



**Mwangemi & 377 others v African Safari Club Ltd (Cause  
133N of 2008) [2025] KEELRC 1211 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1211 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 133N OF 2008**

**JK GAKERI, J  
APRIL 30, 2025**

**BETWEEN**

**ALPHONCE MWANGEMI & 377 OTHERS & 377 OTHERS & 377 OTHERS &  
377 OTHERS ..... CLAIMANT**

**AND**

**AFRICAN SAFARI CLUB LTD ..... RESPONDENT**

**RULING**

1. Before the Court for determination is the applicant's Notice of Motion dated 27<sup>th</sup> February, 2020 seeking various Orders which the court considered and found the application to be res judicata Industrial Court Cause Number 133N of 2008 and Civil Appeal Number 314 of 2014.
2. Aggrieved by the decision, Sheila Nkatha Muthee appealed and after considering the appeal, the Court of Appeal allowed it partly as follows:  
  
“According, we partly allow the appeal, set aside the ruling of the learned Judge to the extent that she found that the entire application was res judicata and direct that the allegations relating to the wrongful conduct of the auction sale of the suit property be heard and determined by a Judge other than Omollo J. save for that, the appeal against the finding that the application seeking the setting aside of the consent Orders was res judicata fails and is hereby dismissed...”
3. After the appeal, Roland Ruedin and Hanspeter Ruedin filed the Notice of Motion dated 18<sup>th</sup> July, 2024 urging the Court to consider prayers (c), (g), (h), (i), (j) and (k) of the Notice of Motion dated 27<sup>th</sup> February, 2020. Other than prayer (c), the other prayers relate to the auction, sale and subsequent events and are therefore within the directions of the Court of Appeal.



4. As will become clear later in this ruling the applicants in the Notice of Motion dated 18<sup>th</sup> July, 2024 had no locus standi.
5. Prayer (c) of the Notice of Motion dated 27<sup>th</sup> February, 2020 was not part of the directions of the Court of Appeal and is not included in this ruling.
6. The applicants are therefore seeking Orders that:
  - (g) The purported auction sale of the suit premises by Stephen Kimani Karuu t/a Kiriyu Merchants Auctioneers, the 2<sup>nd</sup> Affected/Interested Party to Erdemann Property Limited, the 1<sup>st</sup> Affected Party at a fictitious auction sale allegedly held on 8/4/2014 be declared to have been conducted against the terms and conditions of sale approved by the court, to have been conducted fraudulently, incompetently, criminally and illegally and therefore null and void and be set aside as a matter of right.
  - (h) Any certificate of sale, vesting order and transfer of the suit premises to the 1<sup>st</sup> Affected/Interested Party as the purchaser be declared to be incompetent and null and void having been procured fraudulently, unconstitutionally and without jurisdiction and be set aside as a matter of right.
  - (i) The registration of Erdemann Property Limited, the 1<sup>st</sup> Affected/Interested Party as the proprietor of the suit premises be nullified and cancelled and its certificate of title in the suit premises be declared to null and void.
  - (j) Erdemann Property Limited, the 1<sup>st</sup> Affected/Interested Party be removed and evicted from the suit premises.
  - (k) The Applicants be restored to the suit premises and ownership and possession of the suit premises be reinstated or restored to the Applicants.
7. In response, the two Notices of Motion, the 1<sup>st</sup> Interested Party and the claimant's filed Notices of Preliminary Objection dated 8<sup>th</sup> September, 2024 and 5<sup>th</sup> September, 2024 respectively.
8. The 1<sup>st</sup> Interested Party contended that:
  1. The Court has no jurisdiction to grant the Orders sought in the instant application by dint of Article 162(2)(a) of *the Constitution* of Kenya or Section 12 of the *Employment and Labour Relations Court Act*.
  2. The Applicants have no locus standi to pursue the applications for failure to obtain a grant of letters of administration under Section 54 of the *Law of Succession Act* rendering the applications incompetent, fatally and incurably defective.
  3. The court is functus officio having adopted the consent Orders recorded on 2<sup>nd</sup> December, 2013.
9. The claimants/Respondents contend that:
  1. The suit is incompetent, superfluous, fatally defective, misconceived and an abuse of the court process.
  2. Applicants have no locus standi as they are not administrator of the deceased's estate and have not obtained letters of administration limited to the instituting of this application.



3. The Ruling of Hon. Justice Onyiego rectified the certificate of confirmation of grant to exclude the suit premises and no appeal was filed.
  4. The applicants did not substitute the deceased auctioneer within one (1) year of his death as provided by Order 24 of the Civil Procedure Rules.  
Mr. Stephen Kiman Karuu t/a Kiriyu Merchants Auctioneers died on 12<sup>th</sup> August 2022.
  5. The court has no jurisdiction to hear and determine the prayers on the property in the application and ought to down its tools.
  6. The Application is res judicata as determined by Onyango J on 19<sup>th</sup> November, 2021.
10. In the courts view, the two Preliminary Objections may be condensed into two principal objections namely; want of jurisdiction and locus standi. The issues of res judicata and functus officio were directly and indirectly settled by the Court of Appeal.

### **Submissions of the Interested Party**

11. On locus standi counsel for the 1<sup>st</sup> Interested Party placed reliance on the sentiments of the Court in Alfred Njau and Others V City Council of Nairobi [1982] KAR 229 on the essence of locus standi, to urge that since the applicants did not possess any grant of letters of administration of the estate of Karl Jacobs and though they may be beneficiaries of the estate, they did not have the requisite standing.
12. That the letters of Administration were granted to one Sheila Nkatha Muthee in contravention of Section 66 of the *Law of Succession Act*.
13. Reliance was also placed on the decisions in In the matter of the Estate of Charles Muigai Ndung'u (deceased) of Karinde, Kiambu District Nairobi HCSC No. 23980 of 2002 and In the matter of the Estate of Gathii Gatimu (deceased) Nairobi HCSC No. 599 of 1994 on who may become administrators of an estate, to urge that the applicants did not approach the court with clean hands and the application is an abuse of the court process.

### **Claimant's submissions**

14. On locus standi, counsel submitted that the 1<sup>st</sup> applicant lacked the requisite standing citing the Court of Appeal decision in Virginia Edith Wambui Otieno V Joash Ochieng Ougo & Another [1982-99] I KAR.
15. Reliance was made on the sentiments of Hon. Justice Nduma Nderi in his Ruling on 11<sup>th</sup> July, 2014 which was not appealed against.
16. As regards jurisdiction, counsel submitted that since the issues under consideration related to land, the court has no jurisdiction by dint of Article 162(2)(b) of *the Constitution* of Kenya.

### **Applicant's submissions**

17. Counsel submitted that the Court of Appeal remitted prayer (c), (g), (h), (i), (j) and (k) in the motion dated 27/2/2020, while aware of the death of 2<sup>nd</sup> Interested Party.
18. That the Preliminary Objections invited the court to delve into facts and are therefore not Preliminary Objections and the applicants had locus standi otherwise the Court of Appeal would not have remitted the matter to the court for hearing and determination and the issue was raised earlier.



19. Counsel maintained that the death of the 2<sup>nd</sup> Interested Party was res judicata and could not be raised as a Preliminary Objection.
20. On jurisdiction, counsel submitted that the court had jurisdiction by dint of Article 162(2)(a) of the Constitution and Section 12 of the Employment and Labour Relations Court.
21. That the 1<sup>st</sup> Interested Party's Preliminary Objection sought to by-pass Section 20 of the Employment and Labour Relations Act on procedural technicalities and the same was prohibited by Article 159(2) (d) of the Constitution as the applicants were the only beneficiaries of the estate of their father.
22. On functus officio, counsel submitted that the court was not functus officio in relation to prayers (c), (g), (h), (i), (j) and (k) in the motion dated 27/2/2020 as it was directed to hear and determine the issues by the Court of Appeal.
23. Further submissions by counsel delve deeply with the facts of the case on the sale which counsel characterises as fictitious and fraudulent for non-compliance with the court's directions and lack of a valuation or reserve price.
24. In their further submissions dated 23<sup>rd</sup> October, 2024, the applicants laid emphasis on the issue of locus standi by citing the application dated 27<sup>th</sup> June, 2020 which sought the arrest of the applicants to force them settle the decree.
25. Reliance was placed on Articles 22, 3, 10, 25(c), 40, 48, 50(1), 159(2), 160(1) and (5) of the Constitution of Kenya to urge that the applicants were persons.
26. Reliance was also made on the provisions of Section 34 of the Civil Procedure Act to urge that the Court had jurisdiction to hear and determine the application as the Decree is not a separate suit and the sale was in execution of a Decree of this court.

Counsel urged the court to dismiss the Preliminary Objections.

27. The issues that commend themselves for determination are:
  - i. Whether the two Notice of Preliminary Objection meet the threshold of a Preliminary Objection and
  - ii. Whether the Preliminary Objections are merited.
28. On the 1<sup>st</sup> issue, it is trite law that the threshold of a Preliminary Objection was articulated by the Court of Appeal in its locus classicus decision in Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd where Law JA and Sir Charles Newbold P. stated as follows:

“...a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a Preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

29. Sir Charles Newbold P. stated

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary Objection does nothing



but unnecessary increase costs and on occasion, confuse the issue and this improper practice should stop”

30. Similarly, in *Hassan Ali Joho & Another V Suleiman Said Shabal & 2 Others* [2014] eKLR, the Supreme Court stated:

“ A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a Preliminary point may dispose of the suit”.

See also *Hassan Nyanje Charo V Khatib Mwashetani & 3 Others* [2014] eKLR.

31. The sentiments of Law JA exquisitely captures an objection to the jurisdiction of the Court as a Preliminary Objection and being one of the grounds cited by the 1<sup>st</sup> Interested Party and the claimants, the threshold of a Preliminary Objection has been met and the same may be said on locus standi which is right to institute proceedings or a suit which is addressed by *the Constitution* of Kenya and statutes.

32. On jurisdiction, while the 1<sup>st</sup> Interested Party and the claimants argue that the court is devoid of jurisdiction and ought to down its tools, the applicant’s argue that the court has jurisdiction as conferred by *the Constitution* of Kenya and the *Employment and Labour Relations Court Act*.

33. It is trite law that “jurisdiction is everything” as echoed by Nyarangi JA in his famous rendition in *Owners of Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd (Supra)*.

34. In *Samuel Kamau Macharia & Another V Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR, the Supreme Court held that

“ A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”

35. Article 162 of *the Constitution* of Kenya provides that:

- (1) ...
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to--
  - (a) employment and labour relations; and
  - (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

36. In addition, Section 12 of the *Employment and Labour Relation Court Act* provides that:

1. The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the court relating to Employment and Labour Relations including-

Subsection (2) of the Act exemplifies the various types of disputes over which the court has jurisdiction.

Notably, Section 12(2) of the *Employment and Labour Relations Court Act* is not exhaustive.



37. The foregoing provisions delineate the jurisdiction of the Employment and Labour Relations Court and courts have robustly addressed the jurisdiction of the court.
38. In *United States International University (ISIU) V Attorney General* [2012] eKLR Majanja J stated
- “...By virtue of Article 162(3), section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret *the constitution* and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of *the Constitution* within a matter before it.
39. Finally, in *Tea Growers Association and 2 Others V the National Social Security Fund board of Trustee & 13 Others* [2024] KESC 3 (KLR), the Supreme Court of Kenya expressed itself as follows:
- “In our view, there is nothing in *the Constitution* the ELRC Act or indeed in our decision in the *Karisa Chengo* case to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC Court is precluded from determining the constitutional validity of a statute. This is specially so if the statute in question lies at the centre of the dispute...”
40. Significantly, under Rule 73(2) of the Employment and Labour Relations Court (Procedure) Rules, 2024,
- Rules on execution or stay of execution of an Order or decree of the court shall be in accordance with the Civil Procedure Rules.
41. Since the Civil Procedure Rules 2010 were made pursuant to the provisions of the *Civil Procedure Act*, the Act applies as well.
42. Section 34 of the *Civil Procedure Act* provides that:
1. All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit
  2. The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
43. While it is not in dispute that the instant application arose out of a sale of land in accordance with an Order of this court, it is also not in contest that the prayers sought by the applicants relate to the setting aside of the sale of the land, declare the same void, cancel the title relating to the suit premises, order eviction of the 1<sup>st</sup> Interested and restored the suit premises to the applicants, which are matters squarely within the jurisdiction of the Environment and Land Court.
44. However, since the application dated 27<sup>th</sup> February, 2020 is a proceeding or suit emanating from execution proceedings, the court is deemed to have jurisdiction by dint of Section 34 of the *Civil Procedure Act*.



45. The court is in agreement with the applicant's counsel that it is vested with jurisdiction to hear and determine the instant Notice of Motion.
46. As regards locus standi, parties have adopted contrasting positions. Simply put, the Objector's case is that the applicants do not have letters of administration of the estate of Karl Jacobs, an argument the applicants concede but argue that the Objectors had previously sued the applicants to satisfy a decree in a motion dated 27<sup>th</sup> June, 2020.
47. It is common ground that one Sheila Nkatha Muthee obtained a Certificate of Grant on 22<sup>nd</sup> March, 2016 and the same was confirmed on 16<sup>th</sup> May, 2016 and was rectified and amended by Justice Onyiego.
48. It is unclear to the court why the applicants made no steps to obtain the letters of administration or contest the grant made to Sheila Nkatha Muthee since May 2016, and who did not participate in the instant application.
49. Counsel for the applicants submitted vociferously that since the objectors had previously been sued the applicant's they had locus standi to sue in this instance and *the Constitution* of Kenya confers standing under various articles.
50. Concerning the motion dated 27<sup>th</sup> June, 2020, the applicants were sued as 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
51. However, the applicants provided no evidence as to whether they objected to their inclusion or that they were indeed found culpable. A party has liberty to sue any party, who, in its view is liable to make good any liability accruing but that does not, in the court's view, accord such a party a reciprocal right to sue.
52. In this case, the applicants are suing as beneficiaries of Karl Jacobs Reudin who died on 19<sup>th</sup> March, 2013 but they are yet to comply with the provisions of the *Law of Succession Act* which are mandatory.
53. In *Sheila Nkatha Muthee V Alphonse Mwangemi Munga & Others and Frank Helge NeuGebaner, Nduma Nderi J* held as follows:

The applicant herein cannot move the court to set aside orders made by this court against the respondent company and therefore Sheila Nkatha Muthee lacks locus standi in these proceedings”.
54. Section 67 of the *Law of Succession Act* and Rule 36 of the Probate and Administration Rules provide for the grant of letters of administration ad corrigenda bona, a limited grant to enable the grantee preserve the estate of the deceased pending the grant.
55. Although in the instant case the grant was confirmed in May 2016, Sheila Nkatha Muthee did not and is not prosecuting the instant application, which leaves the applicants exposed for want of standing to institute the instant application.
56. Contrary to the applicants' counsel's argument that the Court of Appeal directed this court to hear and determine the issue of the contested auction sale, the court retains jurisdiction to hear and determine issues arising between the parties other than those that are res judicata.
57. The foregoing is fortified by the decision in *Muthee (As Administrator of the Estate of Karl Jacobs Reudin Deceased and 2 Others V Alphonse Mwangemi Munga & 11 Others* (suing on their behalf



and on behalf of 367 Employees of African Safari Club Ltd): Erdemann Property Ltd and 3 Others (Affected Party) [2024] KECA 793 (KLR), where the Court of Appeal stated:

Accordingly, we partly allowed the appeal, set aside the ruling of the learned Judge to the extent that she found the entire application was res judicata and direct that the allegations relating to the wrongful conduct of the auction sale of the suit property be heard and determined by a Judge other than Omollo J. save for that, the appeal against the finding that the application seeking the setting aside of the consent Orders was res judicata fails and is hereby dismissed”.

58. Similarly, in *Otieno V Ougo & Another* (Supra), the Court of Appeal stated:

... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception”.

(See also *Rajesh Pranjivan Chudasama V Saitesh Pranjivan Chudasama V Sailesh Pranjivan Chudasama* [2014] KLR 490, *Morjaria V Abdalla* [1984] and *Alfred Njau & Others V City Council of Nairobi* (Supra).

59. A reading of the Court of Appeal decision in *Muthee V Alphonse Mwangemi Muna & Others* (Supra) reveals that the issue of locus standi did not arise perhaps because Sheila Nakatha Muthee had secured a confirmed grant.

60. Although the court is satisfied that the two applicants have no locus standi, since the suit was instituted by a person who had locus standi, and the Court of Appeal, a superior court directed that the issue of the contested auction sale be determined, it is only fair that the court addresses the issue on this instance.

61. The applicant’s case is grounded on the contention that:

1. The auction was neither supported by a valuation report nor a reserve price.
2. The conditions of sale were not adhered to in terms of the newspaper and number of days.
3. The court knew or ought to have known that the auction failed.
4. The auctioneer was not licensed to auction property in Mombasa.
5. No auction took place and the suit premises were sold by private treaty.
6. The suit premises were fraudulently sold in execution of a money decree. Provisions of the *Auctioneers Act* and Rules were not complied with.
7. The 1<sup>st</sup> Interested Party knew of and participated in the fraud in the said auction and transfer of the premises and did not obtain a clean title.
8. No account was given by the claimants after the attachment of movable assets which exceeded the decretal sum of Kshs.137,400,025.00
9. Applicants were not heard in all proceedings for the sale and transfer of the suit premises.
10. The court failed to satisfy itself of the legality and validity of the auction before issuing a vesting Order executing the transfer and registration of the transfer in favour of the 1<sup>st</sup> Interested Party and had evidence of the fraud and illegality.



11. The court intermeddled with the property of a person it knew was dead as the deceased was not a debtor.
62. In their grounds of opposition, the claimants/Respondents argued that the instant application does not comply with Order 45 Rule 1(i)(a) of the Civil Procedure Rules owing to the delay.
63. That the 1<sup>st</sup> Applicant had not paid Kshs.5.2million as costs as Ordered by the court, res judicata issues were resolved in ELC Petition No. 17 of 2017, abuse of court process, the Court of Appeal decision was not appealed against, the ELRC was justified in ordering the sale of the deceased's land to pay employees and litigation.
64. The 1<sup>st</sup> Interested Party's case is principally that it was a bona fide purchaser for value without notice and was neither aware of nor privy to the alleged fraud.
65. Strangely, the applicants did not isolate, address and illustrate with authorities, judicial and others, the specific issues to be canvassed but provided a detailed analysis of the facts of the case.
66. Reliance was placed on the decisions in Rv. Karisa Chengo [2017] eKLR, Albert Chaurembo V Maurice Munya & Others (Supra), Macfoy V United Africa Co. Ltd (Supra) among others on jurisdiction to urge that the court had no jurisdiction to adopt the consent on 2<sup>nd</sup> December, 2013.
67. The 1<sup>st</sup> Interested Party addressed the consent dated 11<sup>th</sup> December, 2013 and the innocent purchaser for value of the suit premises without notice, urging that it participated in the auction held on 8<sup>th</sup> April, 2014 and it was notified that it was the successful bidder and paid a deposit (25%) on 13<sup>th</sup> May, 2014 to the auctioneer and full price on 2<sup>nd</sup> July, 2014 and also paid arrears of rates, Kshs.1,340,000.00 and stamp duty Kshs.4,800,000.00.
68. Reliance was placed on the sentiments of the Court in Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the Estate of Sospeter Mukuru Mbeere (deceased) V Stephen Njoroge Macharia [2020] eKLR.
69. I have considered the pleadings filed by the parties and submissions by counsel.
70. This case has a long and chequered history and happens to be one of the oldest in this court and the inordinate duration it has taken to resolve the matter is attributable to the parties, largely on account of inundating the court with applications.
71. In Muthee V Alfonse Mwangemi Munga & Others (Supra) the Court of Appeal provided a comprehensive history and chronology of events from 18<sup>th</sup> October, 2008 when the suit was filed as a representative suit.
72. Along its long and winding journey, the suit precipitated Petition No. 24 of 2014 filed before the High Court in Mombasa, ELRCC No.133N of 2008, Civil Appeal No. 314 of 2014, Petition No. 17 of 2017 before the Environment and Land Court in Mombasa and Civil Appeal No. 263 of 2022, which directed this Court to hear and determine the issues germane to the contested auction sale.
73. It is common ground that the instant application is traceable to the African Safari Club Ltd's inability to satisfy the award made by the Industrial Court vide its award in favour of the claimants on 28<sup>th</sup> April, 2011 being Kshs.50,506,075.00, as salary arrears and terminal benefits, six months salary compensation and certificate of service.
74. The claimants had sought to have the directors of the company, Mr. Karl J. Reudin and Frank H. Neugebauer examined on identity and location of assets of the company and avail books of accounts



and be held personally liable to the decree holders and their assets be attached and sold to recover the decretal sum of Kshs.137,400,025.00.

75. A subsequent application to sell LR No. 15/5/1/MN File No. CR 1337 of Section No. 1 Mainland North and CR No. 13086 Plot No. 64 Watamu Kilifi District culminated in the consent dated 2<sup>nd</sup> December, 2013 which led to the impugned auction sale.  
Records reveal that Mr. Karl J. Reudin died on 19<sup>th</sup> March, 2013.
76. In his Ruling on 11<sup>th</sup> July, 2014, Hon. Justice Nduma Nderi observed that the preservatory Order made by the High Court on 30<sup>th</sup> December, 2013 were either made oblivious or disregard of the Orders of the ELRC made on 11<sup>th</sup> December, 2013 following the tracing of the company's property.
77. Relatedly, the 1<sup>st</sup> Applicant herein Sheila Nkatha Muthee, filed Petition No. 24 of 2014 at the High Court and on 2<sup>nd</sup> May obtained an injunction to restrain the respondents from selling or purporting to sell the suit premises and barred the Registrar of Land from registering, transferring, leasing or vesting order or other transaction on the suit premises pending determination of the application and the same was later dismissed for want of prosecution.
78. It is unclear whether the 1<sup>st</sup> Applicant was disclosing the status of the suit before the ELRC when she filed suits in the High Court and the Environment and Land Court at Mombasa.
79. This court is not persuaded that the orders granted would have been granted if the 1<sup>st</sup> Applicant had disclosed that there was a suit pending in another court of equal status.
80. It is not in dispute that on 16<sup>th</sup> December, 2013, the trial court ordered the sale by public auction of Plot No. MN/1/1515 CR NO.13371. The Registrar of the court was to issue notification of sale and execute all documents.
81. Subsequently, the 1<sup>st</sup> Interested Party registered a caveat over the property to protect its interests.
82. However, subsequent attempts to have the Chief Registrar of Lands transfer the plot to the 1<sup>st</sup> Interested Party failed owing to the injunction obtained by the 1<sup>st</sup> Applicant at the High Court, contempt proceedings against the Lands Registrar notwithstanding.
83. The transfer was executed by the Registrar of the Court on 21<sup>st</sup> July, 2014, outstanding rates of Kshs.93,680.00 paid and the caveat withdrawn.
- 84.. The Registrar's Notification of Sale dated 16<sup>th</sup> December, 2013 quoted the sum due as Kshs.137,397,575.00.
85. The public auction was to be conducted by Kiriyyu Merchants Auctioneers from 11:00 O'clock on the specified date as per the advertisement at Nation Newspaper.
86. The Conditions of Sale included particulars specified in the Schedule, bidding to be determined by the officer conducting the sale, highest bidder to be declared the purchaser with officer or courts right to decline the bid if the price offered appears inadequate, discretion to adjourn the sale with recorded reasons, deposit of 25% after declaration of purchaser and balance by the 15<sup>th</sup> day after the sale of property failing which the property shall be resold after the issue of a fresh notification of sale.
87. The auction sale was advertised in the People Daily on 18<sup>th</sup> March, 2014, about 20 days before the auction.



88. The 1<sup>st</sup> Interested Party was bid 2. The 1<sup>st</sup> Interested Party was notified of the bid vide letter dated 5<sup>th</sup> May, 2014, received on 5<sup>th</sup> May, 2014 and the 25% deposit was required within 7 days. A Vesting Order was granted in July 2014.
89. It is unclear as to why the 1<sup>st</sup> Interested Party was notified of the bid in May 2014 unless the highest bidder was unable to meet the conditions of the sale.
90. The 1<sup>st</sup> Interested Party paid the deposit via bank transfer on 9<sup>th</sup> May, 2014 and the balance later and the transfer registered on 8<sup>th</sup> February, 2017 and a provisional certificate issued on 9<sup>th</sup> February, 2017.
91. In the court's view, this Ruling turns on whether the applicant's have substantiated the multifarious allegations made by Sheila Nkatha Muthee in her affidavit sworn on 27<sup>th</sup> February, 2020.
92. It is common ground that by its Orders dated 16<sup>th</sup> December, 2013, the court directed that Plot No. MN/1/1515 CR No. 13371 be sold by way of public auction and notification of sale would be issued by the Registrar.
93. Although Sheila Nkatha Muthee depones that no auction took place, she provided no evidence on what transpired on that day or how she learnt of the failed auction, if that was the case. Equally, in its ruling dated 19<sup>th</sup> June, 2015, the court observed that:
94. From the Affidavit, it is clear that the 2<sup>nd</sup> Interested Party conducted an auction and was paid a deposit of Kshs.30millin and the same was deposited in Family Bank (K) Limited Account No. 01200029832 in the name of Kariiyu Merchant..."  
Regrettably, the auctioneer in question has since died.
95. Relatedly, the affiant did not challenge the authenticity or validity of the Auctioneer's Memorandum dated 13<sup>th</sup> May, 2014 on the auction or the notification of the 1<sup>st</sup> Interested Party that it was the second highest bidder for the suit premises.
96. Similarly, copies of letters on record attest to the fact the auction sale took place on 8<sup>th</sup> April, 2014 as envisaged. For instance, the letters from Zed Achoki & Co. Advocates to the Chief Land Registrar dated 24<sup>th</sup> July, 2014 and 1<sup>st</sup> April, 2014 respectively.
97. Notably, the Registrar's Notification of sale named Kiriyyu Merchant's Auctioneers as the firm to conduct the auction and none other, from 11:00 O'clock on the specified dates as per the advertisement, which the auctioneer placed in the People Newspaper on 8<sup>th</sup> March, 2014 as opposed to the Nation Newspaper.
98. Regrettably, the ELRC court is faulted for having not found that the fact that the newspaper was different, the number of days was less and payment of deposit and balance was effect outside the prescribed time frame vitiated the auction sale.  
It is equally assailed for not finding that the auction failed.
100. Having given directions that the suit property be sold by public auction and was involved throughout the process until the suit property was registered in the 1<sup>st</sup> Interested Party's name, the court was satisfied that alleged non-conformities did not vitiate the process.
101. Concerning valuation of the suit premises and reserved price, the Conditions of Sale dated 16<sup>th</sup> December, 2013 did not expressly require that the suit properly be valued before sale or a reserved price be fixed by the Registrar of the Court.



102. Significantly, the applicants allege that the suit property was fraudulently transferred to the 1<sup>st</sup> Interested Party which is also accused of having been aware of and participating in the alleged fraud.
103. It is trite law that fraud is serious allegations and must be strictly proved.
104. In *Ndolo V Ndolo* [2008] IKLR, the Court of Appeal stated as follows:

We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities' but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases”.

105. Similarly, in the words of Tunoi JA in *Vijay Morjaria V Nansingh Madhusingh Darbar & Another* [2000] KECA 223 (KLR)

It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy Garrett* [1878] 7 ch.D 473 at 489...”

106. As regards the standard of proof, in *R. G. Patel V Lalji Makanji* [1957] EA 314, the Court of Appeal expressed itself 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”

(See also *Central Bank of Kenya V Trust Bank Ltd & 4 Others* [1996] eKLR, *Christopher Ndaru Kagiria V Ester Mbandi Kagiria & another* [2016] eKLR, *Belmon Finance Corporation V Williams Furniture Ltd. (Buckley LJ)*, *Urmila w/o Mahendra Shah V Barclays Bank International Ltd* [1979] eKLR and *Moses Parantai & Peris Wanjiku Mukaru V Stephen Njoroge Macharia* [2020] eKLR).

107. Although the applicants use the term fraud or fraudulently severally, in relation to the purchase and transfer of the suit property to the 1<sup>st</sup> Interested Party, they have not provided credible evidence to demonstrate that either the 1<sup>st</sup> Interested Party, the auctioneer or any other person's conduct was fraudulent.
108. No scintilla of evidence has been availed to prove that there was collusion between the auctioneer and the 1<sup>st</sup> Interested Party or the court since allegations have been made against it.
109. This is because the 1<sup>st</sup> Interested Party has maintained that it was a bona fide purchaser for value without notice and availed records of notification of being the second highest bidder and payment of the deposit and the balance.
110. The applicants have not alleged that the auctioneer and the 1<sup>st</sup> Interest Party knew each other previously and conspired or colluded in the sale.



111. The elements or ingredients for qualification of a person as a bona fide purchaser were enumerated by the Court of Appeal in *Wambui V Mwangi and 3 Others* [2021] KECA 144 (KLR).
112. Similarly, the applicants tendered no material to demonstrate that the 1<sup>st</sup> Interested Party was aware of and participated in the fraud.
113. Having failed to particularized the alleged fraud and adduce evidence in support thereof, it was an arduous task to prove that the 1<sup>st</sup> Interested Party was indeed aware of the alleged fraud. Moreover, the 1<sup>st</sup> Interested Party had an Advocate on record.
114. The allegation that the applicants were not heard is puzzling on account that at all material times one Sheila Nkatha Muthee was privy to the proceedings before the Employment and Labour Relations Court and even filed cases in the High Court and the Court of Appeal.
115. Sheila Nkatha Muthee filed Succession Cause No. 305 of 2013 and obtained ad colligenda bona on 24<sup>th</sup> January, 2014 to enable her preserve Shanzu Plot No. MN/1/1515 CR. NO.13371.
116. This Order was exclusively for the preservation of the suit property. She also filed Succession Cause No. 421 of 2014 and Civil Appeal No. 314 of 2014 and 263 of 2022.
117. In the latter appeal, the appellant sued as the Administrator of the Estate of Karl Jacobs Reudin – Deceased.
118. Finally, Sheila Nkatha Muthee swore the Supporting Affidavit relied upon by Mr. Hanspeter Reudin and Roland Ruedin in the instant motion.
119. In the circumstances, the applicants cannot be heard to say that they were not represented in the proceedings which culminated in the sale of Plot Number LR NO.1515/1/MN CR. No. 13371.
120. Flowing from the foregoing, it is discernible that the court is not persuaded that the Orders sought are merited.
121. In arriving at this decision, the court has also considered the far reaching consequences the granting the Orders sought would have, especially on the 1<sup>st</sup> Interested Party, who was an innocent purchaser for value and the claimants as well in light of passage of time.
122. Consequently, the applicant’s Notice of Motion dated 27<sup>th</sup> February, 2020 is disallowed with no Orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 30<sup>TH</sup> DAY OF APRIL, 2025.**

**DR. JACOB GAKERI**

**JUDGE**

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of



Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

