



**Ndetei v Muia & another; County Government of Makueni & another (Interested Parties)  
(Environment & Land Petition 006 of 2024) [2025] KEELC 2974 (KLR) (1 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 2974 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND PETITION 006 OF 2024**

**EO OBAGA, J**

**APRIL 1, 2025**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS  
OF INDIVIDUALS UNDER THE BILL OF RIGHTS OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLE 19,20,21,22(1),  
(2),(4),23,24,28,29(C),40,43(B) AND 64 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ARTICLES 2(5),(6) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF PROTECTION FROM DEPRIVATION OF PROPERTY**

**AND**

**IN THE MATTER OF THE NATIONAL LANDS  
COMMISSION ACT N. 5 OF 2012, LAWS OF KENYA**

**IN THE MATTER OF EMALI TOWNSHIP BLOCK 1/198**

**BETWEEN**

**EDWARD MUTINDA NDETEI ..... PETITIONER**

**AND**

**LOIS MUIA ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, MAKUENI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**COUNTY GOVERNMENT OF MAKUENI ..... INTERESTED PARTY**



**RULING**

1. The Petitioner filed this Constitutional in which he sought the following reliefs:
  1. A declaration be issued that the Petitioner herein is the legal owner of the parcel of land known as plot No. 556 measuring 20 ft by 100 ft having purchased it from the 2<sup>nd</sup> interested party.
  2. A declaration that the amalgamation of plots No. 555, 556 among other plots to one parcel of land known as Emali Township Block 1/198 was illegal, null and void and in contravention with the Petitioner's constitutional right of ownership.
  3. An order setting aside and/or reviewing the judgment and ruling delivered on 28<sup>th</sup> December, 2018 and 18<sup>th</sup> September, 2024 respectively.
  4. An order preserving the Petitioner parcel of land and properties constructed on the parcel of land known as Plot No. 556.
  5. Any other further order that the Honourable court may deem it fit and just to grant.
  6. An order for payment of costs of this Petition by the Respondents.
2. The Petitioner contemporaneously filed a Notice of Motion dated 11<sup>th</sup> November, 2024 in which he sought the following orders:
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That this honourable court be pleased to issue orders of stay of execution of the ruling delivered on 18<sup>th</sup> September, 2024 pending hearing and determination of this petition.
  - e. Costs of this application.
3. Before the Notice of Motion dated 11<sup>th</sup> November, 2024 could be heard, the 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection in which he raised the following grounds:
  - a. That the Petition and Notice of Motion dated 11<sup>th</sup> November, 2024 together with the Notice of Motion dated 11<sup>th</sup> November, 2024 are *res judicata* and thus offends the provisions of Section 7 of the Civil Procedure Act.
  - b. That the Petition and Notice of Motion dated 11<sup>th</sup> November, 2024 are a non-starter, bad in law and an abuse of the Court process and the honourable court is being asked to seat on Appeal of its own decision.
  - c. That the Honourable court is *Functus officio* in that it is being asked to entertain and revisit a matter on a merit based re-engagement having heard and delivered its judgment way back on 28<sup>th</sup> December, 2018.
  - d. That the honourable court lacks the jurisdiction to entertain and hear the Petition herein on grounds that the Petitioner seeks the setting aside of the judgment delivered on 28<sup>th</sup> December,



2018 whilst the Petitioner filed an appeal against the same judgment in Court of Appeal Civil Appeal Number 123 of 2019 and the Appellate court upheld the judgment of the Superior Court and dismissed the Appellants appeal.

- e. The Petition and the Notice of Motion filed herein is an abuse of the court process and ought to be struck with costs to the 1<sup>st</sup> Respondent.
  - f. The Petitioner/Applicant if dissatisfied with the ruling of the honourable court dated 18<sup>th</sup> September, 2024 ought to have filed an appeal which he has not done and neither did the Petitioner/Applicant seeks to have the orders revised and/or set aside and thus there exists no basis for stay of execution of the orders. The judgment and/or decree of the court giving rise to the ruling dated 18<sup>th</sup> September, 2024 is still in place.
4. The parties were directed to file written submissions in respect of the preliminary objection. The 1<sup>st</sup> Respondent filed submissions dated 11<sup>th</sup> February, 2025. The court had given the 1<sup>st</sup> Respondent 14 days within which to file and serve submissions. The Petitioner was to file his submissions within 14 days of being served. The 1<sup>st</sup> Respondent filed and served submissions upon Petitioner on 12<sup>th</sup> February, 2025. As at 10<sup>th</sup> March, 2025, the Petitioner had not filed submissions. The Petitioner was given 7 days to file submissions.
  5. As at the time of writing this ruling on 24<sup>th</sup> March, 2025, the Petitioner had not filed his submissions. In his submissions, the 1<sup>st</sup> Respondent submitted that the Petition and Notice of Motion are *res judicata* in that the issues raised in the petition were raised in Makueni ELC No. 98 of 2017 whereby a judgment was delivered on 28<sup>th</sup> December, 2018. The Petitioner applied for stay of execution of the judgment which application was granted. An appeal which the Petitioner filed before the Court of Appeal was heard and determined. The Petitioner's appeal was dismissed with costs.
  6. The 1<sup>st</sup> Respondent submits that the parties in ELC 98 of 2017 are the same parties in this Petition. The properties which were the subject of litigation in ELC 98 of 2017 are the same properties which are the subject of litigation in this petition. The 1<sup>st</sup> Respondent also submitted that this court has no jurisdiction to sit on appeal in a judgment by a court of equal status and that this court cannot overturn a decision which has been affirmed by a higher court.
  7. I have carefully considered the Preliminary Objection as well as the submissions by the 1<sup>st</sup> Respondent. The issues which emerge for determination are firstly whether his petition is *res judicata*. Secondly, whether this court has jurisdiction to overturn a decision which has been affirmed by a higher court. The principle of *res judicata* is predicated on Section 7 of the [Civil Procedure Act](#) which states 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.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.



8. The Petitioner herein was the 1<sup>st</sup> Defendant in ELC 98 of 2017. The 1<sup>st</sup> Respondent in this Petition was the Plaintiff in ELC 98 of 2017. The 1<sup>st</sup> Interested Party in the Petition was the 2<sup>nd</sup> Defendant in ELC 98 of 2017. The 2<sup>nd</sup> Interested Party in this Petition was a witness for the Petitioner in ELC 98 of 2017. The subject matter in ELC 98 of 2017 was LR No. Emali Township Block 1/98 and Plot 556. These are the same properties which are the subject of this Petition.
9. The Supreme Court in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others* (2021) eKLR held as follows:
  81. We reaffirm our position as in the Muiri coffee case that the doctrine of *res judicata* is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of *res judicata* prevents a multiplicity of suits, which would ordinarily clog the courts apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party; conclusively.....
  82. If we were to find that the doctrine does not apply to conditional litigation, the doctrine may well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of the *Constitution* in both Civil and Criminal litigation and its application now embedded in all procedural statutes. Further Article 50 on the right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine *res judicata*, they only need to invoke some constitutional provision or other.
10. The Supreme Court went further to state as follows:
  86. We restate the elements that must be proven before a court may arrive at the conclusion that a matter is *res judicata* to be invoked in a civil matter the following elements must be demonstrated.
    - a. There is a former judgment or order which was final;
    - b. The judgment or order was on merit;
    - c. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
    - d. There must be between the first and the second action identical parties, subject matter and cause of action.
11. Applying the principles which were set out by the Supreme Court, I find that the parties before ELC 98 of 2017 are identical to the parties in this Petition. There is a final judgment which was delivered which judgment was affirmed by the Court of Appeal. The litigation in ELC 98 of 2017 revolved around Emali Township Block 1/198 and plot 556. The evidence which was adduced in favour of the Petitioner in ELC 98 of 2017 is that it is the 2<sup>nd</sup> Interested Party who sold plot 556 to the Petitioner who was the 1<sup>st</sup> Defendant in ELC 98 of 2017. The 1<sup>st</sup> Defendant who is the Petitioner herein had filed an application seeking to join the 2<sup>nd</sup> Interested Party as 2<sup>nd</sup> Defendant in ELC 98 of 2017 but the application was struck out on 23<sup>rd</sup> October, 2024. I therefore find that the Constitutional Petition is *res judicata*.
12. On the second issue, I find that this court has no jurisdiction to set aside a judgment rendered by a court of concurrent jurisdiction. Furthermore, it will be absurd for this court to purport to set aside



a judgment which has been affirmed by the Court of Appeal and I do not have the jurisdiction to do so. I therefore uphold the Preliminary Objection and proceed to strike out the Petition as well as the Notice of Motion dated 11<sup>th</sup> November, 2024 with costs to the 1<sup>st</sup> Respondent.

It is so ordered.

**HON. E. O. OBAGA**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 1<sup>ST</sup> DAY OF APRIL, 2025.**

In the presence of:-

Mr. Kiluva for Petitioner

Mr. Mbindyo for 1<sup>st</sup> Respondent

Court assistant Steve Musyoki

