



**Sang & another v Choge & 5 others (Environment & Land Petition E004 of 2024) [2025] KEELC 3367 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3367 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND PETITION E004 OF 2024**

**CK YANO, J**

**APRIL 24, 2025**

**BETWEEN**

**THOMAS KIRWA SANG ..... 1<sup>ST</sup> APPLICANT**

**MOSES KIPNGETICH KIRISWO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SUSAN SAMBAI CHOGE ..... 1<sup>ST</sup> RESPONDENT**

**ABRAHAM KIPROP CHOGE ..... 2<sup>ND</sup> RESPONDENT**

**NELSON KIPYEGO CHOGE ..... 3<sup>RD</sup> RESPONDENT**

**ELPHAS KIPCHIRCHIR CHOGE ..... 4<sup>TH</sup> RESPONDENT**

**THE COUNTY SURVEYOR, UASIN GISHU COUNTY ..... 5<sup>TH</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR, UASIN GISHU COUNTY .... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioners commenced the suit herein against the Respondents by way of a petition dated 6<sup>th</sup> June, 2024 seeking the following reliefs: -
  - a. A declaration that the creation of the surrender of title deed, Survey Plan Map titled Plateau/ Kipkabus Block4 (Lelmokwo)/1-13 and issuance of title deeds for the same is null and void and the said Survey Plan Map and all the resultant title deeds should be cancelled forthwith and fresh surrender of title deed and survey be undertaken and title deeds issued with correct acreages of the Kibor & partners as per their original shares.
  - b. A permanent injunction restraining the 1<sup>st</sup> to 9<sup>th</sup> (sic) Respondents by themselves, their officers, employees, servants and/or agents or otherwise howsoever from further entering into or



further allowing any person to enter into or giving authority to any person to take possession of, to remain upon and or occupy such or any part and or portion of parcel of land of the whole or any portion derived from, excised from and or subdivided from the parcels of land known as Plateau Kipkabus Block 4 (Lelmokwo)/9 & 10 howsoever registered or described and or from surveying, subdividing the same or any part thereof, from allocating and or issuing any title deeds to any person to any part of the whole or any portion or plot of land derived therefrom and from further interfering with any part thereof, howsoever registered or described and from further interfering with the existing registered particulars of proprietorship of the parcels of land known as Plateau/Kipkabus Block 4 (Lelmokwo)/9 & 10 or any part or portion of land allegedly excised or to be excised or set apart and or subdivided from the same however subsequently described and or registered.

- c. A permanent injunction restraining all and registration of any contemplated dealings, to wit all surveys, adjudications, allocations, allotments, transfers, charges, cautions, transmission under the Registered *Land Act*, chapter 300 of the Laws of Kenya or under any other law by the Respondents by themselves, their officers, employees, servants and or agents in respect of the petitioners parcels of land known as Plateau/Kipkabus Block 4 (Lelmokwo)/1 – 24 or any part or portion thereof howsoever described and or registered.
  - d. A declaration that the titles set out hereinabove, that is to say:- Plateau/Kipkabus Block 4 (Lelmokwo) together with all the subdivisions thereto are null and void and the same should be cancelled and or revoked forthwith and the registers thereto should also be cancelled.
  - e. An order be issued restraining the 1<sup>st</sup> to the 10<sup>th</sup> (sic) Respondents by themselves, their officers, employees, servants and/or agents from interfering with your petitioners' title to the parcels of land known as Plateau/Kipkabus Block 4 (Lelmokwo) measuring 88 acres and 150 acres respectively and from interfering in any way whatsoever with your petitioners' quiet and peaceful occupation of the suit properties.
  - f. That costs of this petition be borne by the Respondents herein.
2. Briefly, the Petitioners' claim is that at all material times, they were and are still legitimate and lawful owners of plot No. 773 within Lower Kabito Adjudication Section and have been in occupation of the same since 1955 to date. That in the 1980s, a group of 9 men bought land known as LR. 5798 with each having different shares of it. That survey work was done after surrender of the original title and the same resulted in several litigations between the parties. Among the cases listed by the Petitioners are High court civil suit No. 235 of 1998.; Misc Civil Cause No. 262 of 1994; Eldoret ELC E038 of 2021; Probate and Administration Cause No. 48 of 2003 and Eldoret ELC Case No. 93 of 2014.
  3. Contemporaneously with the filing of the Petition, the petitioners also filed a Notice of Motion application dated 6<sup>th</sup> June, 2024 seeking the following orders: -
    - a. Spent.
    - b. Spent
    - c. Spent
    - d. That pending the hearing and determination of this suit, this Honourable court be pleased to issue orders of injunction restraining the Respondents by themselves, their servants, agents, proxies and/or persons exercising authority from them from inhibiting, alienation, dealing, disposing, trespassing and/or in any other manner interfering with the petitioners' quiet use, occupation and possession of all those of land known as Plateau/Kipkabus 9 & 10.



- e. That there be stay of execution and/or further execution and/or further execution proceedings and/or further proceedings in Eldoret Environment and land Court Civil Suit No. 76, 93 & 94 of 2014, 30 of 2018, E005 & E006 of 2014 pending the hearing and determination of the petition.
  - f. That the costs of this application be provided for.
4. The application is based on the grounds set out on the face of the motion and is supported by the affidavit of Thomas Kirwa Sang and Moses Kipngetch Kiriswa sworn on 6<sup>th</sup> June, 2024.
  5. The 1<sup>st</sup> to 4<sup>th</sup> Respondents filed a Notice of Preliminary Objection dated 9<sup>th</sup> July, 2024, in response to the Notice of Motion dated 6.6.2024. The Notice of Preliminary Objection was raised on the following grounds: -
    1. The Honourable Court is functus officio and hence bereft of jurisdiction to hear and determine the petitioners' claim in land reference No. Plateau/kipkabus Block4(Lelmokwo)/24 as it will be akin to;
      - a. Reviewing its judgment and ruling in Eldoret Environment and Land Case No. 93 of 2014 between Abraham Kiprop Choge, Nelson Kipyego Choge and Elphas Kipchirchir Choge v Thomas Kirwa & Abraham Rotich delivered on 30<sup>th</sup> June, 2022 and 19<sup>th</sup> May, 2023 respectively.
      - b. Hearing and adjudicating upon a matter which has been dealt with and determined or considered by the Court of Appeal in Eldoret Court of Appeal Civil Application No. E063 of 2023 between Thomas Kirwa, Abraham Rotich v Abraham Kiprop Choge, Nelson Kipyego Choge whose determination was delivered on 26<sup>th</sup> day of April, 2024.
    2. The Petitioners lack locus standi and/or capacity to institute the application dated 6.6.2024 and the Petition dated 6.6.2024 on their own behalf and on behalf of the original members of Kibor & Partners who were the shareholders of land formerly known as Plateau/ KipkabusBlock4(Lelmokwo) L.R. 5798.
    3. The sub-division and transfer of the resultant portions of L.R. No. 5798 was the subject matter in Eldoret ELC Civil Suit No. 973 of 2012 between Susan Sambai Choge, Abraham Choge, Nelson Kipyego Choge, Elphas Kipchirchir Choge, Elizabeth Jepkorir Choge v the Chief Land Registrar and the Attorney General. In delivering its judgment on 15<sup>th</sup> April, 2016, the Honourable Court finally determined the issues being raised in the application herein and the entire petition. The application and the petition are therefore res- judicata.
    4. The Applicants/Petitioners have not been authorized to plead on behalf of the defendants in the following suits which they have sought to stay in the proceedings.
      - i. Environment and Land Court Case No. 76 of 2014
      - ii. Environment and Land Court Case No. 94 of 2014
      - iii. Environment and Land Court Case No. 137 of 2014
      - iv. Environment and Land Court Case No. 138 of 2014
      - v. Environment and Land Court Case No. E038 of 2021
      - vi. Environment and Land Court Case No. E005 & E006 of 2023



From the foregoing the application and the petition offends the mandatory provisions of Order 1 Rule 13(1) and (2) of the Civil Procedure Rules and should be struck out.

5. The Application and the Petition offends the mandatory provisions of section 6 and 7 of the *Civil Procedure Act*.
  6. The petitioners' claim is in respect of shares of individual members of KIBOR & PARTNERS which were distributed before the year 2005 after the surrender of the original title deed of L.R. No. 5798 and therefore the claim is statute barred owing to the provisions of section 7 of the *Limitation of Actions Act* Cap 22.
  7. That the Applicants in their petition have not particularized any breach of fundamental rights, social and economic rights on the part of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the petition before the court is basically a claim of land disguised as a constitutional petition.
  8. That the application and petition before the court is a skewed attempt to circumvent the judicial process, mischievous, incompetent and a waste of valuable judicial time and ought to be struck out.
6. The Preliminary Objection was canvassed by way of written submissions. The Petitioners/Applicants filed their submissions dated 9<sup>th</sup> July, 2024 while the 1<sup>st</sup> – 4<sup>th</sup> Respondent filed their submissions dated 18<sup>th</sup> July, 2024, which I have read, considered and taken into account in arriving at my ruling as hereunder.

#### **Analysis and Determination;**

7. It is my considered opinion that the issues arising for determination include;
  - i. Whether the Notice of Preliminary Objection dated 9<sup>th</sup> July, 2024 meets the threshold of what amounts to a Preliminary Objection.
  - ii. Whether the Preliminary Objection is merited.
  - iii. Who should bear the costs of the P.O.

#### **i. Whether the Notice of Preliminary Objection dated 9<sup>th</sup> July, 2024 meets the threshold of what amounts to a Preliminary Objection;**

8. The law on what constitutes a preliminary objection is now well settled. In the leading case of Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd 1969 E.A. 696, the Court defined Preliminary Objection as follows;

“...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.”

9. This position has been reiterated by the Supreme Court in the case of Aviation & Allied Workers Union v Kenya Airways Ltd & 3 Others, Application No. 50 of 2014 [2015] eKLR where it was held as follows;

“Thus, a preliminary objection may only be raised on a pure question of law. To discern such a point of law, the court has to be satisfied that there is no proper contest to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”



10. Guided by the above case laws, it is evident that a Preliminary Objection can only be raised on a pure point of law, which is argued on the assumption that there is no contest as to the facts.
11. I have carefully considered the grounds in the preliminary objection as well as the rival submissions thereto. In particular, grounds (1), (2), (3), (4), (5) and (6) of the preliminary objection are in my considered opinion, marred with factual issues which are not only contested but do also need to be ascertained by probing evidence and may further lead to the exercise of judicial discretion.
12. On the first ground on whether the court is functus officio and lacks jurisdiction to entertain the petition as filed, both parties submitted on significantly different facts, with the applicants contending that the court is not functus officio while the respondents maintaining that the court is functus officio.
13. This was also the case in grounds (2) and (4) of the preliminary objection, which touched on the locus standi of the petitioners and the authority to plead in the matters which the petitioners sought stay of proceedings. Again, from a look of the pleadings and the rival submissions in respect to the said grounds, there is a clear contest on the facts as presented by each party and the same does not therefore fall within the scope of what constitute a proper preliminary objection.
14. In ground (3) and (5), the 1<sup>st</sup> – 4<sup>th</sup> respondents raised the issue of res judicata as outlined in section 7 of the *Civil Procedure Act*. The 1<sup>st</sup> – 4<sup>th</sup> respondents submitted that the sub-division and transfer of the resultant portion of L.R. No. 5798 was the subject matter in Eldoret ELC Civil Suit No. 973 of 2012 and judgment delivered on 15/4/2016. It is their contention that the court determined the issues raised in the petition. They however acknowledged that the parties in the previous suit are different from the parties in the petition herein.
15. The Petitioners on the issue of res judicata submitted that the parties in the cases cited by the respondents in the preliminary objection are not similar to the parties in the instant suit. Further, that the cause of action is not the same and that the prayers sought are different and that the issue of injunction and stay of proceedings have not been handled in any court.
16. In *Oraro v Mbaja* [2005] 1KLR 141, the court held as follows: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.
17. Further, in the case of *George Kamau Kimani & 4 Others v County Government of Trans Nzoia & Another* [2014] eKLR, the Court, while dealing with the issue of res judicata raised in a preliminary objection held as follows: -

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.
18. Guided by the above, it is clear that that issues of res judicata will require this court to look into the evidence and ascertain the essential elements to be proved in a claim of res judicata and further consider



the rival position by parties. To this end therefore, it is my considered opinion that an issue of res judicata is incapable of being considered as a preliminary objection in the sense of the law.

19. In conclusion, it is the finding of this court that grounds (1), (2), (3), (4) and (5) of the preliminary objection cannot be sustained for the forestated reasons and are hereby dismissed.

**ii. Whether the Preliminary Objection is merited;**

20. The respondents also raised the issue of the petition being time barred pursuant to the provisions of section 7 of the *Limitation of Actions Act*, Cap 22 and further that the petition has not particularized any breach of fundamental rights as grounds of preliminary objection.
21. On the issue of the petition being time barred, it is the respondents' contention that the petitioners have sought the cancellation of all the titles issued after the survey and registration which was done around the year 2000. That pursuant to the provisions of section 7 of the *Limitation of Actions Act*, an action for the recovery of land cannot be brought after the end of 12 years from the date the right of action accrued. They thus maintained that the petition is time barred.
22. The petitioners on the other hand submitted that the cause of action arose in the year 2014 when the respondents filed the suit and 12 years have not lapsed. They also relied on the provisions of Article 22 of *the constitution* and maintained that they are threatened with eviction and to have their parcels of land illegally hived off to create parcel No. 24.
23. From the onset, I wish to state that an issue of statutory limitation is a matter that touches on the jurisdiction of the court to entertain the suit as filed. Section 7 of the *Limitation of Actions Act* provides as follows: -

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, it first accrued to some persons through whom he claims, to that person.”
24. From a look at the petition, the cause of action accrued sometimes in the year 2000. At paragraph 14 of the petition, the Surrender Form was done on 25/2/2000. At paragraph 22 and 23, the petitioners contend that the basis of the litigation has been the shady surrender of title deed and further that the 1<sup>st</sup> to 5<sup>th</sup> respondents allocated themselves more land on the surrender form.
25. From the above, it is evident that the 12 years have since lapsed from the time the cause of action accrued in the year 2000 as stated by the petitioners in their petition. It is therefore the finding of this court that the petition is time barred.
26. On whether the petitioners have particularized any breach of their fundamental rights, the respondents submitted that the petition did not particularize any breach of fundamental rights, social and economic rights on the part of the 1<sup>st</sup> – 4<sup>th</sup> respondents. They dismissed the petitioners' claim as a land claim disguised as a constitutional petition and thus urged the court to strike out the petition with costs.
27. The Petitioners did not submit on the issue of particularizing the breach of their fundamental rights, social & economic rights or provide any substantive argument as to whether the petition as filed had met the threshold elaborated hereinabove and/or whether the issues raised were not within the private law purview hence could not be instituted in an ordinary way as alleged by the respondents.
28. In determining this issue, this court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in Constitutional Petitions.



29. The court must also ensure that any person who wishes to institute a claim through a Constitutional Petition has met the threshold set in the case of *Anarita Karimi Njeru v Republic 1976-1980 KLR* wherein *Trevelyan & Hancox, JJ*, summarized it as follows;

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

30. As stated in the *Anarita* case above and reiterated in the *Mumo Matemu* case, the petitioners ought to set out their complaint against the respondents with precision and clarity to enable the court to ascertain whether or not a given right or fundamental freedom has been infringed as alleged.

31. At paragraph 25 of the Petition, the Petitioners have merely highlighted that their constitutional rights under Articles 10 and 47 of *the Constitution* were violated by the Respondents but they have failed to elaborate with specificity the manner in which the said provisions were violated.

32. To this end therefore, I agree with counsel for the Respondents that the Petitioners’ Petition does not meet the threshold of what constitutes a Constitutional Petition in law. In my view, the allegations in the Petition are too general and the petition has not passed the test established in the case of *Anarita Karimi Njeru*. Moreover, among the reliefs sought by the Petitioners is an order for cancellation of titles held by the Respondents in respect of portions of the suit properties. This, in my view, is a claim that falls squarely in the realm of private law. I do not think that the dispute herein qualifies to be a constitutional issue. Indeed, the Petitioners concede that there have been several litigations between them and the Respondents and other third parties over the suit property. The Petitioners have exhibited various pleadings, including Judgements and decrees issued by courts of competent jurisdiction, including judgment and decree of this court in ELC No. 93 of 2014 and orders from the Court of Appeal. If the Petitioners were dissatisfied with those decisions, they ought to have sought for review or appeal but not to file a petition. There is a list of authorities that elucidate the principle that private law claims should not form the basis of Constitutions Petitions and should be resolved by using the usual process of litigation, including the appeal process where one is dissatisfied with a decision of a court.

33. In the case of *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited [2013] eKLR*, *Lenaola J* (as he then was) applied the holding in *Re Application by Bahadur [1968] LR (Cost) 297* and held that:-

“Where there is remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in *Haco Industries (Supra)* where the converse may have been expressed as the position. My mind is clear however that not every ill in Society should attract a Constitutional sanction...”

34. In *Re-Application by Bahadur Case (Supra)*, the court in *Trinidad and Tobago* held as follows:-

“*The Constitution* is not a general substitute for the normal procedures for invoking Judicial control of administrative action. Where infringement of rights can find a claim under substantive law, the proper cause is to bring the claim under that law and not under *the Constitution*.”



35. Having perused the material herein, it is with no shadow of doubt that the petitioners in this present case have camouflaged the issues that were litigated and adjudicated upon previously and or are still pending before courts of competent jurisdiction. And as already stated, the claim falls squarely in the realm of private law and can be dealt with in a normal suit. The dispute herein does not qualify to be a Constitutional issue and the petition does not meet the threshold of what constitutes a constitutional petition in law. The dispute raises issues of ownership and trespass which is a private law claim.
36. In view of the foregoing, it is the finding of this court that the preliminary objection is merited to the extent that the claim is time barred and further that the petition does not meet the threshold of what amounts to a proper Constitutional Petition. The claim falls squarely in the realm of private law and can be dealt in an ordinary suit.

**Costs:**

37. It is a well settled principle that costs follow the event. In this case, having held that the notice of Preliminary Objection is merited I find that the 1<sup>st</sup> – 4<sup>th</sup> respondents are entitled to the costs.
38. In the upshot, I accordingly find that the Notice of Preliminary Objection dated 15<sup>th</sup> July, 2024 is merited and consequently, the Petition dated 6<sup>th</sup> June, 2024 and the motion of even date are hereby struck out with costs to the 1<sup>st</sup> – 4<sup>th</sup> Respondents.
39. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 24<sup>TH</sup> DAY OF APRIL, 2025.**

**HON. C. K. YANO**

**JUDGE, ELC**

Ruling delivered in the presence of: -

Mr. Ketter N. K for the Petitioners.

M.s Chirchir holding brief for Mr. Murgor for the Respondents.

No appearance for the 5<sup>th</sup> & 6<sup>th</sup> Respondents.

Court Assistant – Laban

