



**Koross (Suing as the Administrator of the Estate of the Late Elijah CA Koross) v Barchigei  
(Sued as the Legal Representative of the Estate of Jonathan Kipkoros Barchigei) & 2  
others (Civil Appeal E089 of 2023) [2025] KECA 1038 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1038 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL E089 OF 2023  
JM MATIVO, PM GACHOKA & GV ODUNGA, JJA  
JUNE 5, 2025**

**BETWEEN**

**WILLIAM K KOROSS (SUING AS THE ADMINISTRATOR OF THE ESTATE  
OF THE LATE ELIJAH CA KOROSS) ..... APPELLANT**

**AND**

**CHARLES BARCHIGEI (SUED AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF JONATHAN KIPKOROS BARCHIGEI) ..... 1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal from the judgment and decree of the Environment and Land Court of Kenya at  
Kitale (Dr. IUR Fred. Nyagaka, J.) delivered on 5th October 2023 in ELC Petition No. 8 of 2016)*

**JUDGMENT**

1. This appeal is related to Eldoret Civil Appeal no. E088 of 2023. It is an eventful dispute dating back to 1974 over the question of ownership of a parcel of land measuring 514 acres claimed by 5 persons. At the hearing, the trial judge consolidated Kitale ELC Suit No. 34 of 2017 and Kitale ELC Petition No. 8 of 2016, the disputes the subject of the appeal in Civil Appeal No. E088 of 2023 and this appeal, respectively, for purposes of taking evidence only. This means that the evidence that was tendered applied to the two cases that were heard concurrently. He proceeded to render two separate judgements owing to the nature of the claims. At the hearing of the appeals, the parties submitted that the two appeals should not be consolidated maintaining that the issues are not the same.
2. By way of background, the 1<sup>st</sup> Respondent filed a petition dated 6<sup>th</sup> December 2016, alleging that the appellant had violated his rights enshrined in Articles 2(4), 10, 19(1), 19(3), 20(1), 20(2), 20(3), 20(4), 21, 23, 40(1), 40(3), 162(2)(b), 47(1), 47(2), 50(1) and 159(1)(e). The gist of the petition is to be found



in the grounds on the face of it and the 1<sup>st</sup> respondent's supporting affidavit sworn on 6<sup>th</sup> December 2016.

3. As earlier mentioned, the dispute between the parties has its roots traced in 1974. The contextualized background and issues emanating therefrom, will emerge later in this judgment. According to the petition, 1<sup>st</sup> respondent is the son of the deceased, Jonathan Kipkoros Barchigei. The appellant is the son of the late Elijah C.A. Koross. In 1974, Elijah C.A. Koross, desirous of purchasing the suit property namely L.R. No. 11440, measuring 514 acres, approached Jonathan Kipkoros Barchigei (the father of the 1<sup>st</sup> respondent), Chebiator Chemjor, Julius Kibet Cherotich, Hezekiah Kiptoo Komen and Kipserem Rotich (all deceased), to raise money to purchase the property whose consideration was Kshs. 215,000.00.
4. The petition contended that Jonathan Kipkoros Barchigei raised Kshs. 23,000.00 while Kibet Cherutich Kimuron, Chebiator Chemjor Chebitong and Cheserem Kiprotich contributed a total of Kshs. 35,000.00. Hezekiah Kiptoo Komen also contributed a sum of Kshs. 10,000.00. Therefore, he prayed for the following reliefs:
  - i. A declaration that the registration of the entire property known as L.R. No. 11440 in the name of the 1<sup>st</sup> respondent as the sole owner infringes on the petitioner's rights to property as enshrined in Article 40 of *the Constitution* of Kenya;
  - ii. A declaration that the petitioner is entitled to be registered as the owner of 203.82 acres comprised of the property known as L.R. No. 11440;
  - iii. An order of judicial review by way of mandamus to compel the 3<sup>rd</sup> respondent to delete the registration of the 1<sup>st</sup> respondent as the sole owner of the entire property known as L.R. No. 11440 in the register;
  - iv. An order of judicial review by way of mandamus to compel the 3<sup>rd</sup> respondent to register 203.82 acres comprised of the suit property in favour of the petitioner;
  - v. In the alternative to the above, an order compelling the 1<sup>st</sup> respondent to give up and transfer 203.82 acres comprised of the property known as L.R. No. 11440 and transfer it to the petitioner;
  - vi. A permanent injunction restraining the respondents by themselves, their agents, assigns or representatives from alienating or interfering with the petitioner's possession of 203.82 acres comprised of the property known as L.R. No. 11440 by forcible entry or otherwise in any manner prejudicial to the petitioner;
  - vii. In the alternative to the above, an order directing the 1<sup>st</sup> respondent to compensate the petitioner for loss of user of 203.82 acres comprised of the property known as L.R. No. 11440;
  - viii. An order directing the respondents and the petitioner to file a report in court setting out compliance with the orders of the court within 120 days from the date of this decision;
  - ix. An order for costs of this petition;
5. In response, the appellant filed a replying affidavit sworn on 23<sup>rd</sup> January 2017. He opposed the petition in its entirety contending that by dint of the proceedings in HCCC No. 89 of 1997 (formerly Kakamega HCCC No. 43 of 1978), the 1<sup>st</sup> respondent's father together with Kibet Cherutich Kimuron, Chebiator Chemjor Chebitong and Cheserem Kiprotich were declared persona non grata over the suit land namely L.R. No. 11440 measuring 514 acres. The property is situated in Endeless



area, Kwanza, Endebess sub-county within Trans Nzoia County. The court found that his father was the sole and rightful proprietor of the suit parcel of land.

6. The appellant denied that any agreement existed between his father and the 1<sup>st</sup> respondent's father. He maintained that the monies borrowed from the 1<sup>st</sup> respondent's father was a loan and which monies were refunded.
7. The appellant's view was that the 1<sup>st</sup> respondent's deceased father devised devious means of defrauding his father of the suit land. On 11<sup>th</sup> May 1979, they fraudulently obtained a consent to transfer the suit land that was quashed by Mead, J. (as he then was) in Nakuru HC Misc. App No. 10 of 1980. This was affirmed by Aganyanya, J. in Nakuru HCCC No. 115 of 1988 (OS).
8. The appellant contended that the petition was res judicata as the 1<sup>st</sup> respondent was a de facto party or ought to have been a party in Kitale HCCC No. 89 of 1997 where ownership was determined to its logical conclusion. He added that the petition offended the Limitation of Actions Act and therefore, the court lacked jurisdiction to determine it. For those reasons, he prayed that the petition be dismissed.
9. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed their joint replying affidavit filed on 7<sup>th</sup> November 2017. Since they were not joined in previous litigation, they could not affirm or deny the averments set out in the petition. They maintained that all entries in the register in respect to the suit land were made in good faith in pursuance of various legally executed instruments presented for registration. That upon confirmation that the necessary fees had been duly paid, they were processed for registration. For these reasons, they denied that they conducted themselves illegally, fraudulently, irregularly and/or unconstitutionally.
10. They stated that during the registration process, no evidence was furnished to demonstrate that other persons claimed interest over the suit parcel of land. Otherwise, they would have arrived at a different conclusion. Finally, they denied that they violated any constitutional provisions as set out in the petition. Be that as it may, they were ready to abide by the directions and orders of the court as shall meet the ends of justice. They urged this court to address all the issues in this matter so as to put an end to the dispute once and for all.
11. In his judgment dated 5<sup>th</sup> October 2023, Nyagaka, J. issued the following final orders:

“To meet the ends of justice and in light of Article 23 (3) of the Constitution where this court is empowered to award appropriate relief, my orders and disposition in the matter are as follows:

- i. A declaration that the registration of the entire property known as L.R. no. 11440 in the name of the 1<sup>st</sup> Respondent as the sole owner infringes on the Petitioner's rights to property as enshrined in Article 40 of the Constitution of Kenya.
- ii. A declaration that the Petitioner is entitled to be registered as the owner of eighty (80) acres comprised of the property known as L.R. no. 11440.
- iii. The 1<sup>st</sup> Respondent shall surrender the title documents in respect to all that parcel of land namely L.R. No. 11440 for rectification proposes to effect registration as stated in (ii) above.
- iv. The 1<sup>st</sup> Respondent shall execute the necessary transfer forms to effect registration as (ii) above in respect to all that parcel of land namely L.R. No. 11440 within thirty (30) days from the date of this judgment.



- v. Should the 1<sup>st</sup> Respondent fail to comply with (vi) above, the Deputy Registrar shall execute the necessary transfer forms to effect this judgment.
  - vi. A permanent injunction restraining the 1<sup>st</sup> Respondent by himself, his agents assigns or representatives from alienating or interfering with the Petitioner's possession of eighty (80) acres comprised of the property known as L.R. No. 11440 by forcible entry or otherwise in any manner prejudicial to the Petitioner.
  - vii. The Petition against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents lacks merit and is hereby dismissed with costs.
  - viii. Each party shall bear its own costs of the Petition.”
12. The appellant is aggrieved by those findings. He filed his notice of appeal dated 6<sup>th</sup> October 2023. He also filed his memorandum of appeal dated 30<sup>th</sup> November 2023 that raised a prolix 28 grounds disputing the findings of the learned Judge. We have taken the liberty to condense those grounds as follows: the learned Judge erred in allowing the petition when the evidence did not point to a violation of his rights under Article 40 of *the Constitution* but a breach of a purported acknowledgement dated 27<sup>th</sup> August 1974; the petition offended the doctrine of res judicata, laches and statutory limitation; and the acknowledgement dated 27<sup>th</sup> August 1974 was statutorily barred and failed to meet the prerequisites of a contract as to amount to a partnership agreement. As a result, it could not confer any interest in the suit property.
  13. He continued that the refund clause in the acknowledgment dated 27<sup>th</sup> August 1974 was effected in line with the evidence on record; the 1<sup>st</sup> respondent forfeited the defence of consensus ad idem when he accepted, acknowledged and retained the refund of Kshs. 23,000.00 together with an interest sum of Kshs. 2,500.00, retained through the firm of Nyairo Tunoi & Company Advocates; the evidence of retired Justice Philip K. Tunoi in Kitale HCCC NO. 89 of 1997 was not only inconsistent but was set aside by the Court of Appeal in Eldoret Civil Appeal No. 223 of 2013; and the learned judge failed to find that Kshs. 68,000.00 was not received by Elijah C.A. Koross absent evidence to that effect.
  14. He faulted the learned Judge for relying on the land agent's report when it was hearsay and went against the principles of natural justice; there was no basis for the creation of a resulting trust in favor of the 1<sup>st</sup> respondent to the extent of the shares contributed; the letter of consent dated 19<sup>th</sup> August 1980 was illegally obtained; and the learned Judge misinterpreted the doctrine of lis pendens and the provisions of section 28 (b) of the *Land Registration Act*.
  15. He added that particulars of fraud were not pleaded and proved and therefore, his father was not guilty of committing fraudulent activities; the evidence was full of speculations and inconsistencies; and the learned Judge failed to uphold the tenets of transfer of immovable property and thus arrived at an incorrect finding. In view of the foregoing reasons, the appellant prayed that the appeal be allowed by setting aside the judgment of the trial court and substitute the same with an order allowing the appellant's claim. He further prayed for costs of the suit and in this appeal.
  16. The 1<sup>st</sup> respondent filed a notice of cross appeal dated 10<sup>th</sup> February 2025 on 25<sup>th</sup> February 2025. It was filed pursuant to rule 95 of this Court's Rules which provides:
    - 1) “A respondent who desires to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the



grounds of the contention and nature of the order which he or she proposes to ask the Court to make, or to make in that event, as the case may be.

- 2) A notice under subrule (1) shall state the names and addresses of the persons intended to be served with copies of the notice and lodged in four copies in the appropriate registry not more than thirty days after service on the respondent of the memorandum of appeal and record of appeal, or not less than thirty days before the hearing of the appeal, whichever is the later.
  - 3) ...”
17. Sub rule 2 of Rule 95 is relevant here. It provides that a party desirous of filing his notice of cross appeal shall file it not more than thirty days on receipt of the memorandum and record of appeal or not less than thirty days before the appeal is heard. From the record, the 1<sup>st</sup> respondent neither filed his notice of cross appeal thirty days after service nor at least thirty days before hearing of the substantive appeal on 13<sup>th</sup> March 2025. In view of the foregoing, we arrive at the ineluctable conclusion that the notice of cross appeal dated 10<sup>th</sup> February 2025 is irregular and incompetent and is therefore disregarded. Accordingly, the notice of cross appeal, filed by the 1<sup>st</sup> respondent, is hereby struck off.
  18. This appeal was heard virtually on 13<sup>th</sup> March 2025. Learned Counsel Mr. Wafula was present for the appellant, Mr. Rapundo and Mr. Ndegwa Learned Counsel appeared together for the 1<sup>st</sup> respondent while Learned Counsel Mr. Odongo represented the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Parties relied on their respective written submissions that were orally highlighted.
  19. The appellant relied on his written submissions and case digest dated 5<sup>th</sup> March 2025 to submit that the court in Kitale HCCC No. 89 of 1997 determined the issue of ownership to its logical conclusion on 2<sup>nd</sup> April 1980, and affirmed in Eldoret Civil Appeal No. 223 of 2013. In the circumstances, the proceedings in Kitale ELC Petition No. 8 of 2016 were a nullity, otiose and of no legal effect and was therefore res judicata. For this reason, he submitted that the 1<sup>st</sup> respondent failed to accord himself within the meaning of a constitutional question. In any event, the learned Judge erred in relying on the report by H.A. Oduor and the evidence of retired Justice Philip K. Tunoi which were hearsay.
  20. The appellant’s contention was that the petition was premised on an acknowledgement dated 27<sup>th</sup> August 1974. As such, the dispute was purely contractual in nature disguised as a constitutional petition; yet the issue of ownership had already been settled. Be that as it may, the acknowledgement offended the provisions of section 3(3) of the [Law of Contract Act](#).
  21. Speaking to fraud, the appellant submitted that it was neither pleaded nor proved. The trial Judge’s findings that the appellant had committed fraud were based on no evidence. He contended that no trust arose and the learned Judge erred in finding that the appellant held the suit land in trust for the 1<sup>st</sup> respondent. In any event, the issue of trust was dismissed in a previous suit and the 1<sup>st</sup> respondent was estopped from raising it. He submitted that the learned Judge made findings on trust and overriding interests in terms of the consent dated 19<sup>th</sup> August 1980 without any evidence to support that conclusion.
  22. On whether the appellant and the 1<sup>st</sup> respondent held a partnership or contractual relationship, the appellant submitted in the negative. In any event, the 1<sup>st</sup> respondent’s monies were refunded on account of the refund clause. That no partnership could have arisen absent documentary evidence. He prayed that his appeal be allowed with costs.
  23. The 1<sup>st</sup> respondent filed his written submissions together with a list of authorities and case digest all dated 10<sup>th</sup> March 2025. At the onset, we must remind the parties that since the notice of cross appeal filed by the 1<sup>st</sup> respondent has been struck off, we shall similarly not consider any submissions



arising from it. It summarized the facts and evidence tendered at trial to submit that the petition raised constitutional issues as held by the trial court in applying vertical and horizontal bill of rights enshrined in Articles 19, 20, 21 and 23 of *the Constitution*. Further the dispute was not res judicata.

24. He urged this Court to uphold that the 1<sup>st</sup> respondent was neither guilty of laches nor statutorily barred from lodging the petition. In any event, there were no limitations of time when it came to violation of constitutional rights. He lauded the findings of the learned Judge in holding that a partnership agreement existed between the appellant and himself. That there was overwhelming evidence to prove the existence of the partnership from the evidence of retired Justice Philip Tunoi, the proceedings in Kitale HCCC No. 89 of 1997 and H.A. Oduor's report.
25. Consequently, the evidence asserted that the appellant held out a resulting trust over ownership of the suit land for himself to the extent of their contributions as he was never refunded the Kshs. 23,000.00 in terms of the acknowledgment dated 27<sup>th</sup> August 1974. Furthermore, the consent dated 19<sup>th</sup> August 1980 conferred an overriding interest over the suit parcel of land. Finally, particulars of fraud were pleaded and proved. He prayed that the appeal be dismissed with costs.
26. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed their joint written submissions dated 13<sup>th</sup> March 2025. They summarized the facts at trial to submit that since none of the parties challenged the finding that the trial court found no wrongdoing on their part, this court ought to uphold that finding.
27. The respondents were cognizant of the fact that the suit concerned the appellant and the 1<sup>st</sup> respondent primarily on the question of ownership over the suit property. However, they pointed out that Jonathan Kipkoros Barchigei did indeed give Elijah C.A. Koross the sum of Kshs. 23,000.00. Though the appellant was emphatic that the sum was refunded, when the evidentiary burden shifted to him, he did not discharge it. They were of the considered view that the refund clause was never implemented. Thus, there was no basis for discrediting the findings of the trial Judge.
28. On the allegations of fraud, it was submitted that no wrongdoing could be found on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as they were kept in the dark as to the relationship the appellant had with the 1<sup>st</sup> respondent, and the other sleeping partners, before he registered the suit land in his name. They submitted that they validly registered all the entries found in the green card when valid transfer instruments were presented to them for registration and the relevant fees paid.
29. They shouldered the fraudulent burden on the appellant who failed to inform the Land Control Board and the Chief Land Registrar concerning the claims over the suit parcel of land. They were further not aware that the 1<sup>st</sup> respondent and the other sleeping partners were in occupation of the suit land. They prayed that the appeal be dismissed with costs since it was superfluous to have them joined in this appeal.
30. We have considered the appeal and the parties' respective written submissions, examined the record and analyzed the law. Our duty as a first appellate Court was articulated by this Court in John Teleyio Ole Sawoyo vs. David Omwenga Maobe [2013] eKLR that held:

“This being a first appeal we have the duty to reconsider both matters of fact and of law. On facts, we are duty bound to analyse the evidence afresh, re-evaluate it and arrive at our own independent conclusion but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same.”



31. In the same vein, this Court in stated *Ephantus Mwangi & another vs. Duncan Mwangi Wambugu* [1982-88] 1KAR 278 at page 292, as follows:

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did... The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only do so if (a) it appeared that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that the impression based on demeanour of material witnesses was inconsistent with evidence in the case generally.”

32. As stated earlier, this appeal is related to *Eldoret Civil Appeal No E88 of 2023; William. K. Koross vs. Nelson Kiptoo & 7 others*. The evidence in the two cases was taken together simultaneously but the trial Judge rendered two judgements. we shall therefore make references to the summarized facts where necessary in arriving at our conclusions.

33. In 1974, *Elijah C.A. Koross* sought to purchase all that parcel of land namely L.R. No. 11440 also I.R 20230 measuring 514 acres located in Endebess area, Kwanza, Endebess Sub-County of Trans Nzoia County. In the process, the sleeping partners namely *Jonathan Kipkoros Barchigei, Kibet Cherutich Kimuron, Chebiator Chemjor Chebitong, Hezekiah Kiptoo Komen and Cheserem Kiprotich* found themselves involved one way or another.

34. Taking into account the evidence, the submissions before us and the impugned judgment, we posit that the following issues fall for determination and shall be analyzed sequentially:

#### **Whether the petition met the parameters of a constitutional petition?**

35. The appellant argued that the petition was a civil suit disguised as a constitutional dispute because the 1<sup>st</sup> respondent challenged ownership of title. According to the appellant, the 1<sup>st</sup> respondent’s petition revolved around the acknowledgment note dated 27<sup>th</sup> August 1974. Since that was commercial in its nature, the appellant urged this court to interfere with the learned judge’s findings.

36. The dictates of what threshold a petitioner must meet to satisfy that its petition is constitutional are well settled in our jurisdiction and have followed a well-trodden path. In *Anarita Karimi Njeru vs. Republic* [1979] eKLR, the Court said:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

37. This Court in *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR had the advantage of addressing itself on this issue when it held:

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a



requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

- (42) However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of test.”

38. The trial court found that the 1<sup>st</sup> respondent had cited the provisions of *the Constitution* and the manner in which they were infringed. From the petition, 1<sup>st</sup> respondent stated that the appellant infringed on his rights under Article 40 when he registered the suit property in his sole name to his exclusion. He also cited a breach of Article 47 when the appellant was granted a consent from the Land Control Board without affording him an opportunity to be heard.
39. At this juncture, the concern is not on the merits of the allegations but whether it has been explained how cited provisions of *the Constitution* were breached. We find that the learned Judge made no error in finding that the 1<sup>st</sup> respondent raised a constitutional question. For that reason, we shall not disturb that finding.

#### **Whether the petition offended the doctrine of res judicata?**

40. The concept of res judicata is well founded in section 7 of the *Civil Procedure Act* and we need not rehash it. To succeed in a claim for res judicata, a party must demonstrate that there was a former judgment or order which was final; the judgment or order was on merit; the judgment or order was rendered by a court having jurisdiction over the subject matter and cause of action; and there had to be between the first and the second action, identical parties’ subject matter and cause of action. The



Supreme Court of Kenya in John Florence Maritime Services Limited & another vs. Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) where the Apex Court set out its purpose in no uncertain terms 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.”

41. The Apex Court went further to state:

“If the Supreme Court were to find that the doctrine did not apply to constitutional litigation, the doctrine could lose much of its legitimacy and validity. Constitutional tenets permeated all litigation starting with the application of article 159 of *the Constitution* in both civil and criminal litigation, and its application embedded in all procedural statutes. Further article 50 of *the Constitution* on right to fair hearing and article 48 of *the Constitution* on access to justice were fundamental rights to which every litigant was entitled to. Such a holding could lead to parties, that whenever they needed to circumscribe the doctrine of res judicata, they only needed to invoke some constitutional provision or other...”

In granting exemptions to the applicability of res judicata, courts would consider whether there was potential for substantial injustice if a court did not hear a constitutional matter or issue on its merits. Before a court could arrive at such a conclusion, it had to examine the entirety of the circumstances as well as address the factors for and against the exercise of such discretionary power. In the alternative, a litigant had to demonstrate special circumstances warranting the court to make an exception.”

42. The appellant prayed that we interfere with the learned judge’s findings when it pronounced itself as follows:

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172. Commencing with Kitale HCCC No. 89 of 1997 (formerly Kakamega HCCC No. 43 of 1978), the 1<sup>st</sup> Respondent argued that since the Petitioner was successfully enjoined in the suit on 23/10/1978, he substantially participated in the proceedings giving rise to the judgment of the court delivered on 12/02/2013.

173. That argument is in my view a red herring since when the suit was appealed in Eldoret Civil Appeal No. 223 of 2013; Elijah C. A. Koross vs. Hezekiah Kiptoo Komen & 4 Others, the Court of Appeal found that the Petitioner was never a party to the suit and consequently, no orders could lie against him.

174. As a matter of fact, when the 1<sup>st</sup> Respondent elected to review that holding by Application dated 27/08/2015, the Court of Appeal in its Ruling delivered on 05/02/2016, categorically stated that the status of the Petitioner as not a party to the suit was a substantive determination and not a matter for conjecture. For that reason, the court upheld that he was not a party to the suit. The court took into account that no pleadings were ever amended. Furthermore,



the Petitioner never filed any pleadings. For these reasons, I find no element of the doctrine in regards to Kitale HCCC No. 89 of 1997.

175. This Court cannot depart from the reasoned finding of the Court of Appeal regarding the fact that the respective parties herein were never joined as parties to the suit. Thus, it is this Court's finding that the Petitioner was not a party in Kitale HCCC No. 89 of 1997. And further to that, this means that even if they gave Authority to Plead to one H. Komen, the Defendant in that case, the authority was neither here nor there. Such authority could only be given by parties in the suit: the named people were not. This is because the tenet and import of the provisions of the Civil Procedure Rules regarding such authority are clear. In regard to filing of Plaints which is the aspect specifically provided for about such authority, Order 4 Rule 1(3) of the Civil Procedure Rules stipulates that "Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others." Order 4 Rule 1(5) then provides that the same applies *mutatis mutandis* to Counterclaims.
176. In Nakuru HC Misc. No. 10 of 1980; Elijah Chemoiywo Arap Koross vs. Antony Oyier & 10 Others, the 1<sup>st</sup> Respondent sought to quash the consent given on 13/03/1980. He sued the Trans Nzoia Land Control Board and enjoined the Petitioner as one of the interested parties. The court herein was concerned with whether the decision to grant the consent was proper. It did not determine proprietary interests. Furthermore, the Petitioner was an interested party while the 1<sup>st</sup> Respondent was an Applicant in a miscellaneous cause. For those reasons, I find that the dispute does not meet the parameters of the doctrine.
177. The five (5) purchasers moved the High Court sitting at Nairobi in HC Misc. App. No. 167 of 1981; Hezekiah Komen & 4 others vs. Elijah Chemoiywo Arap Koross seeking to have the 1<sup>st</sup> Respondent declared a trustee of the suit land. They further sought subdivision *pro rata*. The court took note of the historical background of the parties including the judgment in Kakamega HCCC No. 43 of 1978 and the ruling in Nakuru HC Misc. No. 10 of 1980.
178. The court found that since ownership had been determined to belong to the 1<sup>st</sup> Respondent and that decision had not been appealed, then he remained the purchaser of the suit land. In its decision delivered on 05/10/1988, the court dismissed the suit for two (2) reasons; firstly, the Applicants had approached the court with unclean hands for failing to disclose that the parties had been in a litigious battle at the High Court in Kakamega. Secondly, the Counterclaim in Kakamega HCCC No. 43 of 1978 was yet to be determined. For these reasons, the court dismissed the Originating Summons on technical grounds.
179. Looking at the order of the court, I find that the suit was not determined substantively but in limine. The court downed its tools to pave way for hearing of the Counterclaim in Kakamega HCCC No. 43 of 1978. Furthermore, the Petitioner was an Applicant. For those reasons, I find that the doctrine of *res judicata* is not applicable to the facts and circumstances of that dispute.



180. In Eldoret HCCC No. 115 of 1998; Hezekiah Kiptoo Komen vs. Elijah C. A. Koross, the suit was not only between the 1<sup>st</sup> Respondent and a party not party to the present suit, but also sought to obtain a consent. For those reasons, *res judicata* is inapplicable. Similar observations were made in Kitale HC Miscellaneous Application no. 81 of 2003; In the matter of the estate of Elijah Chemoiywo Arap Koross.
181. In Eldoret HCCC No. 73 of 1995; Elijah C. A. Koross vs. Hezekiah Kiptoo & 4 others, the 1<sup>st</sup> Respondent sued the five (5) sleeping partners. By order dated 12/02/1996, interim orders were granted staying the sale of the Defendant's goods and heads of cattle attached by M/s Fema Traders or any other Auctioneers (emphasis added). The substantive Application was set to be heard on 26/02/1996. Looking at orders sought before the Court then and the orders granted, it is glaringly evident that the dispute concerned issues, being those relating to sale of goods and heads of cattle, which were not present in the circumstances herein: The Court cannot stretch its imagination so much as to bring in an issue of such a sale into being the same as the one ownership of land herein. I thus find no elements of *res judicata* appurtenant to this matter.”
43. Taking the learned judge's findings into account, together with our reevaluation of the proceedings, we find that the proceedings in Kitale HCCC No. 89 of 1997, subsequently appealed in Eldoret Civil Appeal No. 223 of 2013 confirmed that the 1<sup>st</sup> respondent was not a party therein. The dispute in Nakuru HC Misc. No. 10 of 1980 concerned whether the decision to grant the consent dated 13<sup>th</sup> March 1980 was different from the multifaceted issues raised in this petition. In HC Misc. App. No. 167 of 1981, the question for determination was whether the plaintiff was a trustee of the suit land. Those disputes did not determine violation of the 1<sup>st</sup> respondent's constitutional rights as enshrined in Article 40 of *the Constitution*. In fact, the proceedings in HC Misc. App. No. 167 of 1981 were terminated in limine on account of technicalities such that the dispute was not heard on its merits.
44. In Eldoret HCCC No. 115 of 1998, the suit only concerned the appellant and Hezekiah Kiptoo Komen. In Eldoret HCCC No. 73 of 1995, the dispute concerned the sale of goods and heads of cattle, which were not present in the circumstances herein. Lastly, citation proceedings in Kitale HC Miscellaneous Application No. 81 of 2003 were not the subject of constitutional violation claims as is the proceedings, the subject of this appeal. Ultimately, it is our finding that the issue revolving around the violation of the 1<sup>st</sup> respondent's constitutional rights was never addressed in other fora previously on the merits. For those reasons, the doctrine of *res judicata* did not apply. The appeal on that ground fails and is hereby dismissed.

### **Whether the 1<sup>st</sup> respondent was guilty of laches?**

45. The appellant's argument was that the 1<sup>st</sup> respondent was barred by statutory limitation to institute the petition. The trial court cited several decisions ultimately saying:
- “184. The general perception taken by courts regarding delays and constitutional petitions is that they are not tied to the manacles of the statute of limitation since the nature of the complaint is one of violation of human rights and fundamental freedoms. If the delay is expressly stated in *the Constitution*, that forms the exception to the general rule. However, each case must be decided on its own merit...



186. The 1<sup>st</sup> Respondent's contention was that the Petition was instituted with inordinate delay since the dispute commenced in 1978. That it was incumbent upon the Petitioner, who upon the discovery of a violation of his rights, ought to have invoked the court's jurisdiction then.
187. This court has extensively looked at the entire record and makes the following observations: in its Judgment of 12/02/2013, the court in Kitale HCCC No. 89 of 1997 rectified the title to include the Petitioner as one of the registered proprietors of the suit land. Between 1978 and 2013, the 1<sup>st</sup> Respondent's suit remained alive as against Hezekiah Komen. Though the Petitioner was to be enjoined as a Defendant in that matter, that did not take place. In fact, this formulated the reasoning inter alia to overturn that decision by the Eldoret Court of Appeal in Civil Appeal No. 223 of 2013.
188. Looking at those proceedings, the Petitioner even filed an authority to sue where he granted Hezekiah Komen powers to action that which is necessary, on his behalf in safeguarding his interests. It appears that for a larger period of the dispute, the Petitioner was under the irreproachable impression that he was a party to the dispute.
189. When the Court of Appeal 06/03/2015 clarified that he was never a party to the proceedings, thereby reverting ownership back to the 1<sup>st</sup> Respondent, the Petitioner filed the present suit.
190. In my considered view, the Petition herein not only was filed timeously but also lacked prejudice on the part of the 1<sup>st</sup> Respondent and I say so for the following reasons: firstly, the 1<sup>st</sup> Respondent failed to demonstrate what prejudice he suffered as a result of the suit being filed in 2016. Secondly, all the original purchasers have since passed on. As such, if there was prejudice on one party, it suffered similarly on the other party.
191. Finding that there is no laches in bringing the suit and if so, the same is explainable, I find that the Petition is proper before this court on account of time.”
46. This Court in Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others [2018] KECA 27 (KLR) held as follows on laches:
- “We are alive to the decision of this Court in Peter N. Kariuki vs. Attorney General [2014] eKLR, Civil Appeal No. 79 of 2012, where it was held that there is no time limit within which a party can file a claim for violation of constitutional rights. We have considered the persuasive dicta from the High Court in Kamlesh Mansuklal Damji Pattni & Another vs. Republic 2013] eKLR where it was noted that *the Constitution* did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless, it is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim denied as an abuse of the court process.”
47. Guided by the above decision, we find that the 1<sup>st</sup> respondent was not guilty of laches when it acted timeously in safeguarding his interests. Had the 1<sup>st</sup> respondent not have been deregistered as the proprietor of the suit land in 2015, we do not think he would have filed the petition. The petition was filed in good faith and in the interest of the administration of justice. Accordingly, we find that the doctrine of laches was not applicable to the circumstances herein and dismiss the appeal on that ground.



**Whether a partnership existed between the appellant and the 1<sup>st</sup> respondent? If the answer is in the affirmative, to what extent?**

48. The crux of the 1<sup>st</sup> respondent's allegations of constitutional violations revolved around this question. The trial court found that the appellant was in a partnership with the 1<sup>st</sup> respondent to the extent of his contributions; joined together with the common goal of acquiring the suit property with a view to making profit; that is the acquisition of the suit property.
49. According to the affidavit of retired Justice Philip K. Tunoi, whose evidence is similarly captured in the proceedings in Kitale HCCC No. 89 of 1997, coupled with the report from land agent H.A. Oduor, which documents were not objected to or called for cross examination, Elijah C.A. Koross identified the suit property with an interest to acquire its ownership from the vendor one George Pitman Mott. The leasehold in respect to the suit property was acquired by Land Limited, preceded by Agricultural Settlement Trust.
50. Elijah C.A. Koross approached the sleeping partners, that is Jonathan Kipkoros Barchigei, Kibet Cherutich Kimuron, Chebiator Chemjor Chebitong, Hezekiah Kiptoo Komen and Cheserem Kiprotich with the aim of obtaining their contribution from them.
51. Pursuant to an agreement dated 27<sup>th</sup> August 1974, Elijah C.A. Koross received Kshs. 23,000.00 from Jonathan Kipkoros Barchigei. In exchange, Jonathan Kipkoros Barchigei was to be given 80 acres excised from the suit land after its purchase with free use and occupation of it. He further confirmed that the sum had already been surrendered to Kabyeton Estate Limited with the intention of acquiring ownership of the suit land. A reserve clause indicated as follows:
- “In case of any eventuality in the farm failing to be obtained by me I bind myself to return the said amount of Kshs. 23,000.00.”
52. The appellant maintained that no partnership could exist in the absence of a written partnership. Withal, nothing could be inferred from the conduct of the parties as to suggest its existence. Though he argued that the contract did not exist, he stated that its existence was on the strength of a loan which funds were refunded with interest as per the reserve clause.
53. On one hand, the appellant relied on several vouchers totaling Kshs. 18,900.00. Certainly so, the vouchers did not amount to the sum of Kshs. 23,000.00 and without any narratives set out in unambiguous terms, we cannot conclude that they were intended to settle the refund sum.
54. On the other hand, he also lay credence to a letter dated 11<sup>th</sup> May 1981, drawn by the firm of Nyairo Tunoi and Company Advocates where it was acknowledged that the sum of Kshs. 25,500.00 was received by the law firm on behalf of Jonathan Kipkoros Chesagur. The evidence of retired Justice Philip K. Tunoi was that Jonathan Kipkoros Chesagur refused to accept the refund that was retained in the firm account. His evidence was that conduct was intended to give life to the reserve/refund clause.
55. Having said that, we find that Elijah C.A. Koross was estopped from acting in this manner. This is because the refund clause only arose on the inability of Elijah C.A. Koross to obtain the farm. See Elijah C.A. Koross was given an assignment of lease with an option to purchase from Kaubeyon Estates Limited dated 24<sup>th</sup> January 1975 and transfer instrument registered on 16<sup>th</sup> June 1977. It appears that from those sole facts, the suit land had already been obtained. The refund clause had therefore been overtaken by events and was inapplicable to the facts and circumstances of the case. It was rendered moot.



56. The appellant could not also plead that the 1<sup>st</sup> respondent ought to recover the sum from the firm of advocates because the sum of Kshs. 25,500.00 was a variation of the terms that was never the subject of discussion by the relevant parties. That amounted to altering the terms of the agreement unilaterally and without any color of right. Parties were bound by the terms of their agreement and could not depart without a meeting of the minds.
57. Furthermore, the consent dated 19<sup>th</sup> August 1980 issued by the Trans Nzoia Land Control Board, in its meeting held on 15<sup>th</sup> August 1980, transferred the suit land in its entirety from Land Limited and Elijah C.A. Koross on one part to Jonathan Kipkoros Barchigei, Kibet Cherutich Kimuron, Chebiator Chemjor Chebitong, Cheserem Kiprotich and Elijah C.A. Koross. That consent was never varied nor set aside in the manner set out in section 8 (2) of the *Land Control Act*.
58. The effect of that consent was to create an overriding interest as stated by the trial court by dint of Section 28 (j) of the *Land Registration Act*. Gathered from this consent, it is fortified that indeed the property had been sold to Elijah C.A. Koross. That is why he was listed as a transferor. He could not therefore enforce the refund clause.
59. It is also conceivable that parties were connected with the aim of acquiring ownership of the suit land. This is discernible from the agreement dated 27<sup>th</sup> August 1974 and the conduct of the parties in terms of remitting varied sums of money to Elijah C.A. Koross. We adopt the findings of the trial court in its general assessment and further uphold its finding when it said:

“I have found to the contrary, particularly based on the evidence of the Retired Judge Tunoi as recorded in P.Exhibit 1(a) and (b). Furthermore, concerning disputes lacking written partnership agreements/deeds, the Court of Appeal in *Julius Mworira & Another vs. Kiambati* [1988] eKLR, held as follows:

“In some cases, partners establish their business by entering into a deed. In many cases, agreement is oral. In a verbal contract of partnership, a person has to prove the existence of it by proving material terms. These can be proved by their conduct, the mode they have dealt with each other, and with other people. Their books of accounts, testimony of clerks and agents, letters, admissions, or any other established mode. The burden of proving oral partnership is heavier than where the contract is in writing.”

60. Our unwavering conclusion therefore is that the trial court properly found that the 1<sup>st</sup> respondent paid Kshs. 23,000.00 and was entitled to eighty (80) acres by dint of their agreement on 27<sup>th</sup> August 1974. The 1<sup>st</sup> respondent was therefore entitled to nothing more, nothing less.

### **Whether the appellant held the suit land in trust for the respondents?**

61. The Supreme Court in *Shah & 7 others vs. Mombasa Bricks & Tiles Limited & 5 others* [2023] KESC 106 (KLR) held as follows the concept of trust:

“The *Trustee Act* defined a “trust” and “trustee” as extending to implied and constructive trusts. A constructive trust was an equitable instrument which served the purpose of preventing unjust enrichment. Trusts were created either expressly, where the trust property, its purpose and the beneficiaries were clearly stated, or established by the operation of the law. Like in the instant case, where it was not expressly stated, the trust may be established by operation of the law...



A constructive trust was a right traceable from the doctrines of equity. It arose in connection with the legal title to property when a party conducted himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust would thus automatically arise where a person who was already a trustee took advantage of his position for his own benefit.”

The Court went further to state:

“While Sections 25, 26, and 28 of the *Land Registration Act* established that the rights of a registered proprietor of land were absolute and indefeasible, those rights were subject to the encumbrances recorded in the register and overriding interests, including trusts. Furthermore, in the absence of limitations on trusts, constructive trusts were also included. Consequently, under Article 24 of *the Constitution*, the limitation of property rights was legally defined and encompassed constructive trusts.

Constructive trusts could arise in various circumstances, including in land sale agreements. A trust was an equitable remedy which was an intervention against unconscionable conduct. Where the circumstances of the case were such that it would demand that equity treated the legal owner as a trustee, the law would impose a trust. It was imposed by law whenever justice and good conscience required it. A constructive trust could be imported into a land sale agreement to defeat a registered title.”

62. It is not gainsaid that the appellant is the registered owner of the suit land. Was that registration acquired in trust for himself and the 1<sup>st</sup> respondent? From the evidence we have analyzed so far, it is apparent that Elijah C.A. Koross was the most educated of them all and used this to his advantage. This is why he secured interest in the suit parcel of land in the 70s to the exclusion of the others until they were evicted from the parcel of land by dint of the proceedings in Kitale HCCC No. 89 of 1997.
63. It is also apparent from the evidence that the 1<sup>st</sup> respondent contributed towards the purchase of the property and wasn't refunded. Though the appellant was emphatic that the monies obtained from the 1<sup>st</sup> respondent, (if any) were loans, that evidence was not corroborated. It is also apparent that the parties made an agreement towards acquiring ownership of the suit land absent any sale agreement. Indeed, we have no doubt in our mind that a resulting trust was created when the appellant registered the suit land in favor of the 1<sup>st</sup> respondent. From their conduct and agreement, the appellant's father was to hive off 80 acres of the suit parcel of land. To this extent, we find that a trust was created as an overriding interest over the suit property.

#### **Whether the particulars of fraud were pleaded and proved?**

64. The appellant's contention was that fraud was neither pleaded nor proved by the respondents. As a consequence, the learned judge erred in determining that the appellant obtained title by means of fraud. It is trite law that fraud must not only be pleaded but also proved. The Court of Appeal for Eastern Africa in *R.G. Patel versus Lalji Makanji* (1957) EA 314 stated as follows:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”



65. Arising from this, if fraud is successfully pleaded and proved, the registrable interests in a title could be interfered with by virtue of section 26 of the *Land Registration Act*. The 1<sup>st</sup> respondent's petition at paragraphs 77 and 79 of his petition and paragraph 26 of the Affidavit respectively stated:
- “77. The 1<sup>st</sup> respondent fraudulently obtained the consent of the Land Control Board to transfer the suit property in his name to the exclusion of the petitioner. The 1<sup>st</sup> respondent in particular failed to disclose to the Land Control Board that the petitioner had made the greatest monetary contribution towards the purchase of the suit land and ought to have been registered as the proprietor of 203.82 acres thereof.
79. The 1<sup>st</sup> respondent's acts of fraudulently applying for and obtaining the consent to transfer the suit land in his sole name to the exclusion of the petitioner who made the greatest contribution towards the purchase of the suit land has infringed on the petitioner's right to acquire and own the suit property individually or in association with others.
26. The petitioner subsequently established that the suit property had been fraudulently transferred by Lands Ltd to the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent then undertook the registration of the suit property as the sole owner without the petitioner's knowledge.”
66. According to the register in respect to the suit land, the suit land was registered in favor of Kaubeyon Estates Limited on 1<sup>st</sup> June 1966. It was then charged to Agricultural Settlement Trust on 14<sup>th</sup> January 1965 and discharged on 13<sup>th</sup> July 1965; the same day the property was transferred to Land Limited for a sum of Kshs. 200,820.00. The suit land was leased to Kaubeyon Estates Limited for a term of 15 years from 3<sup>rd</sup> August 1965 at an annual rent of Kshs. 13,177.00. Pursuant to a lease agreement, the property was transferred to Agricultural Settlement Trust on 22<sup>nd</sup> March 1967.
67. Come 24<sup>th</sup> January 1975, Elijah C.A. Koross was given an assignment of lease with an option to purchase. He became lessee for a period of two years in that year when it was made available for an annual revisable rent of Kshs.13,485.10. By letter of consent dated 24<sup>th</sup> January 1975, the application was approved to assign the lease with an option for purchase from Kaubeyon Estates Limited to him. On 19<sup>th</sup> February 1975, the lease was transferred to Elijah C.A. Koross for a sum of Kshs. 41,120.00. It was then leased to Land Limited on 15<sup>th</sup> June 1976 for Kshs. 207,463.25.
68. Vide a letter dated 13<sup>th</sup> November 1975, Land Limited proposed for purchase of the suit land to Elijah C.A. Koross at the consideration sum of Kshs. 215,000.00. On 18<sup>th</sup> November 1975, Agricultural Settlement Trust forwarded the lease agreement from Kaubeyon Estates Limited to Elijah C.A. Koross who informed Land Limited that he was seeking to obtain a loan from ADC vide his letter dated 20<sup>th</sup> August 1975. He further authorized KFA to remit the sum of Kshs. 9,500.00 from the proceeds of his planted crops vide a letter dated 19<sup>th</sup> December 1975.
69. On 28<sup>th</sup> February 1976, Kenya Seed enclosed a cheque in the sum of Kshs. 12,000.00 from proceeds of seed maize from their customer Elijah C.A. Koross. The sum was paid to Agricultural Settlement Trust. On 4<sup>th</sup> November 1976, Land Limited issued an offer letter upon the application of Elijah C.A. Koross to purchase the property. The proposal sought an initial 20% deposit of Kshs. 43,000.00 with the balance of Kshs. 172,000.00 paid in forty monthly installments for twenty years at Kshs. 8,436.00 each.



70. Come 16<sup>th</sup> June 1977, a surrender of lease in favor of Kaubeyon Estates Limited and Elijah Chemoiywo, a transfer to Elijah Chemoiywo Arap Koross for Kshs. 215,000.00 and charge to Land Limited for Kshs. 172,000.00 were all registered on that day. It is also apparent from the bundle of receipts captured on record, the said Elijah C.A. Koross between 1977 and 1993 settled the purchase price to Land Limited. In fact, vide a letter dated 4<sup>th</sup> April 1979, Elijah Chemoiywo Koross requested Kenya Seed Company Limited to remit a loan amount in the sum of Kshs. 47,049.75 to Land Limited realized from proceeds of the cultivated seeds on the suit land. He also authorized Kenya Cooperative Creameries 12<sup>th</sup> February 1987 to pay Land Limited Kshs. 2,000.00 on every 20<sup>th</sup> day of the month. Overtime, he received demand letters on diverse dates between 1982 and 1990. After settling the purchase prices, a discharge of charge interment was issued.
71. The above evidence demonstrates that Elijah C.A. Koross acted in isolation under the pretext that he was the sole purchaser of the suit property. The report by the land agent demonstrated the craftiness exemplified by him. It is for that reason that recommendations were made to have the suit land registered in the names of all the persons involved. The said Elijah C.A. Koross ought to have disclosed to the relevant government entities that he was procuring the title on his behalf and on behalf of the 1<sup>st</sup> respondent; entitled to registration of the suit land to the extent of his contribution. In view of the foregoing, we find that the said Elijah C.A. Koross obtained title to the suit land by means of fraud that was pleaded and proved.
72. The dictates of Article 40 of *the Constitution* connote that every Kenyan's right to ownership of property is not taken advantage of. Where two or more people enter into a venture to obtain ownership of a property, the same should not be met with deceit, lies and crafty machinations with a view to defeating the interest of a bona fide purchaser by hook, line and sinker. The appellant's father herein ought to have taken into account the interest of the 1<sup>st</sup> respondent's father when in 1974, they joined forces to purchase the suit land together with other parties. It is indeed deplorable that he had other ideas; take ownership to his sole self and literally to the grave. His actions amounted to a breach of the 1<sup>st</sup> respondent's rights in Article 40. Certainly, the appellant failed to disclose that he purchased the property together with five others to the relevant government agencies. We therefore find that the learned judge properly discharged the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from any liability.
73. Before we pen off, we must thank the learned Judge most earnestly for his pedantic and immaculate efforts to analyzing each and every issue that arose from the proceedings. We are further most grateful for his utmost skill in considering all the evidence that was availed before him. Finally, we would also like to thank all Learned Counsel for their industry. Without their input, we would have easily gotten lost in translation.
74. In the end, we are satisfied to hold that the present appeal lacks merit. It is hereby dismissed with costs to the respondents.

**DATED AND DELIVERED AT NAKURU THIS 5<sup>TH</sup> DAY OF JUNE 2025.**

**J. MATIVO**

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**JUDGE OF APPEAL**

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

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**JUDGE OF APPEAL**



**G.V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

