purchaser to know in order to judge the nature and value of the property:

Provided that notice to the judgment-debtor may be dispensed with, or substituted service thereof ordered, for reasons to be recorded by the court.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed in the manner hereinbefore prescribed for the signing of pleadings and containing, so far as they are known to or can be ascertained by the person so signing, the matters required by subrule (2) to be specified in the public notice.

(4) For the purpose of ascertaining the matters to be specified in the public notice, the court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

(5) Directions shall be given as to the mode and expense of advertising the sale, which expense shall be costs of the sale.

(6) The advertisement shall be in Form No. 15 of Appendix A.

117. There was no indication that directions were given by court on the mode of sale as per Order 57 Rule (5) above. An advert was placed in the newspaper for sale by Hegeons Auctioneers. The land to be sold was Block 4/295 measuring 2.366ha. The sale was to be conducted on Tuesday 29th January, 2019 at 11am at Mocos Yard Kisii

Town.

118. As per Order 22 Rule 57(6) the advert to be placed for sale is as indicated. Form No.15

details what should be in the advert. It is evident that what the auctioneer placed out as an advert deviates from what is expected as per Order 22 Rule 57 (6) (Form No. 15).

119. Other than the complaint the auctioneer sold a different block as opposed to what was expected, is also evident that the applicant applied to sell Kericho Municipality Block 4/313 which was allowed by court. The auctioneers advertised to sell Block 4/295 which was a different parcel of land altogether.

120. It is therefore apparent that the sale was fraudulently done and against the provisions of Order 22 Rule 57 (6).

121. There was an application by the respondent to stay the sale dated 14/6/2018. The court rejected the application vide its Ruling dated 9/10/2018.

122. On 3/4/2020 J. Mbaru delivered a ruling in respect of an application dated 16/12/2019 where the applicants sought stay orders to stay execution of orders of warrants of attachment and sale of Kericho Block 4/295. J. Mbaru found the application without merit and dismissed it. Aggrieved by this ruling, the applicants appealed to the Court of Appeal which court delivered a ruling on 29/1/2021 indicating the application of 11/5/2020 seeking to set aside order of J. Mbaru dated 3/4/2020 were struck out.

123. As it is the application handled by J. Mbaru and the Court of Appeal related to staying execution which application was struck out and this means the applicant still had room to file a proper application.

124. In the understanding of this court, the application handled by J. Mbaru and Court of Appeal related to stay and not as the

current application relating to cancelling of entries in

the register. It is therefore my finding that this application is not res judicata.

125. As analysed above the sale was done without due process and against the order 22 Rule 57(6).

126. In the circumstances and considering the orders sought I issue orders as follows;

a. An order of mandatory injunction is issued compelling the Chief Land Registrar, Kericho to cancel the illegal entries on L.R. No. KERICHO MUNICIPALITY BLOCK 4/295 measuring 5.831 acres.

b. The Honourable court issues orders setting aside the purported sale and eventual transfer of L.R. No. KERICHO MUNICIPALITY BLOCK 4/295 to Ravji Devji Chhabhadia, Kanji Devji Chhabhadia and Shashikant Kanjibhai Pindoriya respectively, the above purported Purchasers;

c. The Honourable court is hereby pleased to issue a mandatory injunction compelling the Respondents to file before this court the true and just accounts including, but not limited to the exact amount of money paid by Ravji Devji Chhabhadia, Kanji Devji Chhabhadia and Shashikant Kanjibhai Pindoriya to date and the amount paid to each of the employees herein pertaining to the alleged sale of L.R. No. KERICHO MUNICIPALITY BLOCK 4/295 measuring 5.831 acres.

d. The Honourable court is hereby pleased to issue a mandatory injunction compelling Hezron Getuoma Onsongo T/A Hegeons Auctioneers to file before this court the details pertaining the public auction, including but not limited to date,

time and place of the alleged auction, the records of the auction, bidders and the respective bids pertaining to the alleged sale of L.R.No.

**KERICHO MUNICIPALITY BLOCK 4/295
measuring 5.831 acres.**

- e. The claimant is free to institute proper execution proceedings devoid of fraud after the accounts are rendered by the auctioneer.**
- f. The costs of this application be borne by the claimants.**

15. Aggrieved by the above decision, the appellant in **E023 of 2022** is now before this Court pursuing to overturn the verdict in its entirety. In its memorandum of appeal dated 18th March 2022, the appellant has listed 13 grounds of appeal faulting the learned judge for: (a) issuing orders against the principles that protect employee's rights; (b) reviewing the decision rendered by a court of coordinate jurisdiction dated 3rd April 2020 and 9th October 2020; (c) disregarding the Court of Appeal decision in **Nyeri Civil Application No. 52 of 2020** dismissing the notice of appeal filed by Tea Hotel Limited; (d) failing to appreciate that the Court lacked jurisdiction to entertain the dispute; (e) failed to appreciate that the firm of Midigo & Company Advocates was not properly on record; (f) disregarding the totality of the evidence; (g) ordering the appellant to pay costs; (h) failing to appreciate that the equity of redemption had been extinguished; (i) failing to consider the appellants

submissions. The appellant prays that its

appeal be allowed, the ruling dated 18th January 2022 be set aside and costs of the appeal and the trial court be awarded to the appellant.

16. Also aggrieved by the same decision, the appellants in **Civil Appeal No. E028 of 2022** seek to overturn the same ruling faulting the learned judge for failing to find that: (a) the trial court lacked jurisdiction to entertain the application; (b) the respondent's equity of redemption had been extinguished; (c) the respondent authorized the sale of LR No. Kericho Municipality Block 4/495; (d) the learned judge sat on appeal against decisions of a court of coordinate jurisdiction by overruling/ignoring rulings dated 3rd April 2020 and the fact that the application dated 9th March 2019 sought similar orders and violated the doctrine of *res judicata*; (d) the remedy based on Section 26 of the Auctioneers Act was recovery of damages; (e) that the appellants were innocent purchasers for value, and, (f) ignored the appellants' submissions. The appellants prayed that their appeal be allowed, the said ruling be set aside and they be awarded the costs of this appeal.

17. During the virtual hearing of the appeal on 4th February

2026, learned Counsel Mr. Kemboi appeared for the appellant in

E028 of 2022 and the 1st respondent in **E028 of 2022**. Learned counsel Mr. Midega appeared for the 1st and 2nd respondents in **E023 of 2022** and also the 2nd and 3rd respondents in **E028 of 2022**. Learned counsel Mr. Menezes appeared for the appellants in **E028 of 2022** and the 3rd respondents in **E023 of 2022**. All the parties had filed written submissions which they adopted and highlighted briefly.

18. Mr. Kemboi, citing Article **162 (2)** of the Constitution and Section **12 (1)** of the Employment and Labour Relations Court Act maintained that the trial court lacked jurisdiction to entertain a case whose dominant question is title and occupation to land. Counsel relied on in the matter of ***Interim Independent Electoral Commission [2011] eKLR*** among other decisions in support of the proposition that a court cannot arrogate to itself jurisdiction through the craft of interpretation. He maintained that the dispute related to transfer of interest in land, namely **LR No. Kericho Municipality Block 4/295**.
19. Regarding the question whether the title was fraudulently obtained, Mr. Kemboi citing Sections 26 and 80 of the Land

Registration Act maintained that the purchasers acquired
the

title to the land vide a court order, a certificate of sale was issued by the trial court and the proceeds of the sale were used to pay the workers who had been declared redundant by the 1st and 2nd respondents. To further fortify his argument, Mr. Kemboi also argued that an application challenging title to land questioning the legality of the procedure leading to the acquisition of the title or citing corruption is made under Sections 26 (1) (a) (b) and 80 (1) and (2) of the Land Registration Act.

20. Addressing the issue whether the trial judge ignored the doctrine of *res judicata*, counsel cited Section 7 of the Civil Procedure Act and the Supreme Court decision in **Kenya Commercial Bank Ltd vs. Muiri Coffee Estate Limited & Ano. [2016] eKLR** to urge that *res judicata* is not a mere technicality but substantive law. Counsel argued that the issues urged in the ruling that yielded this appeal were urged and determined in by this Court in **Nyeri Civil Application No.38 of 2020** consolidated with **Nyeri Civil Appeal Application No. 52 of 2020**. To further buttress the above argument, Mr. Kemboi cited John **Florence Maritime Services Ltd & Ano. vs. CS, Transport and**

Infrastructure

& 3 Others [2021] eKLR and **ET Monks vs. Attorney General [2012] eKLR** and maintained that the 1st and 2nd respondents and the trial judge were estopped from entertaining the same dispute.

21. According to Mr. Kemboi, *Wasilwa, J.* set aside the earlier decisions rendered by *Mbaru, J* and *Marete, J.* Regarding the sale of the land, counsel relied on **Mbuthia vs. Jimba Credit Finance Corporation & Ano. [1988] eKLR** to urge that the mortgagor's right of redemption is lost as soon as the mortgagee either sells the mortgaged property or enters into a binding contract in respect of the land. Lastly, the appellant's counsel maintained that the auction was conducted in conformity with the law. Lastly, Mr. Kemboi urged this Court to award costs to the appellant.

22. Learned counsel Mr. L.G. Menezes in support of **Civil Appeal No. E023 of 2022** and **Civil Appeal No. E028 of 2022** maintained that the application dated 26th April 2021 was barred by what he termed as "*an extended application of the principle of res judicata.*" He maintained that the new matters raised in the application dated 26th April 2021 could have been raised in the earlier applications dated 9th

March 2019 and

16th December 2019. To further buttress his argument, he cited **Omondi & others vs. National Bank of Kenya & 2 Others [2001] eKLR** and **Mwangi Njagu vs. Meshak Mbogo Wambugu, Civil Suit No. 2340 of 1991, Pop in (Kenya) Ltd & 3 Others vs. Habib Bank AG Zurich, Civil Appeal No. 80 of 1988** and **Thomas Owen Ondiek & Ano. vs. National Bank of Kenya Ltd & Ano. Civil Appeal No. 182 of 2011** in support of the proposition that a litigant cannot evade the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the same court or other courts.

23. Mr. Menezes submitted that the trial court lacked jurisdiction to entertain matters contemplated by Article 165 (2) of the Constitution and Section 13 of the Environment and Land Court Act, Section 150 of the Land Act, Section 101 of the Land Registration Act and section 12 of the Employment and Labour Relations Court. Counsel also argued that the 2nd respondent sought *inter alia* cancellation of the entries in the register of the questioned property and setting aside the sale. He also submitted that the 2nd respondent sought to injunct that which had already

taken place, since the property had already

been sold. He maintained that the fact that the advocates for the 2nd respondent in writing authorized the sale of the property by private treaty dislodged the requirement for settlement of terms under Rules 22 and 57 of the Civil Procedure Rules.

24. Citing section 26 of the Auctioneers Act, he argued that the remedy for a person citing an improperly conducted auction lies in damages against the auctioneer, and not an injunction or cancellation of entries in the register of titles. To fortify this submission, counsel relied on **Anne Wachisi Situma & another vs. I & M Bank Ltd & 2 Others [2021] eKLR** and **Shah Rekhavanti Pankaj vs. Bank of Baroda (Kenya) Ltd & Spotlight Intercepts Auctioneers [2020] eKLR.**

25. Mr. Menezes maintained that the purchasers paid Kshs. 28,000,000/= at the fall of the hammer being 25% of the bid price of Kshs.110,000,000/=. Further, they were issued with a certificate of sale by the auctioneer and subsequently they were issued with a certificate of sale by the court, hence, they are *bona fide* purchasers for value as was defined in **Katende vs. Haridar & Company Ltd**

[2008] 2 E.A. 173. Further, there was no duty imposed on the purchasers to inquire into

the appellant's rights to sell the land. Counsel argued that the burden to prove fraud fell on the 2nd and 3rd respondents. Nevertheless, they did not tender evidence to establish fraud. Counsel underscored that upon registration of the transfer, the purchasers acquired an indefeasible title. He maintained that the relevant provisions of the Civil Procedure Rules were complied with, the valuation was done and the appellant never applied to set aside the sale as required by the rules.

26. In opposing the appeals, Mr. Midega, learned counsel for the 1st and 2nd respondents in **E028 of 2022** and the 2nd and 3rd respondents in **E028 of 2022** contended that at the centre of these proceedings is the fraudulent sale of **L.R. No. Kericho Municipality Block 4/ 295** urging that even though the sale was undertaken in execution of a decree to benefit members of KUDHEIHA, to date the advocates and the auctioneers have never accounted for the proceedings realized from the sale. Counsel urged that by the ruling dated 18th January 2022, the court set aside the sale and ordered the auctioneer and the purchasers to file true and just accounts in court, which has not been done, and

contended that the appellants are evading accountability.

27. Addressing the argument that the trial court lacked jurisdiction, Mr. Midega recalled that KUDHEIHA raised a preliminary objection contending that the trial court lacked jurisdiction citing the same grounds now being urged in these two appeals, but the objection was dismissed and the said ruling has never been appealed against.
28. Submitting on the argument that the notice of motion dated 26th April 2021 which yielded the impugned ruling was *res judicata*, Mr. Midega cited the Court of Appeal decision in **Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others [2017] eKLR** in support of his argument that the elements of *res judicata* laid down in the said case have not been proved in this case.
29. Mr. Midega maintained that the key question in these appeals is the fraudulent sale **L.R. No. Kericho Municipality Block 4/ 295**. Counsel stressed that Rule **32 (2)** of the **Employment and Labour Relations Court (Procedure) Rules** provides that the applicable rules were the **Civil Procedure Rules, 2016**. Further, there was no decree capable of being executed and asserted that

although a consent was recorded, the matter was marked as withdrawn.

30. Mr. Midega cited **Rule 11(b) (b) of the Auctioneers Rule, 1997** to urge that in case of a sale of immovable property, the auctioneer must obtain a court warrant or letter of instructions prior to the intended sale and maintained this rule was not complied with. Further, the only document in the record is an application for execution.

31. It was also Mr. Midega's submission that the auctioneer violated **Rule 15 (b) of the Auctioneers Rules, 1997** which requires an auctioneer upon receipt of a letter of instructions to prepare a notification of sale in the prescribed form. Further, this omission was also in violation of **Order 22 Rule 57 of the Civil Procedure Rules.** Counsel also pointed out that the auctioneer issued a 15 days' notice instead of the 45 days provided under **Rule 15 (d) of the Auctioneers Rules.** He also argued that the notification of sale was not served and that the newspaper advertisement was misleading regarding the specific venue for the auction and the size of **Block 4/295.** He also argued that there were contradicting details about the bidders and failure to pay the 25% of the purchase price at the fall of the hammer, and that the memorandum of sale was forged

nor was the balance paid within 90 days. Lastly,

counsel maintained that the sale was fraudulent and urged this Court to dismiss these two appeals.

32. This is a first appeal; therefore, the entire case is open for reconsideration. This accords with **Rule 31(1) (a) of the Court of Appeal Rules (2022)** which empowers this Court to re-examine both issues of law and fact. However, despite this broad mandate, we are alive to the fact that the trial judge had the unique advantage of observing witness behavior and credibility firsthand. Therefore, we will only overturn a trial court's factual finding if it is shown to be clearly wrong, or if the judge failed to take into account material circumstances or probabilities. (See **Ongwen & 5 Others vs. Omollo & 6 Others [2023] KECA**).

33. First, we will address the argument that the application dated 26th April 2026 was *res judicata*. In support of this argument the appellants contended that the same issues were raised and determined in a previous application dated 14th June 2018 and the ensuing ruling dated 9th October 2018 and an application dated 16th March 2021 which was withdrawn. The *Black's law Dictionary* defines *res judicata*

as follows:

“An issue that has been definitely settled by judicial decision; An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transaction and that could have been but was not raised in the first suit. The three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties.”

34. *Res judicata* is provided for in Section 7 of the Civil Procedure Act. A reading of the said provision shows that it contemplates 5 conditions which, when co-existent, will bar a subsequent suit. The conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.

35. I have read the application dated 14th June 2028 and the ruling dated 9th October 2021 which determined the said

ruling. In the said application, the interested parties, James

Chirchir and Yasangwan Holding Limited mainly prayed for: (a) an injunction staying the sale of BLOCK 4/313; (b) an order setting aside the warrants of sale issued to the auctioneers; and (c) an order that Edgasr Mutai, Davy Koech and Musa Koech who held themselves as the managers of Tea Hotel be ordered to personally settle the claimant's claim. Earlier in this ruling, we highlighted the prayers sought in the application which yielded the impugned ruling. The appellants have overstretched the application of the doctrine of *res judicata*. The application dated 26th April 2026 raised totally distinct matters which had not been resolved, and in any event, the applicants in the two applications are totally different. It is also important to mention that the appellants have cited an application that they say was withdrawn in support of their argument that the application dated 26th April 2021 was *res judicata*. I fail to understand how an application that was withdrawn can be said to be *res judicata*. It cannot be. I say no more.

36. Next, I will address the argument that the trial court lacked jurisdiction to entertain the application dated 26th April 2021 which yielded the impugned ruling. In support of

this

argument, the appellants' counsel in both appeals invoked Article 162 (2) (a) of the Constitution, Sections 12 of the Environment and Land Court Act and Section 12 of the Employment and Labour Relations Act. Granted, arguments citing lack of jurisdiction of a court are considered most compelling and critical "*threshold*" legal grounds in any legal proceedings. This is because as was held in **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR**, jurisdiction is "*everything*" and the moment a court finds it lacks jurisdiction, it must "*down its tools*" and cease all proceedings immediately.

37. However, the "*threshold*" for establishing the subject matter of a dispute is a critical preliminary step that determines whether a court is legally empowered to hear a case. The starting point for ascertaining this threshold is mainly to establish the substance of the claim and the reliefs sought, rather than how a litigant or his advocate chooses to "*label*" or "*craft*" the case. The question narrows to what was the substance of the dispute before the trial court. Apparently, the appellants in both appeals gave this critical question a wide berth much as they argued that the

issue before the Court was use and

occupation of land. However, the land in question was sold pursuant to execution of a decree issued by the Employment and Labour Relation Court, a court of equal status to the High Court that possesses the authority to issue warrants for the attachment and sale of both movable and immovable property to satisfy its decrees.

38. This power is derived from the Court's status as a superior court of record and its application of the Civil Procedure Rules. Under Section 13 of the ELRC Act, any judgment, award, order or decree is enforced in accordance with the rules made under the Civil Procedure Act. Specifically Order 22, governs the execution of decrees. This position is reinforced by several decisions rendered by the ELRC (which we agree with), affirming its powers to issue warrants and adjudicate disputes arising from their execution. (See ***Nairobi East Hospital Limited vs. Ositi (Employment and Labour Relations Appeal E365 of 2025) [2026] KEELRC 189 (KLR) (23 January 2026) (Ruling)***). For example, in ***Nextgen Auctioneers (Interested Party) (Cause 348, 349, 350 of 2021) [2025] KEELRC 3158***, the ELRC allowed application for a

prohibitory order against a Land Registrar to restrain

dealings with property pending the satisfaction of a decree. In **Kenya Union of Commercial Food & Allied Workers Union vs. Gititu [2021] KEELRC 35**, the ELRC reaffirmed that under Order 22 Rule 51 of the Civil Procedure Rules, third parties may object to the attachment of property (including immovable interests) in execution of an ELRC decree.

39. Undeniably, the executing court possesses a wide array of powers to ensure enforcement, but these are strictly bounded by the terms of the decree and strict compliance with the provisions of Order 22 of the Civil Procedure Rules, 2010. The court has the discretion to order execution through the various methods provided under Order 22, including the delivery of specific property, attachment and sale of property, arrest and detention in civil prison, or the appointment of a receiver.
40. A casual reading of Order 22 leaves no doubt that the court's power to execute its decree is pivotal at this critical stage of the litigation. Under the rules, the executing court must decide all questions relating to the execution, discharge, or satisfaction of the decree between the

parties. The provisions governing execution of decrees are carefully designed to prevent a multiplicity of suits, barring separate litigation for

issues that should be resolved in the execution phase. A fundamental limitation is that an executing court must take the decree as it stands. It cannot re-examine the merits of the trial or modify the decree's terms. (See the Supreme Court of India decisions in **Vasudev Dhanjibhai Modi vs. Rajabhai Abdul Rehman AIR 1970 SC 1475** and **Topanmal Chhotamal vs. Kundomal Gangaram AIR 1960 SC 388**).

The only major exception to the "*cannot go behind*" rule is if the decree is a nullity, for instance, if it was passed by a court that lacked jurisdiction. (See the Supreme Court of India decision in **Kiran Singh vs. Chaman Paswan AIR 1954 SC 340**).

41. The appellants' argument urging that before the trial court at this pivotal execution stage was a dispute relating "*use and occupation of land*" to support their contestation that the trial court lacked jurisdiction is not only fundamentally flawed and lacking legal basis but a desperate attempt to alter the character of the decree in question and also to diminish the powers of the ELRC to enforce its decrees. The ELRC has powers to order execution of its decrees arising

from its decisions in any of the modes of execution provided under

Order 22 of the Civil Procedure Rules. Importantly, Section 34 of the Civil Procedure Act dictates that all issues regarding the execution, discharge, or satisfaction of a decree must be decided by the executing court rather than through a separate suit. This provision extinguishes any notion or misconception that the ELRC did not have jurisdiction to entertain issues arising from its own decree.

42. The next fundamental issue is Mr. Midega's contestation that there was no decree capable of being executed. Granted, a valid, extracted decree is a fundamental prerequisite for the execution of a judgment. While a judgment determines the rights of the parties, the decree is the technical translation of that judgment that is actually capable of being enforced. The key point here is that a decree is the basis for execution. This position was underscored by the High Court (*Odunga, J.* as he then was) in ***Elijah Njagi & Ano. vs. Eunice Mwende Kilonzo*** [2021] KEHC 13246 (KLR) in which he stressed that without the formal document (the decree), there is no official "*command*" for the court bailiff or auctioneer to act upon.

43. It is common ground that a consent was recorded by the parties as detailed earlier. Also, it is claimed that the consent

was not honoured which triggered the impugned execution. However, there is nothing on record to show that a decree capable of being executed was extracted. In fact, the only document on the record is the application for execution. In the application for execution, the space where the applicant is required to indicate the date of the decree is blank. In absence of a decree, one wonders on what basis the execution proceeded. On this ground alone, it is clear that the much- hyped execution stood on quick sand. But this is not the only defect in the execution that triggered these appeals. The next critical question is whether the execution process was undertaken strictly in compliance with the provisions of Order 22.

44. Execution of a court decree against immovable property (land and buildings) is strictly governed by Order 22 of the Civil Procedure Rules. Any attachment or sale of land pursuant to a Court decree must follow the precise legal sequence detailed in Order 22 to ensure fairness and prevent irregular dealings. Order 22 prescribes mandatory pre-execution steps. This means that before any attachment of land can take place, several preliminary

requirements must be met. First and

foremost, the judgment creditor must first obtain a formal Decree from the court and serve it on the judgment debtor. We have herein above settled that no decree was extracted. Therefore, no decree was served upon the judgment debtor. The judgment creditor must file a formal application for execution (Order 22 Rule 7) with the court that issued the decree. This was filed despite the absence of a decree.

45. Under Order 22 Rule 9, the application must contain a description sufficient to identify the property (e.g., Land Reference numbers and boundaries) and a specification of the debtor's share or interest in it. A reading of this rule shows that it is couched in mandatory terms. The application for execution did not meet this mandatory requirement.
46. Under Order 22 Rule 48, the Court issues a prohibitory order.

This order forbids the judgment debtor from transferring or charging the property and prohibits any person from taking a benefit from such a transfer. The attachment is only considered "*complete and effective*" once a copy of the prohibitory order is registered against the title at the

relevant Land Registry and a copy is affixed on a conspicuous part of

the property. Again, this rule is couched in mandatory terms. There is nothing on record to show that it was adhered to.

47. The property must be valued, and a public announcement (proclamation) of the sale must be made. For immovable property, the auction must take place at least 15 days after the proclamation. Generally, sales must be by public auction conducted by a licensed auctioneer. While Section 44 of the Civil Procedure Act does not strictly forbid private treaties, there is nothing to suggest that they should be permitted if not expressly authorized by the Court. In this case, there was an assertion that the property was sold by private treaty. There is nothing to suggest that the court's permission was sought and obtained. In any event, the judgment debtor is disputing the alleged sale by private treaty.

48. The other pertinent flaw in this process is that there is nothing to show that the procedure for settling the terms of sale for immovable property in execution of a decree which is primarily governed by Order 22, Rule 57 of the Civil Procedure Rules was complied with. Courts have

emphasized that this stage is crucial to protect the rights of the judgment debtor by ensuring the property is not sold at a gross undervalue and that all

material information is disclosed to potential purchasers. In **Mubiru vs. Uganda Credit and Savings Bank [1978] HCB 109**, while this decision is cited in the context of mortgages, it underscores the necessity of following statutory procedures during execution. The court emphasized that the power of sale is a "*last resort*" remedy and must be exercised with strict adherence to notice requirements and valuation.

49. The other important point to note is that it has been said that the property that was sold is not the one that was stated in the application for execution. The explanation proffered by the appellants is that the parties consented to the substitution of the property. To our mind, under the provisions of Order 22, once the execution of a decree by the sale of immovable property has been initiated, parties cannot simply substitute the property with another one without adhering to the mandatory procedural requirements for attachment and sale of immovable property. The property the subject of the execution was stated in the application for execution as **LR No. Kericho Municipality Block 4/313**. The auctioneer ultimately sold

a totally different property that is **LR No. Kericho Municipality Block 4/295**. Even with the best of

intentions, the auctioneer or the parties either jointly or otherwise could not lawfully substitute the property clearly stated in the application for execution with a different property without seeking and obtaining express approval from the Court.

50. Once property is attached pursuant to a court decree (a writ or warrant of execution), it is placed under the custody of the law (*pignus judiciale*). As a general principle, any interference with, alteration of, or private alienation (sale) of that property without the Court's leave is prohibited and may be considered void or an act of contempt. Our legal framework is anchored in the Civil Procedure Act and the Rules made thereunder, which dictate that attached property is under the Court's jurisdiction to satisfy a debt. Section 47 of the Civil Procedure Act explicitly declares that any private alienation (sale, transfer, or charge) of property after it has been attached is void as against all claims enforceable under the attachment. As was held by the Supreme Court of India in ***Harshad Shantilal Mehta vs. Custodian & Ors., (1998) 5 SCC 1***, once properties are attached, they are essentially held to satisfy legal claims,

and until those claims are determined, the

property cannot be sold or distributed without legal process. Therefore, the parties or the auctioneer could not lawfully substitute the attached property with another one.

51. Earlier in this judgment we reproduced excerpts from the impugned ruling in which the trial judge faulted the manner in which the impugned attachment and sale failed to adhere to the provisions of Order 22. We find no reason to fault the learned judge's findings. We can only add that the execution process is governed by Order 22 which acts as a complete code for enforcing decrees. The procedure for selling immovable property involves several non-negotiable stages and sale of immovable property. We can only emphasize that the Court's duty to follow specific sale requirements is an "*obligation*," and sales held in non-conformity are illegal and without jurisdiction. For the reasons stated herein above, we find no reason to fault the impugned ruling.

52. Arising from our analysis of each and every issue discussed herein above and the conclusions arrived at, it is evident that we have said enough to demonstrate that these consolidated appeals are devoid of merit. Accordingly, I

affirm the ruling delivered by *Wasilwa, J* on 18th January
2022 in **Kericho**

Environment and Labour Relations Court Cause No. 10 of 2016, KUDHEIHA vs. Management of Tea Hotel, Ravji Devji Chabadia & Others. In conclusion, I dismiss these consolidated appeals and award costs of both appeals to the 1st and 2nd respondents in **E023 of 2022** and the 2nd and 3rd respondents in **E028 of 2022**.

53. This judgment is delivered pursuant to Rule 34 (4) of the Court of Appeal Rules, 2022 since *Warsame, JA* (who had concurred with this opinion) was elevated to the Supreme Court before the delivery of this judgment and has therefore ceased to be a member of this Court. Nonetheless, because *Gachoka, JA* also agrees with this opinion, this shall be the judgment of the Court.

Dated and delivered at Nakuru this 8th day of May 2026.

J. MATIVO

.....
**JUDGE OF
APPEAL**

*I certify that this is
a true copy of the
original.*

Signed.

DEPUTY REGISTRAR.

**IN THE COURT OF APPEAL
AT NAKURU**

[CORAM: WARSAME, MATIVO & GACHOKA JJ.A]

CIVIL APPEAL NO. NAK E023 OF

2022 BETWEEN

**KENYA UNION OF DOMESTIC
HOTELS, EDUCATIONAL
INSTITUTIONS,
HOSPITALS AND ALLIED WORKERS
(KUDHEIHA).....APPELLANTS**

AND

**TEA HOTELS LIMITED.....1ST
RESPONDENT THE MANAGEMENT OF TEA HOTEL.....
2ND RESPONDENT RAVJI DEVJI CHHABADIA
KANJI DEVJI CHABHADIA
CHANGRAKANT DEVJI CHHABADIA
SHASHIKANT KANJIBHAI PINDORIYA.....3RD RESPONDENT
YASANGWAN HOLDINGS LIMITED.....4TH RESPONDENT**

CONSOLIDATED WITH

CIVIL APPEAL NO. E028 OF 2022

**RAVJI DEVJI CHHABHADIA.....1ST
APPELLANT KANJI DEVJI CHABBADIA.....2ND
RESPONDENT CHANDRAKANT DEVJI
CHABHADI.....3RD RESPONDENT SHASHIKANT
KANJI BHAI PINDORIYA.....4TH RESPONDENT**

AND

**KENYA UNION OF DOMESTIC
HOTELS, EDUCATIONAL
INSTITUTIONS,
HOSPITALS AND ALLIED WORKERS
(KUDHEIHA).....1ST RESPONDENT
THE MANAGEMENT OF TEA HOTEL.....2ND RESPONDENT
TEA HOTELS LIMITED.....3RD
RESPONDENT YASANGWAN HOLDINGS LIMITED. 4TH
RESPONDENT**

(Being an appeal from the ruling of the Employment and Labour Relations Court of Kenya at Kericho
(Wasilwa, J.) dated 18th January 2022

in

ELRC Cause No. 10 of 2016

CONCURRING JUDGMENT OF GACHOKA, JA.

I have had the privilege of reading the lead judgment authored by my learned brother, *Mativo, JA*. I am in complete agreement with the reasoning and the ultimate outcome of this appeal. I have nothing useful to add.

Dated and delivered at Nakuru this 8th day of May 2026.

M. GACHOKA C.Arb, FCIArb.

JUDICIARY

.....
**JUDGE OF
APPEAL**

*I certify that this is
a true copy of the
original.*

Signed.

DEPUTY REGISTRAR.