**Kahoro & 2 others (Suing on their Behalf and on Behalf of Members of Twendane Company Limited) v Kanyamwi Trading Company Limited (Civil Appeal 62 of 2018) [2025] KECA 941 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KECA 941 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CIVIL APPEAL 62 OF 2018**

**JM MATIVO, PM GACHOKA & WK KORIR, JJA**

**MAY 23, 2025**

**BETWEEN**

**STANLEY KAHORO ..... 1ST APPELLANT**

**MWANGI TIMOTHY NJOROGE ..... 2ND APPELLANT**

**JOSEPH MWANGI ..... 3RD APPELLANT**

**SUING ON THEIR BEHALF AND ON BEHALF OF MEMBERS OF TWENDANE COMPANY LIMITED**

**AND**

**KANYAMWI TRADING COMPANY LIMITED ..... RESPONDENT**

***(An appeal from the ruling and order of the Environment & Land Court of Kenya at Nakuru (L. N. Waithaka, J.) delivered on 20th June, 2014 in ELC Case No. 113 of 2012)***

## JUDGMENT

1. In the contemporary world, one animal known for changing its colour to camouflage with its surrounding environment is the chameleon. It will be green in the morning, brown in the afternoon and yellow in the evening, depending on where its majestic walk has taken it. In the legal world, it is known that parties may attempt to approach the court in different shades, while remaining the same parties. To prevent this mischievous way of litigation, the doctrine of res judicata was developed to bar parties from bringing a litigious action once a final determination has been made on the merits of a similar previous suit.

2. The central issue for determination in this appeal is whether the issues that the appellants raised in the civil suit at Nakuru HCCC No. 113 of 2012 were the same issues that were subject of determination

in Nakuru HCCC No. 156 of 1983. That was the same issue that arose for determination before the trial judge by way of a preliminary objection, which she upheld and struck out the suit with costs.

3. To understand the issues that subject of the appeal, we shall give a background of the suits to determine whether or not the two suits were related. Central to the dispute is a parcel of land known as L.R. NO. 3777/204 Gilgil . The respondent agreed to sell the parcel of land to a company known as Twendane Farmers Company Ltd but there was no written agreement. The purchase price was a sum of Kenya shillings 3.2 million. Twendane Farmers Ltd paid a deposit of Kshs. 360,000.00 but failed to raise the balance. This triggered a dispute between the parties. In the meantime, some members of Twendane Farmers Ltd moved into the land and constructed houses. There is a mutual understanding in this appeal that the appellants were members of Twendane Farmers Ltd and the dispute, as we shall see later in the judgment, is whether the appellants were parties or could be deemed as parties in the dispute that erupted between Twendane Farmers Ltd and the respondent.

4. We shall now summarize the facts of the two suits. As already stated, the issue in dispute is a parcel of land known as L.R. No. 3777/204 Gilgil . It is common ground that there was no written agreement between the parties. The purchase price is not in dispute. It is also not in dispute that Twendane Framers Ltd, the purchaser herein, paid a deposit of Kshs. 360,000.00 but failed to pay the balance. As a consequence, the respondent filed in the Nakuru High Court, Civil Suit No. 156 of 1983 seeking inter alia, injunctive orders against Twendane Farmers Ltd as some of its members had moved onto the land, constructing houses and cultivating on it.

5. Upon hearing the application, the learned judge (O'Kubasu, J., as he then was), on 4th February 1983, granted temporary orders against the defendant company (Twendane Farmers Company Ltd), its servants and shareholders from entering or remaining on the suit land until further orders of the court. The order issued by the learned judge stated as follows:

> "Considering the pleadings in the present case and the few relevant cases as regards interlocutory injunctions I am satisfied that the plaintiff/applicant has established a prima facie case with probability of success and that balance of convenience dictates that the members of the defendant company should not be allowed to move onto this land in dispute until this suit is finally determined. Hence this application is allowed and there will be a temporary injunction against the defendant company, its servants and shareholders restraining them from entering or remaining on the suit. Premises (sic) until final disposal of the suit or until further orders of the court. This order is to be served upon O.C.S. Gilgil Police Station to assist and ensure compliance costs (sic) of this application awarded to the plaintiff/applicant, order accordingly."

6. It appears that there was a lull and everything was quiet until 27th June 2011 when the appellants, members of Twendane Farmers Ltd., filed an Originating Summons, seeking orders against the respondent, the main being, a declaration that they had acquired title to the suit land by way of adverse possession. Together with the Originating Summons, they also filed an application seeking injunctive orders against the respondent to restrain it from interfering with their quiet possession of the suit land.

7. After the filing of the Originating Summons, two diametrically opposed applications were filed by the parties. The first one is a Notice of Motion dated 22nd June 2011 by the appellants seeking the following orders against the respondent:

    a. That this application be certified urgent and service be dispensed with in the first instance.

    b. That pending the hearing and determination of this application this Honorable court be pleased to restrain the respondent by itself, its agents, employees, servants or any person

acting under its authority from using, occupying, surveying, subdividing, developing, clearing, claiming, or in any other manner interfering with the applicant's quiet and peaceful possession of parcel of land known as LR 3777/204 Gilgil .

c. That pending the hearing and determination of this suit this Honorable court be pleased to restrain the respondent by itself, its agents, employees, servants, or any persons acting under its authority from using occupying, surveying, subdividing, developing, clearing, claiming, or in any other manner interfering with the applicant's quiet and peaceful possession of parcel of land known as LR 3777/204 Gilgil .

d. That the costs of this application abide in the suit.

8. On its part, the respondent filed a Notice of Motion dated 27th September 2012 seeking the following prayers:

a. ...(spent)

b. That the suit filed herein by the Plaintiff/Applicant be struck off as it is scandalous, frivolous, vexatious and is an abuse of the Court process.

c. That the restraining orders granted by this Honorable Court on 28t June 2011 be deemed to have lapsed and therefore be set aside.

d. That the Costs of this application be provided for.

9. The applications were by consent of the parties, disposed of by way of written submissions. After considering the applications, the learned judge (L. Waithaka, J.), allowed the Notice of Motion dated 27th September 2012 and struck out the appellants' Originating Summons for being an abuse of the court process, holding that the suit was res judicata. The salient paragraphs of the impugned ruling states as follows:

> "16. It is the defendant's contention that the current suit herein is res judicata as a similar suit involving the same parties and raising similar issues had been determined in HCCC No. 156 of 1983. It was his submissions that the plaintiffs failed to disclose this fact as required under Order 4 Rule 1(1) of the Civil Procedure Rules.
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> 17. In the current suit, the plaintiffs describing themselves as members of Twendane Company Limited filed this suit and prayed that the court finds that they are entitled by adverse possession to 811 acres of the suit property and if the court so finds, the title in the respondent's name be cancelled and the applicants be registered as the absolute proprietors of the suit property.
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> 18. The facts in HCCC No. 156 of 1983 can be summarised as follows; The defendant company (Twendane Farmers Company Limited had entered into an agreement with the plaintiff company (Kanyamwi Trading Company Ltd) to purchase some land from them. The defendant paid a deposit of Kshs. 360,000 but failed to raise the balance of 640,000.There was no written agreement between the parties, no land control board consent was obtained nor presidential exemption in accordance with the provisions of *land Control Act* Cap 302. An application for chamber summons was filed by the plaintiff (Kanyamwi Trading Company Ltd) seeking injunctive orders against the defendants (Twendane Farmers Company Limited) because some of the

defendant's members had started moving into the suit property and some had even started erecting houses and cultivating therein.

19. O'Kubasu J (as he then was) allowed the plaintiffs application and granted a temporary injunction against the defendant Company, its servants and shareholders restraining them from entering or remaining on the suit premises until the final disposal of the suit or until further orders of the court.

20. My understanding of this court order is that the applicants in the current suit who describe themselves as members of Twendane Company Limited are among those members referred to in the ruling of 4th February, 1983. Having being restrained from entering or remaining on the suit premises meant they had no legal right being in occupation of the suit premises unless that order had been vacated or set aside. If the applicants are the same members who were so restrained then they can only be deemed to be trespassers who are also in disobedience of the court order issued on 4th February, 1983. Any rights that the defendant and its members thought they had over the suit premises were to be determined while they were out of the suit premises.

21. The Applicants filed the current suit by Originating Summons on 27th June, 2011 and simultaneously filed a Notice of Motion dated 22 June, 2011 under certificate of urgency seeking a temporary order against the respondent. They were granted interim orders at ex parte stage. The applicants did not disclose to this court, either in their Originating summons or during the arguments that were made in the application for injunctive orders at the ex parte stage about HCCC No. 156 of 1983. The advocate also failed to inform the court that an earlier court had issued injunction orders in favour of the defendant herein.

22. I have perused the ruling in HCCC NO. 156 of 1983 and the orders issued therein were to remain in force "until the final disposal of the suit or until further orders of the court." The ex parte orders which were issued on 27th June, 2011 and extended severally were in direct conflict with the order issued in HCCC NO. 156 of 1983. The applicants chose to deliberately conceal these material facts from the court which had they been disclosed may have led the court to reach a different conclusion/ decision at interlocutory stage.

25. In the present application, it is clear that failure by the plaintiffs to disclose the existence of a previous suit filed against Twendane Company Limited point to no other conclusion than that the plaintiffs deliberately failed to disclose the said facts so as to mislead the court into granting them interim ex parte orders of injunction pending the hearing of the application interpartes. It is further evident that the plaintiff came to court, not to canvass his suit in good faith, but rather to take advantage of the civil process to secure orders in their favour and to the detriment of the defendant. It was obvious that the plaintiff abused the due process of the court.

26. I do not agree with submissions by the plaintiffs counsel that the two suits are not related and that parties are different. It is evident that the present suit is res judicata. The parties in the present suit and those in previous suit are similar. I say this because the defendant in HCCC No. 156 of 1983 being a Limited Liability Company was ordered together with its members not to enter or

remain in the suit premises until the suit was determined. The plaintiffs in the current suit are those same members so ordered by the court. The subject matter of the suit is also the same.

27. Under Section 7 of the *Civil Procedure Act*, this court cannot try any matter that was directly or substantially in issue in a previous suit between the same parties or between parties under whom they or any of them are litigating under the same title. The defendant in the previous suit was litigating under the same title. The issues raised by the plaintiffs for determination by this court are the same issues which were considered by the court in the previous suit. I therefore hold that the present suit is res judicata.

29. Having found that the plaintiffs abused the due process of the court by failing to disclose material facts to the court and further having held that the plaintiffs suit is res judicata, it is clear from the foregoing that the plaintiff's application together with the suit must be summarily dealt with by the court."

10. Aggrieved by that decision, the appellants filed their notice of appeal dated 18th July 2014 on 2lst July 2014 and a memorandum of appeal dated 15th August 2018 raising 11 grounds. They also filed supplementary grounds of appeal dated 24th May 2023, raising a further 11 grounds. Whereas the appellants have filed a whopping 22 grounds of appeal, the same are repetitive and basically raise only one issue: whether the learned judge erred in striking out their Originating Summons on grounds of res judicata. In so doing, did the learned judge consider the facts and the law raised in their submissions? Therefore, we will not set out the grounds verbatim as they will be holistically considered when addressing the parties' submissions.

11. The appeal was heard virtually on 4th March 2025. Learned counsel Mr. Kahiga advocate, appeared for the appellants while the respondent was represented by learned counsel Mr. Kabaiku, advocate. The appellants relied on their written submissions and list and bundle of authorities both dated 29th May 2023. The respondent on the other hand, relied on its written submissions and case digest both dated 2nd June 2023 to support its arguments.

12. The first issue raised by the appellants is that the learned judge erred in finding that the Originating Summons in Nakuru ELC No. 113 of 2012 was res judicata. The appellants cited a number of authorities that have addressed the principles that courts have laid down over the years. They cited the decisions in Hosea Sitienei vs. University of Eldoret & 2 others [2018] eKLR, Njue Njagi vs. Ephantus Njiru Njagi [2016] eKLR and Highway Developers Ltd vs. Central Bank of Kenya & 2 others [1996] eKLR to fortify that the two suits that were subject to the dispute in Nakuru ELC 113 of 2012 and Nakuru HCCC No. 156 of 1983 were substantially different. They argued that the first case was based on a contract while the second one raised issues of adverse possession. Secondly, citing the case of Koloba Enterprise Ltd vs. Shamsudin Hussein Varvani & Another [2014]eKLR, they submitted that the two parties were substantially different as the first case involved limited liability companies and in the second case, the appellants are different from the company. Thirdly, the appellants submitted that the two suits were not similar, as Nakuru HCCC No. 156 of 1983 only dealt with orders of temporary injunction and did not determine the matter conclusively. Finally, the appellant submitted that striking out of the suit offended the spirit of Article 50 of *the Constitution* on the right to a fair hearing, as the appellants were denied an opportunity to adduce evidence and present arguments in support of their case.

13. The respondent opposed the appeal. Firstly, relying on the case of Bugerere Coffee Growers Ltd vs. Ssebaduka & Another (1979) EA 147, the respondent submitted that the appellants neither had

capacity nor authority to sue on behalf of Twendane Company Ltd, the purchaser of the property. In addition, the respondent submitted that the suit was properly struck out as the orders issued in Nakuru HCCC No. 156 of 1983 were issued against the company and its members. It contended that since the appellants did not deny that they are members and having been injuncted from entering or interfering with the suit land, they were trespassers on the land. The respondent argued that it is on the basis of those orders that eviction orders were issued in Nakuru HCCC No. 113 of 2012 against the Twendane Company Ltd and its shareholders, who included the appellants. Citing the case of ET vs. Attorney General & Another [2012] eKLR, the respondent argued that courts should always guard against litigants evading the doctrine of res judicata by introducing new causes of action to seek the same remedy in court in the form of a facelift to subsequent suits. The respondent urged the court to find that the trial judge was right in striking out the suit as the appellants failed to disclose the existence of the previous suit on the same subject matter. The respondent cited a number of cases stating that the essence of the doctrine of res judicata is to bring litigation to an end to avoid abuse of the court process. (See Ukay Estate Ltd vs. Shah Hirji Manek Ltd 7 2 others [2006] eKLR and Yat Tung Investment Co Ltd vs. Dao Heng Bank Ltd & Another [1975]AC 581.)

14. In conclusion, the respondent argued that the appellants cannot institute a suit in their own names as there existed orders against the company and its members from interfering with the suit land. It submitted that the Civil Procedure Rules, at the material time, did not have a time limit and therefore, the argument by the appellants that the temporary injunction lapsed after one year, had no legal basis.

15. We have considered the record of appeal, the submissions and the authorities cited by the parties. As already stated, this appeal is premised on the ruling of the trial court dated 20th June 2014. The appellants are dissatisfied with the findings of the learned judge that Nakuru ELC 113 of 2012 was an abuse of the court process for being res judicata. At the risk of repetition, the only issue that arises for determination is whether the learned judge erred in striking out the suit. In other words, are the two suits namely Nakuru HCCC No. 156 of 1983 and Nakuru ELC no 113 of 2012 similar within the meaning ascribed to the principles of res judicata?

16. The principles on res judicata are well settled and all what the parties have urged us is to find that the facts in this appeal fit their respective positions. Obviously, both arguments cannot be right and our duty as the first appellate court is well known. This Court will not lightly interfere with the discretion of the trial judge unless it is satisfied that she misdirected herself in some matter, and as a result arrived at a wrong decision, or unless it is manifest on the case as a whole that the judge was clearly wrong in the exercise of her discretion, and that as a result there has been a miscarriage of justice. [See Mbogo vs. Shah [1968] EA 93]

17. Before we analyze the facts, it is important to set out the dictates of section 7 of the *Civil Procedure Act* which provides as follows:

> "7. Res judicata
>
> 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.
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> Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

18. Our courts have pronounced themselves on this issue and the principles that have been settled in several cases as submitted by both parties. Our Apex Court in the case of John Florence Maritime Services Limited & another vs. Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) held as follows:

> "The doctrine of res judicata was based on the principle of finality which was a matter of public policy. The principle of finality was one of the pillars upon which the judicial system was founded and the doctrine of res judicata prevented a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensured that litigation came to an end, and the verdict duly translated into fruit for one party, and liability for another party, conclusively."

19. This Court, constituted differently, in the case of Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others [2017] KECA 477 (KLR) ruminated itself as follows:

> "The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.
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> There is no dearth of learning or authority surrounding this issue, and this Court has expressed itself on it endless times. In one recent decision, William Koross v. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR, it was stated;
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> "The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.

> Speaking for the bench on the principles that underlie res judicata, Y.V. Chandrachud J in the Indian Supreme Court case of Lal Chand v Radha Kishan, AIR 1977 SC 789 stated, and we agree;
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> "The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue."

The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit. That much was stated by this Court in Ngugi v. Kinyanjui & 3 Others [1989] KLR 146 when it held (at p147) that;

> "3. Section 7 was a mandatory bar from (sic) any fresh trial of a concluded issue and a Judge cannot competently get round that bar by obtaining the consent of the parties to an arbitration of a concluded issue."

20. Having cited the law, we note that in Nakuru ELC No. 113 of 2012, the subject of the impugned ruling, the appellants described themselves as follows: "Stanley Kahoro Mwangi, Timothy Njoroge & Joseph Mwangi (suing on their own behalf and on behalf of members of Twendane Company Ltd....applicants"

21. The issues framed for determination by the appellants sought in the Originating Summons are as follows:

    1. Whether the applicants are entitled by adverse possession to 811 acres or thereabouts of all that parcel of land known as LR NO. 3777/204 Gilgil situated west Gilgil Township registered in the name of the respondent but currently occupied by the applicants.

    2. Whether the respondent's title be cancelled (sic) and the applicants be registered as the absolute proprietors of the said 811 acres or thereabouts of LR NO. 3777/204 Gilgil and in default of the respondent failing to transfer the said land to the applicants by signing all the requisite conveyance documents, the deputy registrar of this Honourable court do execute all such documents as may be necessary for the registration of the applicants as proprietors of the above said land.

    3. Whether pending the hearing and determination of the originating summons herein, the Honourable court should restrain the respondent by itself its agents, employees, servants or any persons acting under its authority from using, occupying, surveying, subdividing, developing, clearing, claiming or in any other manner interfering with the applicants quiet and peaceful possession of parcel of land known as LR 3777/204 Gilgil .

    4. Whether this court should perpetually restrain the respondent by itself, its agents, employees, servants or any persons acting under its authority from using, occupying, surveying, subdividing, developing, clearing, claiming or in any other manner interfering with the applicants quiet and peaceful possession of parcel of land known as LR 3777/204 Gilgil .

    5. Whether the applicants are entitled to the costs of this suit

22. It is also important to set out in brief the proceedings in Nakuru HCCC No. 156 of 1983 captured in the record of appeal as follows:

i. In the Plaint at page 264 of the record of appeal, the plaintiff; Kinyamwi Trading Company( the respondent in this appeal ) seeks orders prayers against Twendane Company Ltd as follows:

a. An order for eviction of the Defendant's servants and/or agents from the suit premises;

b. An order that the Defendant through its servants and/or agents do forthwith pull down and remove the structures built by its servants and/ or agents on the Plaintiff's land;

c. An injunction restraining the Defendant its servants and/or agents and its shareholders and/or members or otherwise howsoever from entering or remaining on the suit premises that is L.R.Nos. 6554/4, 3777/204 and 6564/3;

(d) Damages for trespass;

(e) Such further or other relief as this Honourable Court may deem fit and proper to grant.

23. On its part the defendant in that suit, Twendane Company Ltd filed a defence and counterclaim dated 6th April 1983 and sought the following prayers:

a. That the Plaintiff's suit be dismissed with costs;

b. A Declaration that a resulting Trust exists between the plaintiff and the defendant and that property namely Land Reference Number 3777/204 is jointly owned by the Plaintiff and the Defendant;

c. An injunction restraining the Plaintiff by itself, its servants and/or agents from evicting or interfering in any way with the suit premises;

d. Costs of the Counterclaim

e. Such other or further orders that this Honourable Court may deem fit and just to grant.

On 25th January 1983, O'kubasu, J. (as he then was) gave temporary orders as follows:

1. THAT an injunction do issue to restrain no more members of the Defendant/Respondent from moving in to the suit premises that is to say Land Reference Numbers 6554/4, 3777/204 and 6564/3 until further order.

2. That these members on the suit premises be and are hereby restrained from continuing with construction of houses and cutting down of trees on the suit premises.

3. That a certified copy of this order be served on the Officer Commanding Station, Gilgil Police Station to ensure compliance with the order.

4. That the application be heard inter partes on the 28th day of January 1983.

5. That today's costs be paid by the Defendant/Respondent to the Plaintiff/Applicant.

24. Pursuant to an application to strike out the defence and counterclaim dated 14th July 1983, O'kubasu, J. (as he then was) made the following ruling:

> "This suit concerns a piece of land L.R. Nos. 6554/4, 3777/204 and 6564/3 (hereinafter referred to as the suit land) registered in the name of the plaintiff company. On the 15th January, 1983 the plaintiff filed this suit against the defendant company seeking an order of

eviction of the defendant company, its servants and/or agents, and damages for trespass. A defence and counter-claim was then filed.

From the pleadings it is clear that the defendant company which is one of the numerous so called land buying companies entered into negotiations with the plaintiff company with a view to purchasing the suit land or part of it for its members. The agreed purchase price was Shs. 2.6 million. The plaintiff company received Shs. 360,00/= from the defendant company as part- payment. It should be noted that the suit land is agricultural land hence the *Land Control Act* (Cap. 302 Laws of Kenya) applies to this sale transaction.

Presidential exemption was necessary. Perhaps, it should be noted that the sale transaction was started in 1979, and that up to the time of filing this suit in January, 1983 the plaintiff had received only Shs. 360,000/= from the defendant. There was no written agreement signed by the parties. The defendant company made an attempt to apply for Presidential exemption but the attempt went no further than writing to the Attorney General a letter which was not acknowledged.

Members of the defendant company started moving on suit land in a bid to enforce what they thought to be an agreement for sale of the suit land. But it cannot be denied that if there was any sale agreement between the parties in respect of the suit land such agreement became null and void and hence the defendant company's remedy lies in the refund of the amount already paid. This amount (Shs. 360,000/=) has been deposited in court by the plaintiff company. Clearly, there is no iota of evidence to show that the plaintiff company received anything more than Shs. 360,000/= from the defendant company.

This is indeed a sad case involving about five hundred members of the defendant company. These people were landless and hence they formed a company in order to pull resources together.

Unfortunately the contract entered into cannot be enforceable in law. Having considered the submissions by both advocates, I am satisfied that members of the defendant company have no legal right to be on the suit land. The submission by Mr. Wambugu for the plaintiff company is upheld. Hence, I order that the defence and counter-claim filed herein is dismissed with costs. The plaintiff may proceed with assessment of general damages. Costs of this application to be paid by the defendant company. Orders accordingly."

25. Having considered the facts of the two suits, it does not require any scientific analysis to note that the issues that were in Nakuru HCCC No. 156 of 1983 involved the company known as Twendane Company Ltd and its members. The appellants in the suit that was struck out, that is Nakuru ELC No. 113 of 2012, were claiming adverse possession over the same parcel of land that was the subject of the dispute in Nakuru HCCC No. 156 of 1983. The only innovation invoked in the subsequent suit was to remove the name of Twendane Company Ltd and filed what they dubbed a representative suit on their behalf and on behalf of all members of Twendane Company Ltd. It is beyond argument that they are laying claim to the same parcel land.

26. Clearly, it is not difficult to see that the appellants are trying to use judicial craft and machination arguments to run away from the ruling in Nakuru HCCC No. 156 of 1983. Unfortunately for the appellants, the legal eye does not blink and remains open to avoid an abuse of the legal process.

27. Our analysis of the record of appeal, grounds of appeal, the submissions and the authorities leaves us with no doubt that the learned judge's findings that the suit by way of the originating summons was an abuse of the legal process were sound and she rightly struck it out.

28. As we stated at the outset, a chameleon remains the same, even as it takes the majestic walk in a change of environment, notwithstanding its changing colour in the process. This is the same scenario where we have litigants attempting to approach the courts in different shades and colours. Accordingly, we are satisfied that the grounds of appeal have no merit at all and they are for dismissal.

29. It is for all the above reasons that we do not hesitate to find that the appellants' appeal lacks merit and the trial judge was right in holding that suit was an abuse of the court process. We dismiss the appeal in its entirety with costs to the respondent.

**DATED AND DELIVERED AT NAKURU THIS 23RD DAY OF MAY 2025.**

**J. MATIVO**

**.....**

**JUDGE OF APPEAL**

**M. GACHOKA C.Arb, FCIArb.**

**.....**

**JUDGE OF APPEAL**

**W. KORIR**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**