



**Sheria Na Haki Human Rights Institute v Noor & 10 others; Ethics and Anti-Corruption Commission Directorate of Criminal Investigation (Interested Party)
(Constitutional Petition E003 of 2023) [2025] KEELC 5046 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5046 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION E003 OF 2023**

**JO OLOLA, J
JULY 4, 2025**

BETWEEN

SHERIA NA HAKI HUMAN RIGHTS INSTITUTE PETITIONER

AND

**AHMED SIRAJ NOOR 1ST RESPONDENT
AISHA FATUMA MOHAMMED 2ND RESPONDENT
NGOZI A.J 3RD RESPONDENT
THE REGISTRAR OF TITLES MOMBASA 4TH RESPONDENT
NATIONAL LAND COMMISSION 5TH RESPONDENT
THE HON.ATTORNEY GENERAL 6TH RESPONDENT
DIRECTOR LAND ADMINISTRATION 7TH RESPONDENT
CABINET SECRETARY MINISTRY OF LANDS AND URBAN
DEVELOPMENT 8TH RESPONDENT
COUNTY GOVERNMENT OF MOMBASA 9TH RESPONDENT
INSPECTOR GENERAL OF POLICE 10TH RESPONDENT
O.C.S. BAMBURI POLICE STATION 11TH RESPONDENT**

AND

**ETHICS AND ANTI-CORRUPTION COMMISSION DIRECTORATE OF
CRIMINAL INVESTIGATION INTERESTED PARTY**



RULING

1. Before me for determination is a Notice of Preliminary objection dated 9th November, 2023 as well as a Notice of Motion dated 3rd October, 2024. By the Preliminary Objection, the 6th, 10 and 11th Respondents object to the Petition filed herein on the grounds
 1. That the Petition offends (the) doctrine of Constitutional avoidance;
 2. That the Petition is a simple claim for land alleging invalidity of a title to land but is disguised as a Constitutional Petition and hence should not have been filed as a Constitutional Petition but as an ordinary Plaint; and
 3. That the matter can be properly decided on another basis other than through a Constitutional Petition.
2. By the Notice of Motion as filed the 1st Respondent prays for orders as follows:
 - “2. That there be a temporary stay (of) order No. “A” given on 20th May, 2024.
 3. That Order No. “A” given on 20th May, 2024 be set aside unconditionally;
 4. That this matter be declared res-judicata hence it be struck out following the judgment (delivered) on 4th June, 2024 in ELC. No. 011 of 2022 (OS) Mombasa; and
 5. That the costs of the application be provided for.
3. Given the import of the Preliminary Objection I shall first deal with the same before turning my attention to the Motion.
4. The doctrine of avoidance was well-discussed by the Supreme Court of Kenya in Communications Commission of Kenya and 5 Others –vs- Royal Media Services Limited & 5 Others (2014) eKLR, where the court observed as follows:

“(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “Constitutional avoidance.” The principle of avoidance determines a Constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S –vs- Mhlungu, 1995(3) SA 867 (CC) the Constitutional Court Kentridge A.J, articulated the principle of avoidance in his minority judgment as follows [at paragraph 59]:

I would lay it down as a general principle, that where it is possible to decide any case, Civil or Criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the US Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander V. Tennessee Valley Authority, 297 US 288, 347 (1963).

“(258) From the foundation of the principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd Respondents’ claim in the High Court, regarding infringement of intellectual



property rights, was a plain copyright - infringement claim, and it was not properly laid before that court as a Constitutional Issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court...”

5. Dealing with a similar issue in *KKB –vs- SMC & 5 Others* (Constitutional Petition No. 014 of 2020) [2022] KEHC 289 (KLR), Mativo J. (as he then was) expressed himself on the doctrine as hereunder.

“In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a Constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination unless the determination of the constitutional issue is the only issue that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness averts the determination of the Constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant’s cause...”

6. In the instant matter, the 6th, 10th and 11th Respondents contend that the subject matter of this dispute is a simple claim of land alleging invalidity of title to land and that the same should have been filed as an ordinary Plaintiff.

7. The Petitioner herein is a Non-Governmental Organization which avers that it has brought the Petition on behalf of more than 100 individuals solely on the basis of public interest. It is the Petitioner’s case that the Petition delves into the Constitutional infringement of the occupants rights to property which was infringed when the subject property was allocated to third parties in disregard of the fact that there were people already in occupation of the subject land.

8. At Paragraph 19 of the Petition the Petitioner pleads as follows:

“19. The Petitioner avers further that limitation on the Civil remedies front have seen the residents and/or occupants of the said subject matter motherland being denied access to justice majorly due to lack of locus standi since as they recognize the property is recognized as being Government Land and/or public land and which will attract the term of a busy body from a Civil action point perspective.”

9. As it were, the 6th, 10th and 11th Respondents have not responded to how the Petitioners could address the matter through an ordinary Plaintiff without facing the challenges of standing.

10. I have looked at the issues being raised in the Petition. The prayers made include those for declarations and orders of Judicial Review. Looking at the entire spectrum of the Petition, I was not persuaded that the same is a simple claim capable of being addressed wholly through an ordinary Plaintiff.

11. Accordingly, I am not persuaded that the Preliminary Objection was merited and I hereby dismiss the same.

12. Turning to the Motion by the 1st Respondent, it is his prayer that Order No. ‘A’ granted by this court on 20th May, 2024 be set aside unconditionally. In addition, the 1st Respondent urges the Court to declare this matter as res Judicata following a Judgment delivered on 4th June, 2024 in ELC. Case No. 11 of 2022 (OS).



13. Order 40 Rule 7 of the Civil Procedure Rules upon which the application is premised provides as follows:

“An order for an injunction may be discharged, or varied, or set aside by the Court on application made thereto by any party dissatisfied with such order.”
14. At Paragraph 4 of the Supporting Affidavit of Ahmed Siraj Noor (the 1st Respondent) he sets out the grounds for being dissatisfied with the order as follows:

“4. That in light of my exhibit on pages 53 to 59 I do humbly aver to this Honorable Court that the Applicant/Petitioner mislead (sic) this court by misrepresentation that they were indeed in fully (sic) occupation usage and developing (the) suit properties, which allegations were not factual and indeed wrong as a result the court issued Order No. A of 20th May, 2024 which is now adversely affecting me and other third parties who are innocent purchasers. There is now urgent need to stay the said order No. “A” and subsequently set in (sic) aside since none of the Applicants is in occupation of any of the suit sub-plots as initially alleged.”
15. While indeed the Court has discretionary power to set aside and/or vary orders of injunction under Order 40 Rule 7 of the Civil Procedure Rules, I was not persuaded that the said provisions could be invoked in the present circumstances. I say so because the said Order No. “A” which the 1st Respondent wants to be set aside was the result of a substantive Ruling delivered by the Honorable Justice L. Naikuni after a substantive hearing of two applications filed by both the Petitioner and the 1st Respondent.
16. By an Amended Notice of Motion dated 25th August, 2023, the Petitioner had sought conservatory orders to issue restraining the Respondents from conducting a survey, sub-dividing, evicting, alienating, or dispossessing the Petitioners from the suit property. Having heard the parties, and in the Ruling delivered as aforesaid on the said 20th day of May, 2024, the court allowed the Petitioner’s Motion having found merit in the same.
17. That being the case, it was clear to me that where the Respondent was dissatisfied with the said finding, the only recourse available to him was by way of an Appeal and not to come back to this court asking it to set its order aside on account that he was dissatisfied therewith.
18. On the other hand, the 1st Respondent has urged the court to strike out the suit on account that the same is res judicata ELC Petition No. E011 of 2022 (OS) wherein Judgment was delivered on 4th June, 2024. In support of that position, the 1st Respondent avers at paragraph 5 of the Supporting Affidavit that he is aware that the names appearing to have instructed Sheria Na Haki Human Rights Institute (the Petitioner) are the same names appearing as the Plaintiffs in the said Mombasa ELC. No. 011 of 2022 (OS).
19. As it were, whenever the question of res-judicata is raised, a court will look at the decision claimed to have settled the issues in question, the entire pleadings and record of that previous case, and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title and whether the previous case was determined by a Court of competent jurisdiction.
20. In the matter before me, it was not clear to me how the 1st Respondent came to the conclusion that the Plaintiffs in the said ELC. No. 11 of 2022 (OS) were the same people who had instructed the Petitioner



herein. Neither did the 1st Respondent explain if the parties were the same and/or were litigating over the same subject matter to warrant the matter to be rendered res judicata.

21. In the premises I did not find any merit whatsoever in the 1st Respondents' Motion dated 3rd October, 2024.
22. Accordingly, both the Preliminary Objection dated 9th November, 2023 as well as the Notice of Motion dated 3rd October 2024 are hereby dismissed with costs to the Petitioner.

Ruling dated, signed and delivered in open court and virtually at Mombasa this 4th day of July, 2025

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J.O. OLOLA

JUDGE

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. No appearance for the Petitioner
- c. Mr. Omwenga Advocate for the 1st Respondent
- d. No appearance for the other Respondents

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