



**Ali v Cysewski & 3 others (Petition E003 of 2024)
[2025] KEELC 4202 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4202 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION E003 OF 2024**

EK MAKORI, J

MAY 28, 2025

**IN THE MATTER OF: THE ALLEDGED CONTRAVENTION OF ARTICLES 2(5) & (6),
(10, 11, 20(5), 22, 40(3), 42, 47, 62, 69 & 70 OF THE CONSTITUTION OF KENYA (2010)**

AND

**IN THE MATTER OF: THE IMPLEMENTATION OF THE AFRICAN (BANJUL)
CHARTER ON HUMAN AND PEOPLE’S RIGHTS ARTICLES 2,3,7,13,14 & 24**

AND

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION
ACT (NO. 4 OF 2015) SECTIONS 4, 5, 6 & PART III THEREOF**

AND

IN THE MATTER OF: THE CIVIL PROCEDURE RULES (2010) ORDER 53

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT NO.5 OF 2012

BETWEEN

SAMIR WALIMOHAMED ALI PETITIONER

AND

ANTHONY JOHN CYSEWSKI 1ST RESPONDENT

REGISTRAR OF TITLES, MOMBASA 2ND RESPONDENT

THE NATIONAL LAND COMMISSION 3RD RESPONDENT

COUNTY GOVERNMENT OF KILIFI 4TH RESPONDENT



JUDGMENT

1. The petition dated March 7, 2024, seeks the following orders:
 - a. A declaration that the allocation of the public access road portion reserved for a public access road linking Old Ferry Road and the Malindi – Mombasa Highway to the 1st Respondent was illegal, unconstitutional, and null and void.
 - b. A declaration that the allocation of LR. No. 1XX85, which includes a portion reserved for a public access road linking the Malindi–Mombasa Highway and Old Ferry Road to the 1st Respondent, was illegal, unconstitutional, and null and void.
 - c. An order for judicial review in the nature of certiorari to bring before this court the purpose of quashing the decision of the 2nd, 3rd, and 4th Respondents to alienate LR. 1XX85 to the 1st Respondent herein.
 - d. An order for judicial review in the nature of a writ of mandamus compelling the 2nd Respondent to cancel the registration of the 1st Respondent as the proprietor of LR. 1XX85, which includes a portion of the public access road.
 - e. A declaration that the initial LR. 1XX85, designated in survey plan PDP 1993, is public property and is held in trust for the use and enjoyment of the residents of Kilifi County and, generally, the members of the public.
 - f. An order for judicial review in the nature of a writ of mandamus compelling the 5th Respondent to re-survey to restore the public property, being the public access road, namely LR. 1XX85, to its initial dimensions as formerly captured in the survey plan PDP 1993.
 - g. An order for mandatory injunction directing the 1st Respondent to open up the public access road in LR. 1XX85 and to demolish and remove all structures erected there that impede free access through the said public access road.
 - h. That this court be pleased to make any such other orders as it may deem fit and just to give effect to the Petitioner’s claim.
 - i. Costs of this petition.
2. The 1st Respondent has replied to the petition and submitted a counterclaim dated 26th December 2024, seeking the following orders:
 - a. A declaration that the 1st Respondent is the legal and registered owner of the property known as LR. 1XX85.
 - b. A declaration stating that no public road connects Old Ferry Road to Mombasa Malindi Road through the property known as LR. 1XX85.
 - c. A permanent injunction restraining the Petitioner and the 3rd and 4th Respondents, including their agents, servants, employees, and/or individuals acting under their instructions, as well as any other persons, from infringing on the Applicant’s right to quiet possession and peaceful enjoyment of the property known as LR. 1XX85.
 - d. A permanent injunction restraining the Petitioner and the 3rd and 4th Respondents, including their agents, servants, employees, and/or individuals acting under their instructions, as well



as any other persons, from obstructing or preventing the 1st Respondent from fencing or securing the boundaries of the property known as LR. 1XX85.

- e. An order revoking the survey on FR 251/54 dated 1994, which shows a proposed road reserve passing through the suit property.
- f. General damages.
- g. The Petitioner owes Special damages of Kshs. 1,954,800/- to the 1st Respondent.
- h. The 3rd and 4th Respondents owe Special damages of Kshs. 3,083,055/- to the 1st Respondent.
 - i. Costs.
 - j. Interest on (e), (f), (g), and (h) at court rates;
 - k. Any other or further relief that this court may deem appropriate to grant.
3. The Petitioner's supporting affidavit substantiates the petition, which is dated the same day and includes annexures. The 1st Respondent has filed a replying affidavit dated December 26, 2024, accompanied by a List of Documents and a Witness Statement dated January 23, 2025.
4. I did not receive responses from the 2nd, 3rd, and 4th Respondents.
5. The court directed written submissions on the petition.
6. Based on the materials and submissions provided to me, the issues I present for the court's determination are: whether a valid constitutional petition has been properly filed, considering the doctrines of sub judice and constitutional avoidance; the merits of the orders sought in both the petition and the counter petition; and which party should bear the costs associated with the petition and counter petition.
7. The Petitioner asserts that a portion of the suit property, specifically LR.1XX85, was designated as a public access road for public use, intended to connect Old-Ferry Road with the Malindi–Mombasa Highway on July 23, 1993, as articulated in the Kilifi Mtaani/Kisumu Ndogo Part Development Plan.
8. It is alleged that on January 15, 2024, the 1st Respondent irregularly, unlawfully, and illegally fenced off and obstructed the aforementioned public access road, thereby converting it into private property. Consequently, the members of the public have been deprived of the use and enjoyment of the suit property and the designated public access road.
9. The Petitioner further maintains that the public access road in question had already been reserved at the time the suit property was alienated and allocated to Coast Development Limited.
10. Therefore, the portion of the suit property set aside for the public access road was not available for allocation to a private entity. Consequently, the allocation of the public access road to a private individual constitutes a violation of the Petitioner's constitutional rights, as well as the rights of the residents of Kilifi County to equitable access to public property.
11. The Petitioner also argues that the allocation of the public access road to an individual violates Articles 10 and 20(5) of *the Constitution* of Kenya, as it was carried out without transparency, accountability, and public involvement, thereby undermining social justice and equity.



12. The 1st Respondent asserts that there is no public road or public access road reserved or approved on the subject property, and that the subject property is his private property, inclusive of the access road situated therein.
13. The 1st Respondent further contends that Part Development Plan No. 134.KLF 7.91 (1993 PDP) did not designate a public road on LR. No. 1XX85 (subject property), and that Survey Plan F/R 251/54 did not reserve, set aside, or establish any public road or public access road on the subject property.
14. The 1st Respondent maintains that, by virtue of the subject property encompassing the access road situated therein and having purchased it for value, he is well within his rights to enclose the subject property, including the access road located therein, on January 15, 2024, to assert his right to possession and enjoyment thereof.
15. The 1st Respondent further asserts that the title to the subject property was lawfully and legally established.
16. The Petitioner has raised preliminary issues pertaining to their capacity to pursue this petition, on the one hand, and the ongoing case, Malindi ELC No. E040 of 2021 Antony John Cysewski v County Government of Kilifi and The National Land Commission concerning the same subject matter, on the other hand, which is currently pending before my esteemed colleague, Njoroge J.
17. I align myself with the decision cited by the Petitioner regarding the matter of capacity to sue, as articulated in *Kiluwa Limited & Another v Commissioner of Lands & 3 others* (2015) eKLR, which stated that:

“The provisions of Articles 22(2) and 258(2) of *the Constitution* changed all these common law principles. The expression or phrase 'in addition' used in Articles 22(2) and 258(2) of *the Constitution* do not constitute a condition precedent to a person's right to bring court proceedings in the public interest. The phrase merely emphasizes and expands the right of every person to initiate proceedings in "the public interest" in addition to a personal interest (where there is a claim or alleged contravention or infringement of a right or fundamental freedom, or threat thereto, or a contravention or threat to violate *the Constitution*).”
18. The Petitioner herein contends that the alleged public access road, which is the subject of this petition, was designated a public utility through the Kilifi (Mtaani/Kisumu Ndogo) Part Development Plan (PDP) approved by the Ministry of Lands and Housing, under the then Commissioner of Lands Wilson Gachanja, on 23rd July 1993.
19. The aforementioned PDP, referenced within the Ministry of Lands under Department Reference No. 134 KLF 91 and listed as PDP Number 76, was also approved by the Director of Physical Planning on October 12, 1992. According to the 1993 PDP, a road was established linking the Old Ferry Road to the current Kilifi–Malindi Highway. The link road, per the deed-plan and survey map, read in conjunction with the 1993 PDP, establishes the road within what is currently identified as Plot No. LR. No. 1XX85, which is presently registered in the name of the 1st Respondent.
20. It has also been revealed that the public access road is the subject of an additional lawsuit, Malindi ELC No. E040 of 2021, Antony John Cysewski v County Government of Kilifi and the National Land Commission, in which the 1st Respondent seeks a declaration affirming that the public access road is his private property. The case is currently pending trial, and the trial court has issued no orders, with proceedings presided over by Njoroge J.



21. Notwithstanding the absence of any directives in the said case, the 1st Respondent, without regard for the law, proceeded to close the public thoroughfare and unlawfully appropriated it as his private property. This action has necessitated the filing of the current petition, which seeks the restoration of access to the public road.
22. The 3rd and 4th Respondents, who serve as Defendants in Malindi ELC No. E040 of 2021, have filed their defenses, asserting that the specified portion constitutes a public access road. Moreover, they contend that the orders and injunctions sought by the 1st Respondent in his amended plaint are contrary to the public interest of the community and the inhabitants of Kilifi and Malindi, as the road serves as a crucial connection between the Old Ferry Road and the Kilifi-Malindi Highway.
23. It is noted that Malindi ELC NO. E040 of 2021 has yet to be resolved by the trial judge, thereby rendering it illegal and unlawful for the 1st Respondent to close the public access road, as alleged in the present petition.
24. At paragraph 16 of the 1st Respondent's replying affidavit, it is stated that the suit property is a leasehold of 999 years, which was acquired on September 3, 2012, through a purchase from Beatrice Bahati Mulewa. This includes a copy of the sale agreement dated September 3, 2012, a copy of the title dated January 9, 2012, and a copy of the search dated January 21, 2020, attached to the Petitioners' supplementary affidavit.
25. The 999-year lease granted to the 1st Respondent in 2012, in violation of Article 65(1) of *the Constitution*, is a significant legal violation. This article stipulates that leasehold tenure for non-citizens, such as the 1st Respondent, who possesses British citizenship, must not exceed ninety-nine (99) years, as evidenced by the passport submitted in these proceedings.
26. It is crucial to note that the Land Registrar did not possess the authority to grant a 999-year lease to the 1st Respondent, thereby violating Article 65(1) of *the Constitution* of Kenya.
27. Furthermore, the 1st Respondent acquired the property in 2012, at which time an existing public road was present, representing an overriding interest inherent in the title deed granted to him. Consequently, he cannot purport to close the public access road, as the public highway does not encompass his private property.
28. On the other hand, the 1st Respondent contends that the evidence on record contradicts the Petitioner's claim. The Petitioner asserts that the Kilifi (Mtaani/Kisumu Ndogo Part Development (1993 PDP) established a roadway linking the Old Ferry Road to the current Kilifi – Malindi Highway, and that this link road, when considered alongside the deed plan and survey map about the 1993 PDP, is located within the suit property (LR.No.1XX85) registered in the name of the 1st Respondent. However, the evidence on record refutes this assertion.
29. The correspondence dated June 21, 2024, from the National Director of Physical Planning at the State Department for Lands and Physical Planning within the Ministry of Lands, Public Works, Housing, and Urban Development confirms that Part Development Plan No. 134.KLF 7.91 (1993 PDP) did not include provisions for a public road on LR—no—1XX85 (suit property).
30. Furthermore, the aforementioned letter indicated that Part Development Plan No. 134.KLF 7.91 (1993 PDP) cannot serve as a basis for surveying or initiating the alleged public road. It also stated that the Part Development Plan No. 134.KLF.7.91 (1993 PDP) was explicitly created for the Mtaani Kisumu Ndogo Project, and that LR. No. 1XX85 (suit property) is not situated within the planning area; it is merely included in the plan as an adjunct to the planning area.



31. The letter dated 13 August 2024 from the Director of Surveys within the State Department for Lands and Physical Planning, specifically the Directorate of Land Surveys and Mapping at the Ministry of Lands, Public Works, Housing, and Urban Development, elucidates that the survey conducted for Cadastral Plan F/R 251/54 was executed to subdivide LR 9042/4, resulting in the creation of Subdivision Parcels LR No. 1-48. The excising of a road over the adjacent land parcel L.R. 1XX85 was identified as a significant anomaly.
32. The correspondence dated 12 September 2012, authored by the Regional Surveyor of the Kenya Rural Roads Authority for the Kilifi Region, indicates that the Regional Surveyor at that time, Mr. Ronald Malika, conducted a site visit to the subject property. Following this visit, he acquired cadastral maps detailing the property both before and after the subdivisions, and delineated the road alongside the adjacent properties. Furthermore, he was also presented with the road reserves of the Kenya Rural Roads Authority along both the Malindi Highway and Old Ferry Road.
33. Following his analysis pertaining to cadastral maps and fact-finding, Mr. Ronald Malika determined that the currently existing road (64m x 9m) that has been upgraded to bitumen standards does not appear on any maps, nor does it feature in any Part Development Plan of the Kilifi Town Council.
34. The Survey Report dated 1 March 2024, prepared by the Senior Surveyor of the Kenya Rural Roads Authority, unequivocally indicates that there is no KeRRA road traversing LR No. 1XX85.
35. The Covering Report authored by SGT. Hellen Koech, Investigation Officer in DCI Inquiry File No. 14 / 2024, pertains to investigations into allegations regarding the unlawful closure of a public road on the subject property. The findings indicate that following a thorough examination of evidence presented by witnesses and documentation obtained from various survey and road departments, it is established that there is no public road traversing LR No. 1XX85.
36. The report dated 19 December 2024 from the Senior Prosecution Counsel asserts that it is evident that an access road traversed the property of E-1. However, the national government agency responsible for mapping roads in rural areas within the country, known as the Kenya Rural Roads Authority (KeRRA), has confirmed that there is no recognized public road existing over the property owned by E-1.
37. The 1st Respondent contends that it is established law that the party making an allegation bears the burden of proof. This legal principle is encapsulated in sections 107, 108, and 109 of the [Evidence Act](#). The Petitioner has failed to produce any evidence from the government agency responsible for mapping roads in rural areas of the country to substantiate his claim that a public road or public access road was reserved, set aside, or created over the property in question.
38. Moreover, the 1st Respondent has submitted a letter dated June 21, 2024, from the National Director of Physical Planning, as well as another letter dated August 13, 2024, from the Director of Surveys. These individuals are the authors and custodians of Part Development Plan No. 134.KLF.7.91 (1993 PDP) and Survey Plan F/R 251/54, respectively. According to the 1st Respondent, these documents serve to refute the Petitioner's assertion that the aforementioned documents reserved, set aside, or created a public access road over the property in question.
39. Having established the foundation of the petition and the counterclaim, it is evident that the crux of the controversy pertains to the existence of a public access road along the public road traversing LR No. 1XX85.
40. As highlighted above, the Petitioner and the 1st Respondent have presented evidence that contradicts each other regarding the existence of such a thoroughfare.



41. One of the preliminary issues that I am tasked with determining is whether this court, in exercising its constitutional jurisdiction, possesses the authority to adjudicate over the matter, considering the existence of another active suit, Malindi ELC No. E040 of 2021, involving Antony John Cysewski v County Government of Kilifi and the National Land Commission.
42. I assert that the concerns articulated herein bear resemblance to those in the preceding lawsuit, which was lodged before this petition. When assessed from a mathematical standpoint, the issues are indeed congruent. The 1st Respondent initiated legal proceedings against the 3rd and 4th Respondents, who serve as the Defendants in the aforementioned suit, to challenge the creation of a public access road encroaching upon the subject property. The parties have presented their defenses, and the Petitioner has duly acknowledged this in this matter.
43. From my perspective, both the petition and counter-petition face significant headwinds due to the doctrine of sub judice and the principle of constitutional avoidance.
44. The sub judice doctrine, which translates to "under judgment" in Latin, delineates the principle that when a matter is currently before a court of law, no other court should preside over the same issue until the resolution of the initial suit is achieved. In Kenya, this doctrine is codified within Section 6 of the *Civil Procedure Act*. It serves to avert the proliferation of lawsuits and guarantees that identical matters are not adjudicated in different courts concurrently. The primary objective of the doctrine is to obstruct overlapping litigation and to ensure that multiple courts do not make determinations on the same legal issue. The doctrine is applicable when a matter is pending in a court of law and the identical matter is also in dispute in another lawsuit involving the same parties.
45. The Supreme Court of Kenya, in the case of National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 Others (Interested Parties) [2020] eKLR, articulated:

“The term sub judice is defined in Black’s Law Dictionary, 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub judice rule is to stop the filing of multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub judice must therefore establish that; there is more than one suit over the same subject matter, that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”
46. As previously established, although this petition was initiated as a public interest litigation, the matters at hand are currently being adjudicated in Malindi ELC No. E040 of 2021, which was filed before this petition. Consequently, the present petition and counterpetition contravene the doctrine of sub judice.
47. Subsequent to the comprehensive hearing process of the petition, which is now beyond the possibility of being stayed, the subsequent question pertains to the doctrine of constitutional avoidance. The claims and documentation presented by the parties, notably the Petitioner and the 1st Respondent, establish that both possess evidence indicating that, for the Petitioner, there exists no public access road as referenced by the Ministry of Lands under Department Reference No. 134 KLF 91, which is also



recorded as PDP Number 76, and was sanctioned by the Director of Physical Planning on October 12, 1992. According to the 1993 Part Development Plan (PDP), a road was established linking the Old Ferry Road to the current Kilifi–Malindi Highway, indicating an approved Part Development Plan to that effect. In contrast, the 1st Respondent holds a title and Part Development Plan No. 134.KLF.7.91 (1993 PDP) along with Survey Plan F/R 251/54, which demonstrates that the access road is situated within private property LR No. 1XX85, of which he asserts ownership.

48. The 2nd, 3rd, and 4th Respondents did not respond to the petition and could have resolved the underlying issue concerning the title held by the 1st Respondent. The 3rd and 4th Respondents submitted defenses in the previous lawsuit. In my opinion, it is that lawsuit that can ultimately and decisively determine whether we have a public access road or not.
49. Under the doctrine of constitutional avoidance as applied in Kenyan law, courts are encouraged to refrain from deciding cases on constitutional grounds when such cases can be resolved through standard statutory interpretation and conventional litigation. If a matter can be addressed without resorting to the court’s constitutional jurisdiction, this approach is preferable; the court is likely to favor this course of action. It is crucial that parties seek remedies under ordinary law before engaging the constitutional jurisdiction of the court. Should a fundamental issue be resolved without requiring the interpretation of *the Constitution*, the court will respond accordingly, thus avoiding expansive constitutional declarations that have significant ramifications when more limited grounds are available.
50. In *Rhigo v Hiriba & 6 others* [2024] KEELC 6222 (KLR), this court reaffirmed the principle of constitutional avoidance as follows:

“This brings me to the next front, the doctrine of constitutional avoidance; when a party has a remedy provided under the legislation, they must follow the path to exhaustion before petitioning a Constitutional Court. See *KKB v SCM & 5 others* [Constitutional Petition 014 of 2020] [2022]KEHL 289 [KLR] thus:

“Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on the constitutional arguments that the court will entertain The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sigittarious Wrestling Club & another*, in which Ebrahim J.A. said the following:

“.....courts will not normally consider a constitutional question unless the existence of a remedy depends upon it: if the remedy is available to a Petitioner under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights.”

51. In conclusion, I refrain from making any broad constitutional declarations regarding the issues raised herein. I reserve that to be decided in the primary case, ELC No. E040 of 2021, which will ultimately address the concerns articulated herein through standard legal procedures. The custodians of the two PDPs referenced by the parties will be interrogated and subjected to cross-examination under oath. The trial court will subsequently determine the appropriate remedies by evaluating the legitimacy of the title held by the 1st Respondent, deciding whether it was acquired regularly or irregularly, and establishing whether the 1st Respondent has obstructed a public access road, as well as whether, under *the Constitution*, a foreigner may lawfully hold a 999-year lease.



52. I down my judicial tools. The petition and counter-petition are hereby dismissed without an order concerning costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY IN MALINDI ON THIS 28TH DAY OF MAY 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Kinaro for the Petitioner

Mr. Iddi for the 1st Respondent

Ms. Kimathi for the 4th Respondent

Happy, Court Assistant

In the Absence of:

Mr. Kiilu for the 3rd Respondent

