Koross (Suing as the Administrator of the Estate of the Late Elijah CA Koross) v Kiptoo & 6 others (Civil Appeal E088 of 2023) [2025] KECA 1031 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KECA 1031 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL E088 OF 2023

JM MATIVO, GV ODUNGA & PM GACHOKA, JJA

JUNE 5, 2025

BETWEEN

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

AND

NELSON KIPTOO .... 1ST RESPONDENT

JONATHAN KIPKOGEI .... 2ND RESPONDENT

SOLOMON KIPROP .... 3RD RESPONDENT

BERNARD KIBETT KOSGEI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIBET CHERUTICH KIMURON) .... 4TH RESPONDENT

WILLIAM KIPRUTO (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CHEBIATOR CHEMJOR CHEBI TONG) .... 5TH RESPONDENT

KIPRONO KIPSEREM (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CHESEREM KIROTICH) .... 6TH RESPONDENT

CHARLES T BARCHIGEI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JONATHAN KIPKOROS BARCHIGEI) .... 7TH 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 No. 34 of 2017)

JUDGMENT

1. *The Constitution* of Kenya guarantees the right to own land. But experience has shown that getting a title to that parcel of land is more difficult than finding one's way in a maze. One has to walk through a network of paths and hedges before achieving his goal. In the process, many do not reap the fruits of

their struggle. This is the scenario facing us in this appeal. The parties have been engaged in a labyrinth of legal battles and as the names of the parties will show, many of them are watching the continuing legal battle from the afterlife, and probably wondering whether it was worth the fight. We say so as this legal imbroglio commenced way back in 1974 and half a decade later, the parties are still litigious. In that intervening period, Kenya has had 5 Presidents and several Vice Presidents. This dispute reminds us of the profound words of the novelist, Leo Tolstoy, who asked; How much land does a man need?

2. A brief abridgment of the facts, as captured in the pleadings and giving rise to this appeal, is necessary for contextualization purposes. It is also important to point out at the outset that the subject of this appeal, that is Kitale ELC Suit No. 34 of 2017, was consolidated with Kitale ELC Petition No. 8 of 2016 for purposes of taking evidence when the disputes were heard at the ELC in Kitale. Kitale ELC Petition No. 8 of 2016 is the subject of Eldoret Civil Appeal No. E089 of 2023. Instructively, the trial judge delivered two separate judgements and that is why the two appeals were not consolidated.

3. By Further Amended plaint dated 30th September 2017, the appellant contended that his deceased father, one Elijah C.A. Koross, was the registered owner of all that parcel of land namely L.R. No. 11440 measuring 514 acres. The property is situated in Endebess area, Kwanza Endebess sub-county within Trans Nzoia County. In 1978, the deceased sued Hezekiah Kiptoo Komen in Kitale HCCC No. 89 of 1997 (formerly Kakamega HCCC No. 43 of 1978). He successfully prosecuted the suit out of which the said Komen, who is not a party before us, was evicted from a portion of the suit land measuring 60 acres on 2nd April 1980. He was evicted together with Kibet Cherutich Kimuron, Chebiator Chemjor Chebitong, Cheserem Kiprotich and Jonathan Kipkoros Barchigei Chesagur by the court bailiff, the OCPD Wilfred Mwongera and Kamaliza Security Guards, whom the appellant accused of burning their houses and camping there.

4. The appellant averred that Kibet Cherutich Kimuron, Chebiator Chemjor Chebitong, Cheserem Kiprotich and Jonathan Kipkoros Barchigei Chesagur, all now deceased, and represented by the 4th, 5th 6th and 7th respondents respectively, participated in those proceedings. His conclusion was that they were agents of Hezekiah Kiptoo Komen and suffered the same fate. He emphatically averred that in that suit, the court declared that his father was the sole proprietor of the suit parcel of land.

5. Come 1st February 2017, the appellant contended that he was lawfully ploughing on the parcel of land when the 1st, 2nd and 3rd respondents unlawfully and without any color of right, invaded and trespassed on 60 acres of the suit land. The appellant complained that as a result, he was unable to continue with his cultivation works. He also accused the 7th respondent of unlawfully using a portion of the suit land.

6. The appellant continued that the respondents were so acrimonious that they physically assaulted him causing grievous bodily harm. The 1st, 2nd and 3rd respondents were charged with the offence of assault causing actual bodily harm in Kitale Chief Magistrate's Court Criminal Case No. 551 of 2017. In spite of those charges preferred against them, those respondents vowed to bar the appellant from gaining access to the suit land. He accused them of hiring goons to stop him from using the suit parcel of land.

7. The appellant further contended that the 1st – 6th respondents illegally and continually occupy 60 acres while also unlawfully and illegally used another portion of the same suit land courtesy of a previous partisan administration. The appellant lamented that the actions of the respondents amounted to trespass. The particulars of trespass were set out in paragraph 10A of the appellant's plaint. He also averred that resulting from the respondents' actions, the appellant had been deprived of the use and enjoyment of the parcel of land and consequently suffered loss and damage. For those reasons, he sued the respondents seeking the following reliefs:

a. A permanent order of injunction restraining the Defendants, their families, servants and/or agents and/or any other person(s) acting through the Defendants or claiming interest through them from trespassing on any portion of L.R. No. 11440;

aa. A mandatory injunction requiring the Defendants, their families, servants and/or agents and/or any other person(s) acting through the Defendants or claiming interest through them to remove themselves together with their properties from Land Parcel no. L.R. No. 11440 in default thereof they be removed with reasonable force and at their own expense;

b. Costs and interest thereon;

c. Any other appropriate relief this Honorable Court may deem fit to grant.

8. The 1st – 6th respondents entered appearance and filed a document titled 'reply to amended (amended) plaint'. It is dated 27th October 2017. It included their joint statement of defence and counterclaim. The 2nd, 3rd and 4th respondents are brothers. They're the sons of the deceased Kibet Cherutich Kimuron. Denying the contents of the plaint, they averred that the appellant held 187 acres of the suit land in trust for them and sought that relief from the trial court.

9. The 7th respondent filed his statement of defence and counterclaim dated 2nd November 2017. He urged that the appellant had misrepresented that there was no pending suit when he had in fact filed Kitale ELC Petition No. 8 of 2016. He contended that though the suit land was registered in the name of Elijah C.A. Koross, the same was obtained by means of fraud.

10. The 7th respondent averred that the late Jonathan Kipkoros Barchigei was approached by Elijah C.A. Koross to contribute money towards the purchase of the suit property from Land Limited. Jonathan Kipkoros Barchigei remitted a sum of Kshs. 23,000.00 which was acknowledged as received in an acknowledgment note dated 27th August 1974.

11. The purchase price of the property was Kshs. 215,000.00.

Jonathan Kipkoros Barchigei, together with Hezekiah Kiptoo Komen, Kibet Cherutich Kimuron, Chebiator Chemjor Chebitong and Cheserem Kiprotich, paid a total of Kshs. 68,000.00, while the balance was obtained from the proceeds of a loan. Upon settlement of the full purchase price, it was agreed by the parties that the remainder of the suit property would be shared amongst them depending on their contributions.

12. According to the 7th respondent, the meaning and tenor of that acknowledgment note, also termed as an agreement, was that Jonathan Kipkoros Barchigei was entitled to immediate ownership, occupation and possession of 80 acres of the suit parcel of land. It was on this premise that the 7th respondent remained in occupation of the suit property.

13. Denying that his deceased father was a party in Kitale HCCC No. 89 of 1997, the 7th respondent averred that he was only a witness to the proceedings. This fact of not being a party was affirmed by this Court in Eldoret Civil Appeal No. 223 of 2013; William Koross vs. Hezekiah Kiptoo Komen and 4 others. Furthermore, those proceedings did not determine that the appellant's deceased father was the proprietor of the said parcel of land.

14. The 7th respondent complained that upon receipt of the full purchase price, Elijah C.A. Koross clandestinely and fraudulently obtained a consent from the Land Control Board to transfer the entire property in his name to the detriment of the others. On discovery, a complaint was lodged before the provisional administration and the Agricultural Development Corporation in 1981. Through that intervention, the purchasers were settled on one hundred and eighty-seven (187) acres of the suit land.

The Agricultural Development Corporation, after conducting their investigations, concluded that the Elijah C.A. Koross had defrauded the respondents and recommended an alteration of the title to reflect the parties' agreement.

15. Given the amount contributed against the total deposit sum, the 7th respondent averred that he was entitled to 203.82 acres calculated as follows: 23,000/58,000 × 514 acres. In light of the above, the 7th respondent prayed that the appellant's suit be dismissed and his counterclaim be allowed in the following terms:

    a. A declaration be and is hereby issued that the 7th Defendant is entitled to ownership and registration of 203. 82 acres comprised of the property known as L.R. No. 11440;

    b. An order be and is hereby issued compelling the Plaintiff to transfer 203.82 acres comprised of the property known as L.R. No. 11440 to the 7th Defendant within 14 days of this decision, in default of which the Deputy Registrar of the Environment and Land Court should execute the transfer documents in place of the Plaintiff;

    c. A permanent injunction be and is hereby issued restraining the Plaintiff by himself, his agents or servants from interfering with the 7th Defendant's ownership and possession of 203.82 acres comprised of the property known as Land Reference No. 11440;

    d. Costs of the suit;

    e. Any other relief that the court may deem fit and just to grant in the circumstances.

16. In his judgment dated 5th October 2023, Nyagaka, J. dismissed the appellant's plaint but allowed the respondents' counterclaim in the following terms:

    a. A declaration be and is hereby made that the Plaintiff held all that parcel of land namely L.R. No. 11440 in trust for himself, the 4th, 5th, 6th and 7th Defendants pro rata.

    b. A declaration be and is hereby made that the Defendants are entitled to ownership of all that parcel of land namely L.R. No. 11440 pro rata to the extent of their contributions as follows:

    aa. The 7th Defendant shall have (80) acres of the suit land.

    ab. The 4th, 5th and 6th Defendants shall jointly have one hundred and twenty-one naught seven (121.7) acres of the suit land accounting for forty naught six (40.6) acres each.

    ac. The Plaintiff shall have the remainder of the portion of land being, approximately 312.3 acres.

    c. The Plaintiff 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 (b) above.

    d. The Plaintiff shall execute the necessary transfer forms to effect registration as (b) above in respect to all that parcel of land namely L.R. No. 11440 within thirty (30) days from the date of this judgment.

    e. Should the Plaintiff fail to comply with (d) above, the Deputy Registrar shall execute the necessary transfer forms to effect this judgment.

    f. A permanent injunction be and is hereby issued restraining the Plaintiff whether by himself and/or his agents or servants, assigns or any other person acting under his behest from interfering with the 4th, 5th, 6th and 7th Defendants' ownership and possession of the acres delineated in (b) above comprised of the property known as Land Reference No. 11440.

g. The Plaintiff's suit lacks merit and is hereby dismissed with no order as to costs.

h. The 1st - 6th Defendants' Counterclaim is merited to the extent that it has been allowed by this court with each party bearing its own costs.

i. The 7th Defendant's Counterclaim is merited to the extent that it has been allowed above.

17. The appellant is aggrieved by those findings. He filed his notice of appeal dated 6th October 2023. He also filed his memorandum of appeal dated 30th November 2023 that raised a garrulous 33 grounds disputing the findings of the learned Judge. We have taken the liberty to summarize those grounds as follows: the 1st, 2nd and 3rd respondents lacked the locus standi to file a counterclaim as they did not obtain grants of letters of administration; their counterclaim was incurably defective for lacking a verifying affidavit; the 4th, 5th and 6th respondents were awarded claims absent a counterclaim; the trial court awarded reliefs not sought in the parties' pleadings thereby violating the cardinal principle that parties are bound by their pleadings; and the trial court erroneously dismissed the argument that res judicata subsisted in light of the respondents' counterclaims.

18. He faulted the learned Judge for finding that the appellant's grant of letters of administration issued did not properly confer his right to file suit on behalf of the deceased; the respondents and the appellant never partnered with a view to purchasing the suit parcel of land; no evidence supported the fact that the appellant collected a sum of Kshs. 68,000.00 from the respondents; the agreement dated 27th August 1974 failed to meet the fundamental prerequisites of an agreement as to bind the parties; and he was emphatic that the sum of Kshs. 23,000.00 plus interest of Kshs. 2,500.00 was refunded to the 7th respondent but he refused to accept that payment.

19. He complained that the learned Judge distributed the suit land to the respondents without legal or factual basis; the trial court erroneously considered the evidence of Philip Tunoi in Kitale HCCC No. 89 of 1997 when the entire suit was set aside by the Court of Appeal in Eldoret Civil Appeal No. 223 of 2017; the learned Judge was in error in finding the existence of a trust by misrepresenting the provisions of section 28 (b) of the *Land Registration Act*; fraud was neither pleaded nor particularized by the parties; and the report of the land agent was biased as it failed to capture the input of all the parties.

20. He continued that the learned Judge fell into error in finding that the consent dated 19th August 1980 conferred land rights in favor of the respondents; the trial court misapplied the doctrine of lis pendens; the respondents were not entitled to a share of the suit land; and the trial court erred in dismissing his suit. In view of the foregoing reasons, the appellant prayed that the appeal be allowed by setting aside the judgment of the trial court and be substituted with an order allowing the appellant's claim and dismissing the respondents' counterclaims. He further prayed for costs of the suit and in this appeal.

21. The 4th, 5th and 6th respondents filed a notice of cross appeal dated 18th December 2023. They also filed an amended notice of cross appeal dated 4th January 2024. It is important to point out that the amended notice of cross appeal was filed without leave of this Court. Was that procedure regular?

22. Rule 16 (1) of the Court of Appeal Rules provides that where a person obtains leave to amend a document, the document itself may be amended or, if it is more convenient, an amended version of the document may be lodged. The 4th, 5th and 6th respondents filed their amended notice of cross appeal 16 days after their notice of cross appeal had been filed. We are of the considered view that a party seeking to amend a notice of cross appeal must first obtain leave before filing that amended document as governed by rule 16 (1). Thus, we find that the said parties ought to have first sought and obtained leave to amend that document before lodging the same and in that application to comply with rule 46 of the Rules of this Court.

23. An amendment of such a document is sacrosanct and is permissible only after leave of the court has been obtained. The absence of seeking such leave is not a technicality such that neither the oxygen principles nor the provisions of Article 159 of *the Constitution* can succor a litigant for falling to secure such a critical step. To meet the ends of justice, parties are required to adhere to the rules of procedure which are a handmaiden of justice. For those reasons, we find that the amended notice of cross appeal was filed irregularly and unlawfully.

24. Turning to their notice of cross appeal dated 18th December 2023, a cursory perusal of the said notice reveals that neither the requisite fee therefor was paid nor was it filed. Accordingly, it is not properly before us.

25. The 7th respondent filed a notice of cross appeal dated 10th February 2025 on 25th February 2025. It is indicated to be filed pursuant to rule 95 of the Court of Appeal Rules which provides as follows:

> "(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.
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> 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.
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> (3) ...."

26. Sub rule 2 of rule 95 provides that a party desirous of filing his notice of cross appeal shall obligatorily file that pleading 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. Evidently, the 7th respondent did not file his notice of cross appeal thirty days after service. This appeal was heard on 13th March 2025. The 7th respondent's notice of cross appeal dated 10th February 2025 was not mathematically filed at least thirty days before the hearing that took place on 13th March 2025. From that analysis, our inescapable conclusion is that the notice of cross appeal dated 10th February 2025 is irregular and incompetent. This settles any issues arising from the cross appeals as it is our finding that they were irregularly filed and we hereby strike them out.

27. As stated, this appeal was heard virtually on 13th March 2025. Mr. Wafula advocate was present for the appellant. Mr. Katwa advocate appeared for the 1st, 3rd and 4th respondents, Mr. Mbugua advocate represented the 2nd, 5th and 6th respondents while Mr. Rapundo and Mr. Ndegwa were the advocates that represented the 7th respondent.

28. The appellant relied on his written submissions, together with his list of authorities and case digest, all dated 6th March 2025, to submit that the 4th – 6th respondents did not file a counterclaim while the 1st – 3rd respondents failed to obtain letters of administration. On account of the fact that their counterclaim was not accompanied by a verifying affidavit, he submitted that there was no basis for an award in their favor. In light of the above, the appellant submitted that they were undeserving of any reliefs.

29. He argued that since Kitale HCCC No. 89 of 1997, and affirmed by this Court in Eldoret Civil Appeal No. 223 of 2013, determined that he was the sole proprietor of the suit land, the issue of ownership had already been determined. He observed that the respondents all participated in the proceedings and therefore had no legal claim of ownership. In that regard, the learned Judge violated the res judicata doctrine when it proceeded to determine that issue afresh in spite of evidence that several disputes had been previously filed regarding the issues between the parties.

30. The appellant then attacked the learned Judge's analysis of the fact that his letters of administration were irregular. He submitted that the grant was proper and was in any event inconsequential to the suit before the trial court. Furthermore, no prejudice was suffered by any parties on the absence of his co-administrators testifying before the trial court.

31. The appellant submitted that the respondents' claim was statutorily barred by dint of section 20 (1) of the *Limitation of Actions Act*. He contended that no trust arose and the learned Judge erred in finding that the appellant held the suit land in trust for the respondents. In any event, the issue of trust was dismissed in a previous suit and the respondents were estopped from raising it. He submitted that the learned Judge made findings on trust without any evidence to support that conclusion.

32. On whether the appellant and the respondents held a partnership relationship or contractual relationship, the appellant submitted in the negative. In any event, the 7th respondent's monies were refunded on account of the refund clause. Be that as it may, no partnership could have arisen absent documentary evidence. He furthermore pointed out that the 4th respondent testified that his father paid the vendor directly. How could a partnership have arisen in the circumstances? He asked.

33. The appellant maintained that it was only through his efforts that the property was acquired. Accordingly, no one could lay claim to it. He submitted that there were no particulars of fraud pleaded and proved and, in any event, he did not procure ownership by means of fraud. He submitted that the evidence of the land agent and retired Justice Philip Tunoi were of no probative value and ought to have been disregarded since they were not cross examined. Finally, the appellant submitted that the consent dated 19th August 1980 did not confer proprietary interest to the respondents. He prayed that his appeal be allowed and the cross appeals be dismissed.

34. The 1st, 3rd and 4th respondents filed their written submissions and a list of authorities and case digest all dated 10th February 2025. They collectively submitted that the learned Judge was correct in his findings on res judicata, statutory limitation, the question of the verifying affidavit, the appellant's letters of administration, H.A. Oduor's report, the doctrine of lis pendens and locus standi, the findings of a resulting trust and partnership subsisting, the analysis of the consent dated 19th August 1980 as well as the issues surrounding fraud. They however urged this Court to redistribute the acreage as follows: the appellant, 1st, 3rd and 4th respondents to each get 128.5 acres; the 7th respondent to get 80 acres hived out of the appellant's share; and the appellant to get the remainder being 48.5 acres.

35. Arriving at these figures, they contended that if the suit property was purchased for a sum of Kshs. 251,000.00, with a deposit of Kshs. 43,000.00, the scientific value yielded a return price of Kshs. 418.00 per acre. They submitted that they had contributed a combined total of Kshs. 35,000.00. The appellant meanwhile brought the balance of the Kshs. 43,000.00 from the 7th respondent who remitted 23,000.00 after they had submitted their contribution. That the appellant contributed a paltry sum of Kshs. 8,000.00 and used Kshs. 15,000.00 for his own personal gain.

36. They contended that balance of the purchase price was raised from the proceeds of leasing the property to Kenya Seed Limited.

They further urged this court to direct the appellant to reimburse them a sum of Kshs. 138,298.75 being the money retained by the appellant from the proceeds from Kenya Seed Limited and Kshs. 1,939,300.00 being the lease rate at Kshs. 200.00 per acre from 1982 to date. That both amounts do attract interest at 12% from 1979 and 1982 respectively. They faulted the learned Judge for not applying a scientific valuation adopted by them upon which the deposit sum of Kshs. 43,000.00 was calculated.

37. The 1st, 3rd and 4th respondents maintained that the appellant never contributed to the purchase price of the property. He was therefore not entitled to a share of the distribution or at the very most, a residual contribution. It was their contention that they were the first-in-time purchasers in February 1974; way before the appellant obtained funds from the 7th respondent. As such, they submitted that the appellant had no capacity to sell to the 7th respondent, without their knowledge, since they were already proprietors.

38. Turning to the report by H.A. Oduor, they submitted that it was authentic and accurately represented the facts on the ground.

They particularly highlighted that they each contributed Kshs. 40,000.00 towards the purchase of the property and the trial court erroneously disregarded that piece of evidence. They urged this Court to allow its cross appeal and dismiss the main appeal.

39. The 2nd, 5th and 6th respondents joined forces to file their written submissions, together with their list, bundle and digest of authorities, all dated 11th March 2025. They submitted that the trial court was generally correct in its assessment of the issues in dispute. They only urged this Court to interfere with the valuation as proposed by the 1st, 3rd and 4th respondents. They associated themselves with the submissions of the 1st, 3rd and 4th respondents praying that the appeal be dismissed with costs.

40. The 7th respondent filed written submissions together with a list and case digest, both dated 10th March 2025. He abridged the facts giving rise to this appeal to submit that the trial court properly found that the present dispute was not res judicata, his counterclaim was founded on the maxim of trust and was therefore not statute barred.

41. He further lauded the learned Judge's finding that a partnership agreement existed between the appellant and the 4th, 5th, 6th and 7th respondents. In submitting on this, the 7th respondent extensively relied on the affidavit of retired Justice Philip Tunoi sworn on 23rd May 2018. He argued that the appellant held a resulting trust over ownership of the suit land for the 4th, 5th, 6th and 7th respondent to the extent of their contributions.

42. Speaking to the facts argued at trial, the 7th respondent concurred with the trial court to the extent that it found that the 7th respondent was never refunded the sum of Kshs. 23,000.00 and as such, the refund clause was not injected with life. He fortified this submission with reliance on the evidence of retired Justice Philip Tunoi set out in Kitale HCCC No. 89 of 1997. Relying on the court's analysis, the 7th respondent reiterated that the payment vouchers did not constitute credible evidence to support the assertion that he had been refunded.

43. Regarding the consent dated 19th August 1980, the 7th respondent submitted that the trial court properly analyzed the evidence to find that it had never been voided or reversed. In the circumstances, it conferred ownership to the 7th respondent to the extent of his contribution. In any event, the appellant elected not to challenge that consent.

44. Disputing that the trial court erroneously considered the file in Kitale HCCC No. 89 of 1997 which was produced in evidence, the 7th respondent noted the findings of this Court in Eldoret Civil Appeal No. 223 of 2013 to submit that all the appellate court did was set aside the decision of the learned Judge

but made no nullification findings on the substantive proceedings. Secondly, the file in Kitale HCCC No. 89 of 1997 was uncontrovertibly produced in evidence without objection. Thirdly, sections 34 and 84 of the *Evidence Act* gave sanctity of judicial proceedings as genuine. Lastly, the court did not isolate its determination on the strength of the proceedings alone. Its decision was premised on other evidence corroborating the proceedings.

45. Looking at the evidence of the land agent, one H.A. Oduor, the 7th respondent submitted that neither the appellant nor his father ever challenged its contents. It was thus undisputed and was properly applicable to the facts and circumstances of the case. The appellant's allegation that the report was prepared absent his input was an afterthought and baseless. On the allegations of fraud, the 7th respondent submitted that it pleaded and proved the same and was rightfully found by the superior court as having subsisted during registration.

46. Finally, the 7th respondent submitted that his cross appeal was merited and ought to be allowed for the following reasons: section 27 of the Partnership Act provides that where partnership contribution is unclear, the parties ought to have equal shares. In that regard, he urged this court to award 100 acres to the appellant, 4th, 5th, 6th and 7th respondents in spite of the appellant's non-monetary contributions. In the alternative, he submitted that he was entitled to 203.2 acres. Finally, the trial court erroneously failed to award costs to the 7th respondent who was a successful party.

47. Our duty as a first appellate Court was enunciated by this Court in the case of Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR) that held as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-
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> "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

48. We have anxiously examined the prolix record of appeal and the supplementary records of appeal. The learned Judge's findings were premised on the basis of this record that is before us. The following facts are undisputed: 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 within 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 bridled one way or another.

49. The suit land was previously registered in favor of Kaubeyon Estates Limited on 1st June 1964. It was then charged to Agricultural Settlement Trust on 14th January 1965 and discharged on 13th July 1965; the same day the property was transferred to Land Limited for a sum of Kshs. 200,820.00. The suit land was then leased to Kaubeyon Estates Limited for a term of 15 years from 3rd 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 22nd March 1967.

50. By letter of consent dated 24th November 1973, the Land Control Board approved a transfer of lease from Land Limited to Elijah Chemoiywo Koross. He entered into an agreement with Jonathan Kipkoros Barchigei on 27th August 1974 drawn by retired Justice Philip K. Tunoi, who was an advocate at that time. It was executed by the parties namely Jonathan Kipkoros Barchigei and Elijah C.A. Koross. It was attested to by retired Justice Philip Tunoi and captured the following terms:

> " I, Elijah C Koross, do hereby acknowledge receipt of the sum of Kshs. 23,000.00 given by Jonathan Kipkoros Arap Chesagur which sum has been paid on my behalf to Kabyeton Estate Limited for the purchase of the said farm L.R. No. 11440. In exchange thereof, I give to the said Jonathan Kipkoros Arap Chesagur 80 (eighty acres) acres on the said farm after the purchase of it and he will free use and occupation of the said 80 acres. 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."

51. On 8th February 1974, Kibet Cherutich Kimuron appointed Elijah C.A. Koross as his Attorney over all that property namely Cherangany/Chebororwa/182. Under the terms of engagement of that Power of Attorney, the donee's appointment was to generally take charge of his interests over the donor's parcel of land and do anything as may be necessary to carry out the powers.

52. Another charge was registered in respect to all that parcel of land namely Cherangany/Koitugun/78 on 5th July 1974. The charge document indicated that the property was at the time charged in favor of Kenya Commercial Bank (KCB) for a principal sum of Kshs. 35,000.00. Similarly, a subsequent charge dated 5th July 1974 in respect to parcel number, Cherangany/Koitugun/99 to KCB for a principal sum of Kshs. 35,000.00 was registered.

53. On 24th January 1975, Elijah C.A. Koross was issued an assignment of lease with an option to purchase from Kaubeyon Estates Limited. He became lessee for an annual revisable rent of Kshs.13,485.10 for a period of two (2) years in the year it was made available. That land was transferred to Elijah Chemoiywo Koross on 19th February 1975 for Kshs. 41,120.00.

54. Vide a letter dated 13th November 1975, Land Limited made a proposal to Elijah C.A. Koross for purchase of the suit land. Under the terms and conditions of the offer, the property was to be purchased at a consideration sum of Kshs. 215,000.00.

55. In its letter dated 18th November 1975, Agricultural Settlement Trust, the predecessor of Land Limited, forwarded the lease agreement from Kaubeyon Estates Limited to Elijah C.A. Koross. This was preceded by his application for transfer of the suit land to his name. In his letter dated 20th August 1975, Elijah C.A. Koross requested Land Limited for indulgence as he sought to obtain a loan from Agricultural Development Corporation.

56. Come 28th February 1976, Kenya Seed Company enclosed a cheque in the sum of Kshs. 12,000.00 from proceeds of seed maize from their customer Elijah C.A. Koross to Agricultural Settlement Trust. Vide a letter dated 19th December 1975, Elijah C.A. Koross authorized the Kenya Farmers Association to remit the sum of Kshs. 9,500.00 from the proceeds of his planted crops.

57. On 15th June 1976, a transfer of the suit land was made in favor of Land Limited for a sum of Kshs. 207,463.25. Thereafter on 4th November 1976, Land Limited issued an offer letter following the application of Elijah C.A. Koross seeking to purchase the suit land. The proposal disclosed that a deposit of Kshs. 43,000.00 be paid. Thereafter, the balance of Kshs. 172,000.00 was to be paid in forty monthly installments in a twenty-year span at Kshs. 8,436.00 each. On 3rd April 1976, a cheque in the sum of Kshs. 25,500.00 was drawn. Its purpose was not revealed.

58. In that same year, that is 1976, the following vouchers were drawn by the firm of Nyairo Tunoi & Company Advocates in favor of Jonathan Kipkoros Barchigei:

    i. Voucher No. 402 dated 22/1/1976 - Kshs. 1,000.00; ii. Voucher No. 29 dated 07/05/1976 - Kshs. 2,000.00;

    iii. Voucher No. 431 dated 26/8/1976 - Kshs. 1,100.00;

    iv. Voucher No. 381 dated 25/10/1976 - Kshs. 300.00; v. Voucher No. 274 dated 21/02/1977 - Kshs. 200.00 vi. Voucher No. 223 dated 03/05/1977 - Kshs.14,300.00 by cheque no. A3XXX87.

    The above vouchers sum totaled Kshs. 18,900.00

59. Vide a transfer instrument registered on 16th June 1977, the property was transferred from Land Limited to Elijah C.A. Koross for a consideration sum of Kshs. 215,000.00. It was charged for a period of twenty years in favor of Land Limited. Confirming that the property had been sold to Elijah C.A. Koross, Land Limited wrote on 19th May 1977 to Archer & Wilcock Advocates requesting the Advocates to prepare the necessary transfer documents having enclosed the necessary documents in the letter.

60. In 1978, vide a plaint dated 22nd May 1978, Elijah C.A. Koross filed Kakamega HCCC No. 43 of 1978; Elijah C. A. Koross vs. Hezekiah Kiptoo Komen seeking to evict the defendant on grounds of trespass. It was later transferred to Kitale under reference HCCC No. 89 of 1997. Hezekiah Kiptoo Komen filed a defence and counterclaim dated 22nd May 1978 seeking to inter alia rectify the register so that the five (5) sleeping partners be registered as the proprietors of the suit land. He accused the appellant of obtaining title by means of fraud. The sleeping partners were listed as witnesses on behalf of Hezekiah Komen.

61. It is important to point out at this juncture that though a Chamber Summons dated 6th October 1978 sought to enjoin the sleeping partners as parties to suit, it is not clear from the record whether orders were issued to that effect. We say so firstly because though Cotran, J. on 23rd October 1978 stated that the application was allowed, no indication was made as to which application the learned Judge was speaking about. Secondly, the said sleeping partners neither entered appearance nor filed any pleadings in that suit thereafter. In the same year, Hezekiah Kiptoo Komen registered a caveat on 24th May 1978 claiming purchaser interests.

62. The primary suit was heard ex parte where Elijah C.A. Koross testified on 2nd April 1980 before Scriven, J. (as he then was). In his judgment dated 2nd April 1980, the learned Judge ordered that Hezekiah Kiptoo Komen be evicted from the suit land. He was furthermore restrained from gaining access to the suit land.

63. All the sleeping partners were evicted from the parcel of land in 1982. It took the intervention of the Provincial Administrator namely PC Hezekiah Oyugi and DC Mr. Oyier to restore them back to it. In the meantime, on 4th April 1979, Elijah C.A. Koross requested Kenya Seed Company Limited to remit a loan amount of Kshs. 47,049.75 to Land Limited realized from proceeds of the cultivated seeds on the suit land.

64. In 1979, Land Agent H. A. Odwor, acting at the behest of Agricultural Development Corporation, prepared a report that was forwarded to the District Commissioner Trans Nzoia vide a letter dated 18th April 1979. The report detailed that Elijah C.A. Koross approached a European man called Mr. Mott seeking to purchase the suit property. Unable to raise the full purchase price, he approached

the sleeping partners who contributed as follows: Jonathan Kipkoros Barchigei - Kshs. 23,000.00, Hezekiah Komen - Kshs. 10,000.00 while Kibet Cherutich Kimuron, Chebiator Chemjor Chebitong and Cheserem Kiprotich each paid Kshs. 40,000.00 to Elijah C.A. Koross as contribution for the purchase price. In total, they contributed Kshs. 153,000.00.

65. The report further stated that the above sums were confirmed as received by the advocate for the parties; retired Justice Philip K. Tunoi who also witnessed Hezekiah Komen pay his Kshs. 10,000.00 contribution as follows: Kshs. 2,700.00 paid on 5th July 1974, Kshs. 5,000.00 paid on 20th July 1974 and Kshs. 2,300.00 paid on 22nd July 1974.

66. The report accused Elijah C.A. Koross of fraudulently obtaining consent from the Land Control Board to the exclusion of the other purchasers. On 19th February 1975, T.Z Land Control Board consented to transfer of the suit land in his name. He was subsequently issued with a letter of offer on 4th November 1976 with an option to purchase. The consideration sum was set at Kshs. 215,000.00 where a deposit of 20% amounting to Kshs. 43,000.00 would be paid and the balance of the loan would be settled over a twenty-year period. The appellant accepted the terms of agreement in his own name to the exclusion of the sleeping partners.

67. The author of the report became suspicious that fishy activities circumnavigated when he received a letter dated 9th May 1977 requesting for execution and registration of documents in respect to the suit land. He remarked that the sleeping partners, though illiterate, were not interested in a refund of their contribution, as they wanted ownership as agreed in April 1979.

68. The report acknowledged that the said purchasers contributed money in good faith and had since lived on the suit land for three years as at the date of the report; with knowledge that they were the registered proprietors. He accused Elijah C.A. Koross, the most enlightened person of them all, of using the former Estates Officer of Land Limited to take the sleeping partners for a ride.

69. For the above reason, the report recommended that a consent be obtained from the Land Control Board to include all the sleeping partners in compliance with the Presidential Directive. Secondly, that Land Limited does approve their names on the strength of the findings of the report. Finally, a consent and approval by Land Limited be handed over to the sleeping partners to register their names in the title deed.

70. In compliance with that report, an application for consent was made before the Land Control Board by Elijah C.A. Koross and Land Limited jointly dated 25th July 1980. In its meeting held on 15th August 1980, the Land Control Board issued a consent in favor of the sleeping partners together with Elijah C.A. Koross dated 19th August 1980 transferring the suit land in their joint names.

71. Elijah C.A. Koross subsequently filed Nakuru HC Misc. No. 10 of 1980; Elijah Chemoiywo Arap Koross vs. Antony Oyier & 10 Others seeking to quash the consent given on 13th March 1980. The five purchasers were enjoined in the suit as interested parties. In his ruling delivered on 12th January 1981, Mead J. declared that the proceedings concerning the application for consent dated 11th May 1979 and subsequent issuance of the consent were a nullity because the applicant had not executed the application consenting to transfer the suit land as sought. Furthermore, the application was statutorily barred. The learned Judge remarked: "All the applicants are saying is that they contributed to the purchase price. Maybe they did, I do not know, but it does not make them purchasers."

72. The five partners then 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 Elijah C.A. Koross declared a trustee of the suit land. They further sought subdivision on a pro rata basis. The evidence

before that court was that the respondent identified the property from a European called George Pitman Mott, approached the sleeping partners and together, they raised funds to purchase the suit land. That in February 1975, upon paying the said sums, the sleeping partners entered on the suit land and commenced cultivation while Elijah C.A. Koross was appointed manager of the farm. They would later discover that Elijah C.A. Koross registered the suit land in his sole name.

73. Upon considering the litigious background, the court, in its decision dated 5th October 1988, found that ownership had been determined in favor of Elijah C.A. Koross and that decision had not been challenged. The suit was dismissed on technicalities in the following terms: 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.

74. By letter dated 10th July 1980, written to the firm of Nyairo Tunoi & Company Advocates, Land Limited, through their estate manager H. A. Oduor, informed the firm that Elijah C.A. Koross deliberately withheld material information when it was approached and were thus misled. In that regard, the letter advised that the draft transfer drawn by Gautama & Kibuchi Advocates was at a variance with the letter of consent.

75. On 11th May 1981, the firm of Nyairo Tunoi & Company Advocates wrote a letter addressing Elijah C.A. Koross as follows:

> " RE: Jonathan Chesagur Shs. 25,500/-
>
> As requested by you we hereby submit to you how the above sum received by us from you for and on behalf of Mr. Chesagur was paid to him or on his behalf. We retained the sum of Kshs. 500/- being our fees. You should also note that we have acted and have been acting for Mr. Chesagur on some other matters which should not be confused with the above refund transaction."

76. In a letter dated 25th November 1983, a staff surveyor called Z.M. Mirutu wrote to the Provincial Surveyor. He referred to the boundary dispute in respect to the suit land. He also made reference to verbal instructions from the addressee asking him to determine a possible solution to the boundary subdividing the suit land into two parts: 187 acres and 327 acres. According to the map, a plan adopted from FR No. 101/44 for proposed subdivision of 514 acres into two (2) plots: 187 acres shared among the sleeping partners while 327 acres be given to Elijah C.A. Koross.

77. After making rough measurements, the author found that 187 acres would go beyond a line of gum trees near a beacon referred to as G-40 into the main house of Mr. Koross. For this reason, a boundary was marked on the ground 20m away from the beacon G-40 along line G-41 - G-40 and the lower part defined by measuring 100m from River Kaibayan junction, that is to say, along the river. This gave 160 acres for portion A whose map was attached and 354 acres for portion B.

78. The author ascertained that the compound (former white man's house), that is to say Mr. Mott, was the farm of Mr. Koross as this was just a possible solution pending the appointment of the Provincial Commissioner (of the former Rift Valley Province). In the meantime, on 25th January 1985, Elijah. C.A. Koross wrote to the Attorney General (AG) and Agricultural Development Corporation (ADC) requesting for their assistance to safeguard his interest and evict unauthorized persons from the suit land.

79. Elijah C.A. Koross authorized Kenya Cooperative Creameries vide a letter dated 12th February 1987 to pay Land Limited Kshs. 2,000.00 on every 20th day of the month. On diverse dates between 1982

and 1990, the said Elijah C.A. Koross received several demand letters from Land Limited to settle outstanding monies owed between 1982 and 1990. Several statements of accounts were also adduced in evidence in the name of Elijah C.A. Koross for the period 1978, 1981, 1983 and 1984 as Land Limited's debtor.

80. Following his success in the suit namely Kitale HCCC No. 89 of 1997, Elijah C.A. Koross filed an application dated 31st October 1994 seeking to dismiss the counterclaim. The same was allowed on 30th November 1994. Dissatisfied with the decision, Hezekiah Komen filed an application dated 6th December 1994 seeking to reverse those orders. The application was allowed, paving way for hearing of the counterclaim that took place commencing 25th February 1998. All the sleeping partners, with the exception of the 7th respondent, testified on 4th August 1998 in support of the counterclaim. Amongst the documents relied on by Hezekiah Kiptoo Komen was H.A. Oduor's report.

81. Meanwhile, Hezekiah Kiptoo Komen filed Eldoret HCCC No. 115 of 1998; Hezekiah Kiptoo Komen vs. Elijah C. A. Koross seeking to obtain a consent to transfer. In dismissing his application on 5th October 1988, Aganyanya, J. found that the applicant was guilty of material disclosure. In addition to those findings, he acknowledged that previous litigation had found that Elijah C.A. Koross was the lawful proprietor of the suit land.

82. Following settlement of the full loan amount of the purchase price, a discharge of charge instrument was issued in favor of Elijah C.A. Koross on 8th March 1993. Subsequently, he sued the five sleeping partners in Eldoret HCCC No. 73 of 1995; Elijah C. A. Koross vs. Hezekiah Kiptoo & 4 Others. By order dated 12th February 1996, interim orders were granted staying the sale of the defendants' goods and herds of cattle attached by M/s Fema Traders or any other Auctioneers. The substantive application was reserved for hearing on 26th February 1996.

83. Kitale HCCC No. 89 of 1997 was heard overtime. In his Chamber Summons dated 5th November 1993, one Cherutich Kimuron sought to set aside orders issuing a warrant of arrest against him. Saliently, retired Justice Philip Tunoi, testified on 30th October 2006 that Elijah C.A. Koross presented him with Kshs. 35,000.00 from the 4th, 5th and 6th Defendants jointly obtained from a charge instrument registered in favor of KCB, of the 6th respondent's parcel of land. He confirmed that he prepared the agreement dated 27th August 1974. He added that the 7th respondent refused to accept the sum of Kshs. 25,500.00 which was retained in the firm account. Finally, he drew the filed counterclaim that set out the facts of the dispute.

84. According to the counterclaim, the five sleeping partners in 1974, contributed a total of Kshs. 68,000.00 to purchase the suit land as follows: Jonathan Kipkoros Barchigei paid Kshs. 23,000.00, Hezekiah Komen paid Kshs. 10,000.00 while the remaining three (3) purchasers paid a combined total of Kshs. 35,000.00. The purchase price of the suit land was capped at Kshs. 215,000.00 to be paid to Land Limited, the vendor. Additionally, the sleeping partners appointed Elijah C.A. Koross (who did not contribute any monies) their manager for the purpose of facilitating payment of the purchase price.

85. Upon considering the evidence of the parties, J.R.Karanja.J. allowed the counterclaim on 12th February 2013. The learned Judge was of the view that the sleeping partners were proprietors of the suit land. The court held:

> " All in all, judgment is entered for the Defendants against the Plaintiff as prayed in the Counterclaim to the extent that the Plaintiff is not entitled to the sole registrable interest in the suit land (prayer (a)) and that he (sic) appropriate register be rectified to have the suit land registered in the names of the Plaintiff and the five Defendants and/or their Personal Legal

Representatives (prayer (a)). Thereafter, the parties shall at their own work out modalities aimed at sharing and or distributing among themselves the entire portion of the land."

86. The Court further found that the consents obtained on 13th March 1980 and 9th March 1988 were invalidated by the Nakuru High Court and Eldoret High Court respectively. The court noted that the 2nd consent, given on 19th August 1980, was never invalidated and was most crucial in establishing that the five purchasers had a right to claim ownership over the suit land. Following the successful judgment, the five purchasers caused the suit land to be registered in their names on 9th July 2014.

87. Dissatisfied, Elijah C.A. Koross preferred an appeal in Eldoret Civil Appeal No. 223 of 2013; Elijah C. A. Koross vs. Hezekiah Kiptoo Komen & 4 Others. In its judgment dated 6th March 2015, the Court set aside the judgment of the trial court. The Court found that the sleeping partners were never joined as parties to the proceedings. Additionally, the Court found that the ex parte judgment of Scriven J. rendered the issues raised in Hezekiah Komen's counterclaim res judicata. The effect of the judgment reversed the registered interests of the 4th, 5th, 6th and 7th respondents extinct since the suit land was reverted back to the name of the appellant's father.

88. Aggrieved by that finding, the appellant challenged the decision to the extent that the interested parties were never enjoined in the proceedings at the trial court by application dated 27th August 2015. The same was dismissed on 5th February 2016 in the following terms:

> "Whether or not the third-party respondents were parties to the suit is a matter of fact, and not a matter for conjecture. For the court to have considered the status of the third-party respondents in its judgment and to have arrived at the conclusion that they were not parties to the suit is a substantive determination, and not one that could by any stretch of imagination fall within the definition of an error or accidental slip as envisioned by rule 35 of this court's Rules ... This court having rendered a substantive decision on the status of the third-party respondents is for all intents and purposed functus officio..."

89. Following that decision, the appellant obtained an eviction order dated 6th August 2015 seeking to evict all the sleeping partners from the suit land. Dissatisfied with the order, the sleeping partners filed an application in Kitale HCCC No. 89 of 1997 challenging the eviction order. In his ruling dated 11th May 2016 Obaga, J. adopted the findings of the Court of Appeal to hold that the applicants were not parties to the suit. Consequently, no eviction orders could lie against them. The court corrected the order by removing the applicants' names from the order. As such, the order only lay against Hezekiah Kiptoo Komen. Following the decision of the Court of Appeal, the appellant proceeded to register the suit land in his name on 4th July 2017.

90. Before we formulate the germane issues for determination, we must make a commentary on the submissions of the 1st, 3rd and 4th respondents who made several proposals while submitting before this Court. Those submissions were also adopted by the 2nd, 5th and 6th respondents. They urged this Court to redistribute the acreage as follows: the 4th, 5th and 6th respondents to each get 128. 5 acres, the 7th respondent to get 80 acres and the appellant to get 48.5 acres.

91. In the alternative, they urged this Court to direct the appellant to reimburse them a sum of Kshs. 138,298.75 being the money retained by the appellant from the proceeds from Kenya Seed Limited and Kshs. 1,939,300.00 being the lease rate per acre at Kshs. 200.00 per acre from 1982 to date. That both amounts do attract interest at 12% from 1979 and 1982 respectively.

92. It is not gainsaid that they filed a statement of defence and counterclaim before the trial court together with the 2nd, 5th and 6th respondents. We have anxiously perused through the said pleading. At no point

did they plead as they are proposing before this Court. These were issues that were introduced for the first time before this Court.

93. We will not tire to remind parties of the aphorism that parties are bound by their pleadings and cannot elect to depart from them. Evidently, the respondents were introducing fresh evidence guised as submissions that were not pleaded before the trial court. In essence, they were adducing evidence from the bar through their respective counsel. If we were to allow this chain of thought and entertain it, we would pardon the respondents to steal a march from the other parties; putting a halt to the turbines of justice. In fact, that would amount a travesty of justice. For that reason, we will strictly confine ourselves to the facts and evidence as was recorded at trial and will not depart from the tenet.

94. Having said that, and taking into account the evidence at trial and the submissions of the parties, we postulate that the following issues fall for determination and shall be analyzed serially:

Whether the counterclaims offended the doctrine of res judicata?

95. The concept of res judicata is well founded in section 7 of the *Civil Procedure Act*. It provides as follows:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

96. To succeed in a res judicata claim, 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. See 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 certain 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."

97. The appellant urged this court to find that the learned Judge was in error in finding as follows:

> " 187. Commencing with Kitale HCCC No. 89 of 1997 (formerly Kakamega HCCC No. 43 of 1978), the Plaintiff argued that since the 4th, 5th, 6th and 7th Defendants were successfully enjoined in the suit on 23/10/1978, they substantially participated in the proceedings giving rise to the Judgment of the Court delivered on 12/02/2013.
>
> 188. 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 4th, 5th, 6th and 7th Defendants were never parties to the suit and consequently, no orders could lie against them.

189. As a matter of fact, when the Plaintiff 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 third-party Respondents as not parties to the suit was a substantive determination and not a matter for conjecture. For that reason, the court upheld that they were not parties to the suit. The court took into account that no amendment to pleadings took place. Furthermore, the said Defendants never filed any pleadings. For these reasons, I find no proof of the element of the doctrine in regard to Kitale HCCC No. 89 of 1997.

190. 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 4th, 5th, 6th and 7th Defendants were not parties 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.

191. In Nakuru HC Misc. No. 10 of 1980; Elijah Chemoiywo Arap Koross vs. Antony Oyier & 10 Others, the Plaintiff sought to quash the consent given on 13/03/1980. He sued the Trans Nzoia Land Control Board and enjoined the 4th, 5th, 6th and 7th Defendants as interested parties. It is my finding that the court therein was concerned with whether the decision to grant the consent was proper, and that is not the issue before this Court in the present suit. The Court did not determine proprietary interests. Furthermore, the said Defendants were interested parties while the Plaintiff was an Applicant in a miscellaneous cause. For those reasons, I find that the dispute does not meet the parameters of the doctrine.

192. 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 Plaintiff declared a trustee of the suit land. They further sought subdivision pro rata. The court took into account 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.

193. The court found that since ownership had been determined to belong to the 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 Applicant 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.

194. 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 4th, 5th, 6th and 7th Defendants were Applicants while the Plaintiff was the Respondent in that matter. For those reasons, I find that the doctrine of res judicata is not applicable to the facts and circumstances of that dispute.

195. In Eldoret HCCC No. 115 of 1998; Hezekiah Kiptoo Komen vs. Elijah C. A. Koross, the suit was not only between the Plaintiff and a party, one Hezekiah Kiptoo Komen, who was not party to the present suit, but also sought to obtain a consent. For those reasons, res judicata is inapplicable.

196. In Eldoret HCCC No. 73 of 1995; Elijah C. A. Koross vs. Hezekiah Kiptoo & 4 Others, the Plaintiff 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.

197. Finally, the 4th Defendant filed citation proceedings in Kitale HC Miscellaneous Application No. 81 of 2003; In the matter of the Estate of Elijah Chemoiywo Arap Koross. According to his Affidavit in verification of proposed citation to accept or refuse letters of administration intestate, the deponent desired to have the Counterclaim in Kitale HCCC No. 89 of 1997 heard. He disclosed that he was the 4th Defendant in the matter. That the absence of a representative of the estate of the Plaintiff therein impeded the exercise hence the Application. The nature and character of those proceedings were separate and distinct from those in the present dispute. Be that as it may, the 4th Defendant had cited persons in the deceased estate; certainly, no res judicata arises.

198. For the above reasons, I find that the Plaintiff's bid seeking to find that the claims raised by the Defendants are estopped from re- litigation is a non-starter. The doctrine of res judicata is inapplicable and is accordingly hereby dismissed."

98. It is clear from the above, and from our analysis that Kitale HCCC No. 89 of 1997, subsequently appealed in Eldoret Civil Appeal No. 223 of 2013, found that the 4th, 5th, 6th and 7th respondents were never made parties to the proceedings. Giving evidence on behalf of Hezekiah Komen Kiptoo was not tantamount to joinder as parties. Since the parties were not the same as the parties to these proceedings, we find that the doctrine was not applicable as regards that decision. The learned Judge ably analyzed the proceedings, taking into account the several decisions arising from those proceedings. We adopt that analysis and uphold the findings of the learned Judge.

99. Moving to Nakuru HC Misc. No. 10 of 1980, the trial court found that the dispute concerned the issue whether the decision to grant the consent dated 13th March 1980 was proper. 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 proprietary interest as in the present proceedings. 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. We concur with the findings of the learned Judge that the doctrine did not apply.

100. The doctrine was also inapplicable when looking at the proceedings in Eldoret HCCC No. 115 of 1998 since the suit concerned only the appellant herein and Hezekiah Kiptoo Komen. In Eldoret HCCC No. 73 of 1995, the dispute concerned the sale of goods and heads of cattle, which was not the subject matter of the present proceedings. Lastly, citation proceedings in Kitale HC Miscellaneous Application No. 81 of 2003 were palpably not the subject of proprietary claims as is the proceedings, the subject of this appeal. Taking cue from our above analysis, we find that the appeal on res judicata fails and is accordingly dismissed.

Whether the respondents' counterclaims were barred by limitation of time?

101. The appellant submitted that the trial court erred in failing to find that the respondents were barred by limitation of time from lodging a claim as they so did in their counterclaims since their claims were founded on contract, recovery of land, fraud and misrepresentation. In the resultant circumstances, the counterclaims violated the provisions of sections 4 (1) (a), (2) and (7) of the *Limitation of Actions Act*.

102. In its analysis, the learned Judge found that the counterclaims sought ownership of the suit land on the basis of a trust created from the parties' conduct. Furthermore, allegations of fraud were set out by the parties herein blaming the appellant for fraudulently registering the property in his name to the exclusion of the others.

103. In determining whether the counterclaims were statutorily barred, the learned Judge referred to Bryan A. Garner, (2019) Black's Law Dictionary (11th Edition), Thompson Reuters, St. Paul MN, p. 26 the on the definition of the word "accrue" to determine when time started running:

> " 222. Presently, to establish when the cause of action arises, this court must appreciate the history of the parties, particularly the institution, pendency and determination of the suit in Kitale HCCC No. 89 of 1997. The court entered judgment in favor of the Defendants on 12/02/2013. This was then overturned on 06/03/2015.
>
> 223. That notwithstanding, the father to the Plaintiff got registered as the owner of land parcel LR. 11440 on 16/06/1977. That was the same date a charge was registered by him in favour of Land Limited which was the previous owner of the land. The Defendants claim that the registration of the said parcel in that manner by the Plaintiff's father was done in trust for the 4th, 5th, 6th and 7th Defendants. My understanding of the Defendants' counterclaims is that they are not founded on contract but on trust.
>
> 224. That being the case and finding (as above), it is noteworthy that Section 20 (1) of the *Limitation of Actions Act* provides that none of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy.

225. A trust under the Limitation of Actions Act has the same meaning as that set out in Section 2 of the Trustees Act which states that the expression trust "… extends to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative…"

104. In our view, the trial court was right in its analysis having found that the counterclaims were based upon the existence of a resulting trust. The reasons advanced certainly tilted towards sustaining rather than dismissing the counterclaim. In addition, we find that the interest of justice militated towards sustaining the claims for the court's analysis and to properly have a holistic appreciation of the facts and evidence before the trial court. Justice favored sustaining the counterclaims rather than dismissing them, a draconian measure that would have driven away the parties from the seat of justice. Accordingly, we find no reason to interfere with that finding.

Competency of the parties' pleadings

105. The appellant complained that the learned Judge erred in finding that he had improperly lodged suit since he did not have the requisite authority on the premise that the grant issued in his name, and three others, was unconfirmed. His view was that the issue was not a grave concern and, in any event, did not affect the suit in general. On the other hand, he lamented that the trial court ought to have found that absent a verifying affidavit, the 1st - 6th respondents' counterclaim was incompetent, incurably defective and for dismissal.

106. The trial court acknowledged that indeed the counterclaim offended the provisions of order 7 rule 5 (a) of the Civil Procedure Rules which is couched in mandatory terms. In the same vein, the trial court was conscious of the fact that the appellant did not have a limited special grant. Instead, he filed suit on the strength of an unconfirmed grant. He therefore analyzed this fact to establish whether the appellant's suit was competent in general against the dictates of order 3, rule 7 of the Civil Procedure Rules. The court pronounced itself pertinently as follows:

" 207. It appears on face value that two (2) parties to the dispute herein violated mandatory provisions of the law that would otherwise lead to an automatic dismissal of the suit on technical grounds. This is because rules of procedure are not made in vain. To pardon such parties would be to succor litigants to circumvent the law as and when they so choose yet the seat of justice calls upon parties to turn the turbines by firstly complying with rules of procedure even as they bring an action before a court of law.

208. The present dispute presents an isolated circumstance where the oxygen principle and the provisions of Article 159 of *the Constitution* inoculate the technicalities in favour of substantive justice. Adherence to rules of procedure and the law is a principle this Court will always guard jealously. This is an issue that the Court brings into the notice of the parties that in relation to the issues herein to the effect that if such infractions arise in the future the Court shall not pardon them. The Court has painstakingly applied the provisions of Article 159(2)(d) of *the Constitution* 2010 in order to move to determine the suit on substantive justice rather than technicalities for reasons that the dispute herein seems to have spanned two generations (since 1978). The dispute herein seeks to determine the ownership of the suit land of which the persons claiming to be original owners are all since deceased. Before me is the second generation of

contestants whom I would refer to as derivative owners. When they appeared before me they all, together with their brothers and sisters, their children and possibly grand-children who flocked my Court every time the hearing took place, desired that this dispute be brought to an end in one way or other.

209. With the background and hindsight as stated in the preceding paragraph in mind, this Court considers that if it were to dismiss the Plaintiff's suit and the 1st - 6th Defendants' Counterclaim on the two infractions singled out, it would in essence drive away from the seat of justice and leave hundreds of the derivative contestants languishing in greater pain than has been before. Since none of the proposed administrators of the estate of the late Elijah Chemoiywo Koross raised any issue with their own sibling prosecuting the claim in that behalf without the full grant to him only or the grant Ad Litem having been obtained, and since the 1st to 6th Defendants all acknowledged through the oath of the witnesses who testified in that behalf that the Counterclaim was filed by and on their behalf, in doing substantive justice and further, since Article 10 (2)(b) recognizes equity as one of the nation's values and principles, this Court hereby applies the maxim of equity that "equity treats as done that which ought to be done" to consider the failure by both sets of parties as pardonable...

211. Though the above decision speaks to verification of Plaints and counterclaims, I find that, and for only this isolated unique case, the principle would be extended locus standi as well. Given the higher calling of this court which is to do justice, I am inclined to pardon the two (2) parties but caution all and sundry about demeaning the rules of procedure deliberately as to cause procedural lapses. In light of these circumstances I save the suit and the pleadings on counterclaim by doing justice to hear and determine the issues at hand in the interest of resolving the dispute."

107. Without downplaying the role of a verifying affidavit in a claim or counterclaim, this Court in Josephat Kipchirchir Sigilai vs. Gotab Sanik Enterprises Ltd & Others Civil Appeal No. 98 of 2003, in finding that an omission to fully comply with the provision is a mere irregularity which, except in very clear cases, may be cured, held that:

> " The power of the court to strike out a plaint for non-compliance with Order 7 rule 1(3) is discretionary considering the language of the sub- rule which uses the phrase "the court may" implying that the court has to consider aspects for instance, firstly, the prejudice the failure to comply with the subrule will cause the defendant; secondly whether such prejudice may be appropriately compensated; and thirdly whether or not the plaintiff's case has some merit, in addition to the other grounds contained in Order 6 rule 13(1) of the Rules for striking out a pleading."

108. We have carefully looked at the trial court's analysis and determination of this issue. We find that the trial court acknowledged the parties' absence of confining themselves within the parameters of the law. In fact, that is the position. The appellant cited the decision in Rajesh Pranjivan Chudasama vs. Sailesh Pranjivan Chudasama [2014] eKLR where this Court indeed rightly affirmed that a litigant is clothed with locus standi upon obtaining a limited or full letter of administration in case of intestate succession. Such that the appellant had not complied. In the same vein, the counterclaim of the 1st – 6th respondents was not mandatorily accompanied by a verifying affidavit.

109. However, in the interest of justice, the court injected the oxygen principle as well as the principles set out in Article 159 (2) (d) of *the Constitution* and rightfully considered the substance of the dispute. We find that the trial court properly analyzed that issue. Taking into account the history of this dispute, we find no reason to interfere with how the learned Judge exercised his discretion. As such, we see no reason to interfere with those findings.

Whether a partnership existed between the appellant, 4th, 5th, 6th, and 7th respondents? If the answer is in the affirmative, to what extent?

110. This issue was pivotal and the kernel of the parties' dispute. In determining its existence or otherwise, we must first address the appellant's dissatisfaction by the trial court's reliance on the proceedings in Kitale HCCC No. 89 of 1997, the evidence of retired Justice Philip K. Tunoi and the land agent's report. The appellant's bone of contention was that the evidence of retired Justice Philip K. Tunoi, the report of land agent H.A. Oduor made in April 1979 and the proceedings in Kitale HCCC No. 80 of 1997 lacked evidentiary value since the witnesses were not called to testify. Furthermore, the proceedings in Kitale HCCC No. 89 of 1997 were overturned by the decision of this Court in Eldoret Civil Appeal No. 223 of 2013.

111. The allegations raised by the appellant are in our view untenable.

Firstly, while the appellant complained that the land agent and the retired Judge were not called as witnesses, their report and affidavit respectively, were adduced in evidence without any objection from the appellant. He further never applied to call for their cross examination. Secondly, while this court appreciates the import of Eldoret Civil Appeal No. 223 of 2013, and the scenario arising therefrom, Kitale HCCC No. 89 of 1997 were produced autonomously as evidence before the trial court. Similarly, the appellant did not object. This Court in Ibrahim Wandera vs. P N Mashru Civil Appeal No. 333 of 2003 when called upon to deal with the failure by the learned Judge to make reference to a police abstract, which was tendered in evidence without challenge expressed itself as follows:

> "The learned Judge did not at all make reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashru of P. O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross-examined on it and that means that the respondent was satisfied with the evidence. The issue of the ownership was first raised on behalf of the respondent by its counsel in his submissions in the Superior Court."

112. While we appreciate the fact that in that case, a witness was called to produce the police abstract, in this case, the appellant could have objected to the report and the affidavit being produced but failed to do so. It is too late in the day to object to the admissibility of the two documents when no challenge was taken to them at the trial and no decision made thereon. If we were to entertain the objection, we would be allowing a challenge to the decision of the trial Judge on a matter in which he had no opportunity to address his mind to.

113. Thirdly, as pointed out by the 7th respondent, the trial court did not consider that evidence in isolation. It is apparent that the trial court relied on the principle of corroboration in the analysis of the issues at hand. The 7th respondent furthermore invited us to a finding that the proceedings in Kitale HCCC No. 89 of 1997 were qualified for admission by dint of section 34 of the *Evidence Act* to which we concur. It is for those reasons that we find that the evidence was properly on record and the question of its probative worthiness is a separate and distinct issue.

114. Having said that, we shall now distill whether a partnership existed. The trial court, in its analysis, found that the appellant was in a partnership with the 4th, 5th, 6th and 7th respondents to the extent of their contributions. That they were joined together with the common goal of acquiring the suit property with a view to making profit; the acquisition of the suit property. Was this a proper analysis on a preponderance of the evidence adduced?

115. 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, 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.

116. 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.

117. Pursuant to an agreement dated 27th August 1974, whose particulars are captured in paragraph {{>#arguments

para_50 50}} of this judgment, Elijah C.A. Koross received Kshs. 23,000.00 from Jonathan Kipkoros Barchigei. In exchange, he 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."

118. The retired Judge's further uncontroverted evidence was that Hezekiah Komen paid Kshs. 10,000.00 in installments as follows: Kshs. 2,700.00 on 5th July 1974, Kshs. 5,000.00 on 20th July 1974 and Kshs. 2,300.00 on 22nd July 1974. He added that Kibet Cherutich Kimuron, Chebiator Chemjor Chebitong, and Cheserem Kiprotich obtained funds pursuant to a loan facility in the sum of Kshs. 35,000.00. In fact, existence of that charge was adduced in evidence. Furthermore, the proceedings in Kitale HCCC No. 89 of 1997 captured the testimonies of Benjamin Maritim, legal assistant Agricultural Development Corporation and Land Registrar Aloice Opanga corroborating this evidence.

119. The above findings were regurgitated in the land agent's report save the fact that Kibet Cherutich Kimuron, Chebiator Chemjor Chebitong, and Cheserem Kiprotich contributed Kshs. 40,000.00 each towards the purchase of the suit land. We have analyzed the evidence on record and indeed find that the sum of Kshs. 40,000.00 was not corroborated. The trial court was therefore correct in find that evidence inconceivable.

120. 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. However, guided by the above evidence, we find that indeed all the parties were connected with the aim of acquiring ownership of the suit land. This is discernible from the agreement dated 27th 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 Mworia & 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."

121. The appellant then submitted that even if the agreement dated 27th August 1974 was anything to go by, the said Jonathan Kipkoros Barchigei was refunded his share. On one hand, the appellant relied on several vouchers totaling Kshs. 18,900.00. On the other hand, he also lay emphasis on a letter dated 11th 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 for and on behalf of Jonathan Kipkoros Chesagur. Retired Justice Philip K. Tunoi's evidence was that Jonanthan Kipkoross 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.

122. However, we find that Elijah C.A. Koross was estopped from acting in this manner. According to the agreement, the refund clause was only to take effect if and when he was unable to obtain the farm. However, gathered from the assignment of lease with an option to purchase from Kaubeyon Estates Limited dated 24th January 1975 and transfer instrument registered on 16th June 1977, the suit land had already been obtained.

123. In addition, and in concurrence with the trial court, the Kshs. 18,900.00 did not amount to a refund taking into account the fact that the reasons for the vouchers were not disclosed. The appellant could not also plead that the 7th 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.

124. Furthermore, the consent dated 19th August 1980 issued by the Trans Nzoia Land Control Board in its meeting held on 15th 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 on the other part. That consent has never varied or set aside in the manner set out in section 8 (2) of the *Land Control Act*.

125. The consent was further indoctrinated as an overriding interest as rightly 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.

126. The appellant was oxymoronically submitting. While on one hand, he was adamant that the agreement dated 27th August 1974 was unenforceable and of no legal effect, on the other hand, the appellant submitted that the 7th respondent was refunded in pursuance of the refund clause embedded in that agreement. The appellant is clearly contradicting himself. Was the agreement valid so that the refund clause is put to question or invalid and therefore, no basis was laid out for a refund to the 7th respondent?

127. In the same vein, the 1st, 2nd and 4th respondents extensively submitted that they had contributed a joint sum of Kshs. 35,000.00 towards the purchase of the property in 1974. They would then later come to challenge the trial court's analysis when finding that they contributed Kshs. 35,000.00 collectively and not Kshs. 40,000.00 each. See, the trial court, while acknowledging the report of H.A. Oduor, was cognizant of the fact that the said report could not be analyzed in isolation. For that reason, it found that the 4th, 5th and 6th respondent did not contribute Kshs. 40,000.00 each as it was not backed by any evidence.

128. If we are made to understand the submissions of the 1st, 2nd and 4th respondents that the sum contribution of Kshs. 40,000.00 was an accurate representation of what was on the ground. The question we therefore pose is this: did the 4th, 5th and 6th respondents remit Kshs. 35,000.00 collectively or Kshs. 40,000.00 each? If the answer is to the affirmative in the latter, what evidence was adduced to arrive at this finding?

129. These lines of argument remind this Court of the folklore of the ravenous hyena who, encountering a fork in the road, tries to follow both paths simultaneously, resulting in its splitting in two. The appellant and the 4th, 5th and 6th respondents were approbating and reprobating. They wanted to have his cake and eat it. They could not succeed in this manner.

130. Our unwavering conclusion therefore is that the trial court properly found that since the 7th Defendant paid Kshs. 23,000.00 and was entitled to eighty (80) acres, then the 4th, 5th and 6th respondents' joint sum of Kshs. 35,000.00 equated to 121.7 acres which is worked out as follows: (Kshs. 35,000.00 ÷ Kshs. 23,000.00) × 80 acres = 121.7 acres and the appellant was entitled to the balance. We say that the appellant was entitled to the balance because we acknowledge his efforts in securing the balance of the purchase sum. He obtained a facility that settled the balance of the purchase price. He was also instrumental in securing resources over the suit parcel of land with the aim of settling the purchase price to the lender in full. A full account of the contributions made by Elijah C.A. Koross shall be demonstrated sequentially in the paragraphs following.

131. At the risk of belaboring further, though the 1st – 6th respondents proposed a different calculation of the distribution of the estate, that analysis was only introduced in this stage and not before the trial court. In any event, they did not file a notice of appeal. The appeal on this issue similarly lacks merit and is hereby dismissed.

}Whether the appellant held the suit land in trust for the 4th, 5th, 6th and 7th respondents?

132. Our apex Court in the case of Shah & 7 others vs. Mombasa Bricks & Tiles Limited & 5 others [2023] KESC 106 (KLR) also weighed in on the concept of trust as follows:

> " 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."

133. In this case, the appellant is the registered owner of the suit land.

Did he register the suit land in trust for himself and the sleeping partners? 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. It is also apparent from the evidence that the sleeping partners contributed towards the purchase of the property and none of them obtained the funds back. Though the appellant was emphatic that the monies obtained (if any) were loans, that evidence was not corroborated.

134. It is also apparent that the parties made oral agreements towards acquiring ownership of the suit land absent any sale agreements. The trial court relied on the case of Yaxley vs. Gotts [2000] Ch. 162, that held:

> "An oral agreement whereby the purchaser of a house promised to grant another, in exchange for materials and services supplied an interest in the property, though void and unenforceable under Section 2 of the Act of 1989, was still enforceable on the basis of constructive trust and Section 2 (5) in circumstances where, previously, the doctrine of part performance or proprietary estoppel might have been relied upon ..."

135. The trial court then held:

> "295. Looking at the entry on title document entered on 24/05/1978, a caveat was registered by Ezekia Kiptoo Komen, one of the sleeping partners claiming purchaser's interests absolutely. This did not augur well with the Plaintiff. Thus, he struck when the iron was hot by immediately filing Kakamega HCCC No. 43 of 1978 seeking to evict the said KIPTOO KOMEN from the suit land. In the end, he succeeded. This was clear evidence that the Plaintiff had the intended need to explore all possible options to remove any person that stood in his way towards a solitary acquisition of the suit property. He was well aware that the sleeping partners were illiterate and used all means possible to his advantage.
>
> 296. It is my analysis that the interactions between the Plaintiff on the one part and the 4th, 5th, 6th and 7th Defendants on the other part, created a partnership in the sense that each party would acquire a share of the suit land based on his monetary contribution. However, the Plaintiff swindled the Defendants and turned against them once he started pursuing the registration and use of property to his sole benefit...
>
> 299. In the end, while I appreciate the concerted efforts of the Plaintiff to raise balance of the purchase price entitled him to ownership of the suit land, I find that he registered himself as owner of the suit land in trust for the 4th, 5th, 6th and 7th Defendants to the extent of their share of contribution. I make a further finding that the shares are as has been found at paragraph 259 above, and for the Plaintiff, the balance of the whole parcel area size less that of other parties' shares."

136. We see no reason why we should interfere with those findings. In determining the effect of a trust created by equity, the Supreme Court in Shah & 7 others vs. Mombasa Bricks & Tiles Limited & 5 others (supra) further held:

> "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."

137. In the end, we find that the appellant held the suit land in trust for himself and the 4th, 5th, 6th and 7th respondents jointly to the extent of their contributions; an overriding interest as set out in section 28 (b) of the *Land Registration Act*.

Whether the particulars of fraud were pleaded and proved ?

138. 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."

139. Arising from this, if fraud is successfully pleaded and proved, a title may be impeached by dint of section 26 of the *Land Registration Act*. The 7th respondent's statement of defence and counterclaim is captured in his supplementary record of appeal. It is dated 2nd November 2017. A paragraph 4 of the pleading, the 7th defendant averred as follows:

> " The 7th defendant admits the contents of the paragraph 4 of the plaint save to add the registration of the said Elijah C.A. Koross as proprietor of the property known as LR No. 11440 measuring 514 acres (the suit property) was procured by fraud and misrepresentation of material facts.
>
> Particulars Of Fraud/representation Of Material Facts
>
> a. Procuring registration of the suit property without disclosing to the relevant government agencies involved in land administration that the 7th defendant and 4 other parties had contributed to the purchase of the suit property.

b. Procuring registration of the suit property without disclosing to the relevant authorities that he did not contributed (sic) any money towards the purchase of the suit property.

c. Failing to disclose that he was merely a caretaker of the suit property on behalf of the 7th defendant and 3 other parties with a limited role of managing contributions for purposes of the intended purchase.

d. Procuring the registration of the suit property discretely without informing the 7th defendant and 3 other parties who contributed to the purchase of the suit property.

e. Failing to disclose to the relevant government agencies involved in land administration that the 7th defendant and 3 other parties who contributed towards the acquisition of the suit property were entitled to registration and ownership of the suit property depending on their respective contributions.

f. Failing to disclose or admit that the Lands Limited and the Agricultural Development Corporation had investigated the title which he purportedly held over the suit property and concluded that:

    i. The plaintiff had taken the 7th defendant and 3 other persons who contributed money towards the purchase of the suit property for a ride.

    ii. The 7th defendant contributed in good faith towards the purchase of the suit property.

    iii. The actions of the plaintiff should be rectified and the suit property registered in the names of the plaintiff, the 7th defendant and 3 other persons."

140. According to the register in respect to the suit land, the suit land was registered in favor of Kaubeyon Estates Limited on 1st June 1964. It was then charged to Agricultural Settlement Trust on 14th January 1965 and discharged on 13th 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 3rd 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 22nd March 1967.

141. Come 24th 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 24th January 1975, the application was approved to assign the lease with an option for purchase from Kaubeyon Estates Limited to him. On 19th 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 15th June 1976 for Kshs. 207,463.25.

142. Vide a letter dated 13th 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 18th 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 20th

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 19th December 1975.

143. On 28th 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 04th 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.

144. Come 16th 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. It all started on 4th April 1979, when he 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 12th February 1987 to pay Land Limited Kshs. 2,000.00 on every 20th day of the month. Overtime, he received demand letters on diverse dates between 1982 and 1990. After settling the purchase price in full, a discharge of charge interment was issued in his favor on 8th March 1993.

145. The above evidence demonstrates that Elijah C.A. Koross acted in isolation as if he was the sole buyer 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 other sleeping partners. Indeed, they were all entitled to registration of the suit land to the extent of their 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 certainly pleaded and proved.

146. Regarding the doctrine of lis pendens, we are in agreement with the trial court when it held as follows:

> " 319. It is no doubt that the Plaintiff, in spite of the pending litigious matter, proceeded to register the requisite instruments without disclosing the same. In my view, the doctrine of lis pendens remained applicable as long as Kitale HCCC No. 89 of 1997 remained alive since ownership of the suit land was hotly contested. The Plaintiff's failure to adhere to and abide by the dictates set thereto amounted to fraudulent activities on his part.
>
> 320. The Plaintiff's uncandid and ill motive activities were further captured in a letter 10/07/1980 addressed to the firm of Nyairo Tunoi & Company Advocates. The author of the letter Land Limited informed the firm that the Plaintiff deliberately withheld material information when it was approached and were thus misled.
>
> 321. The letter continued that the Land Control Board acceded to correcting the anomaly when it sat on 13/06/1979, 11/07/1979, 14/02/1980 and 13/03/1980 to consider an Application for consent dated 11/05/1979 presented before them. In its meetings, considerations were taken that the sleeping partners had demonstrated that they had placed monetary contributions towards purchase of the suit land.

322. In that regard, the letter advised that the draft transfer drawn by Gautama & Kibuchi Advocates was at a variance with the letter of consent. They acknowledged that the Plaintiff did not want to admit the five (5) sleeping partners. Furthermore, that he would have frustrated efforts to have their interests secured by not signing the application forms. It was their recommendation that a rectification of title be submitted to the relevant authority so that the sleeping partners were included as proprietors of the title together with the Plaintiff. The fact that DW2's father failed to sue PW1's father during his lifetime did not absolve him from any fraudulent activities. He committed acts of fraud with intent to disinherit the sleeping partners.

323. Going by my above analysis, it is my considered view that the Plaintiff did not only commit fraud by registering the suit land pending adjudication proceedings as to ownership but also committed the same when there were subsisting overriding interests over the suit land that remained supreme to his registered ownership over the suit parcel of land."

147. Before we pen off, we must commend the learned Judge for his fastidious and assiduous efforts to capture in detail all the evidence on record. This is premised on the fact that we consciously acknowledge that the dispute commenced way back in 1974. Therein lay the risk of reading through illegible copious documents in a quest to deliver justice upon the parties; let alone the fact that only second-generation witnesses testified. We would also like to thank the counsel on record for their diligence in crafting the issues for our consideration and demonstrating a proper understanding of the dispute.

148. In the end, we are satisfied to hold that the present appeal lacks merit. No sufficient reasons have been demonstrated as to establish why we should interfere with the learned Judge's analysis and findings. Accordingly, the appeal is hereby dismissed. As earlier noted in this judgement the cross appeals also fail and this is a proper case where each party should bear its own costs. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 5TH 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

....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR