

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC PETITION NO. E005 OF 2025

**SAMSON SHANGU WASWA *alias*
ELIJA
MUKETE**-----

**WASWA
PETITIONER**

VERSUS

**THE CHIEF MAGISTRATE KITALE COURT-----1ST
RESPONDENT**

**THE ATTORNEY GENERAL-----2ND
RESPONDENT**

**EDOAN WANYONYI APOLLO-----
INTERESTED PARTY**

RULING

1. What is before the court is a preliminary objection dated **2/7/2025**, taken out by the interested party, that this suit is *res judicata*, in view of **Kitale ELC Misc. Appl. No. 1 of 2022**, and that this is the fifth suit between the interested party and the petitioner, over plot **No. 49** Maeni Farm, hence the petitioner should be declared a vexatious litigant.
2. A preliminary objection is a pure point of law which is taken by the party on the understanding that what is pleaded by the opposite is undisputed. A pure point of law as was defined in **Mukisa Biscuits Manufacturing Co. Ltd -vs- West End**

Distributions Ltd [1969] EA 469. Examples of preliminary objections include a plea of limitation of time, jurisdiction, and *res judicata*.

3. Whether *res judicata* applies to constitutional petitiones was considered in **John Florence Maritime Services Ltd & Another -vs- C.S. Transport & Infrastructure & Others (Petition No 17 of 2015) (2021) KESC 39 KLR (CIV) (6th August 2021) (Judgment)**. The court observed that the doctrine of *res judicata* is based on the principles of finality of a matter as a public policy doctrine, under which a judicial system is founded, to prevent a multiplicity of suits which would ordinarily clog the courts, occasion unnecessary costs to the parties, and is to ensure that litigation comes to an end, where one party gets fruits of his litigation, and the other, suffers a liability.
4. The court held that the doctrine, in equal force, applies to constitutional litigation to promote orderly administration of justice, and the only exception could be where there is a potential for substantial injustice, if a court did not hear the matter or issue on the merits, based on the circumstances, or where

there are exceptional circumstances that warrant the court to act.

5. The petition before the court is dated **5/6/2025**. The petitioner admits the existence of **Kitale CMC L&E No. 42 of 2008**, where the interested party was a defendant, and which led to a judgment for eviction from plot **No. 49** on **5/2/2016** against the interested party, after which an appeal was lodged, a decree issued on **8/1/2009**, following a tribunal award dated **27/1/2008**.
6. The petitioner admits that eventually the interested party filed an appeal in **2009** and obtained a judgment, leading to case **No. 32 of 2011**, before the 1st respondent whose verdict was delivered on **4/2/2021**, but was not appealed against by the interested party, save to seek for an eviction order by a notice of motion dated **21/2/2021**, which was allegedly erroneously issued by the 1st respondent, contrary to the petitioner's rights to fair hearing and to property.
7. The petitioner anchors his petition on **Articles 1, 2, 3, 10, 19, 20, 21, 23, 24, 25, 27, 40, 159, 162** and **165**, of the Constitution saying that the interested party's case **No. 42 of 2008** and the

appeal offended **Section 8(2)** of the Land Disputes Tribunal (repealed), was time-barred, the award, decision, adopted, the decree and all the subsequent orders by the 1st respondent were nullities *ab initio* and offended **Articles 3, 21, 25, 50** and **159** of the Constitution.

8. The petitioner, under **Articles 23, 165(6)** and **(7)** of the Constitution and guided by the cited case law in paragraphs **69** and **70** of the petition, prays for:-

(a) Declaration that the orders of the Magistrate made on 3/10/2021 offend Articles 2, 3(1), 20, 25, 27, 40, 50, and 159 of the Constitution.

(b) Declaration that his right to own property under Article 40 of the Constitution was violated by the ruling of the 1st respondent dated 13/10/2021.

(c) The order dated 13/10/2021 be quashed under Articles 23 and 165(6) and (7) of the Constitution.

9. In support of the petition, Samson Shangu Waswa swore an affidavit dated **5/6/2025**, attaching a decree in his suit **No. 42 of 2008**, an eviction order, a ruling dated **11/8/2011**, an order, and an application in **ELC No. 32 of 2011** as annexures marked as **SS-1, 2, and 3**. He avers that the 1st respondent acted without jurisdiction.

- 10.** Apart from the petition, the petitioner has filed a notice of motion dated **5/6/2025**, seeking conservatory orders against the interested party, to stop him from excavating stones or wasting land parcel **No. 49** Maeni Farm. The application is supported by an affidavit sworn on **5/6/2025**, by Elijah Waswa Mukete, attaching copies of photos showing the alleged destruction.
- 11.** The petitioner, through ground of opposition dated **7/7/2025**, opposes the preliminary objection for being bad in law, as requiring production of evidence as held in **Mukisa Biscuits Ltd -vs- West End Distributions** (*supra*), **Hassan Charo -vs- Khatib Mwashetani & Others [2014] eKLR** and **Harry Wanyama Khaemba -vs- Standard Chartered Bank Ltd & Another [2014] eKLR**.
- 12.** The issues calling for my determination are whether what the interested party has pleaded is a pure point of law, and secondly, if the petition is *res judicata*. In **Independent Electoral and Boundaries Commission -vs- Jane Cheperenger & Others [2015] eKLR**, the court observed that a preliminary objection should be founded upon a settled and crisp

point of law, based on undisputed facts, which are incompatible with that point of law.

- 13.** In **Aviation Allied Workers Union of Kenya -vs- Kenya Airways Ltd & Others [2015] eKLR**, the court said that a preliminary objection may only be raised on a pure point of law, and to discern such a point, the court has to be satisfied that there is no proper contest as to the facts and such facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.
- 14.** When this application came up for hearing on **8/7/2025**, learned counsel for the interested party told the court that this court recently delivered judgment in **Kitale ELC Misc. JR. Application No. 17 of 2023, Republic -vs- Rift Valley Provincial Lands Disputes Appeals Committee & Another, Apollo & Others IP, Esther Kiberenge aka Esther Nusumbu & Others Ex parte Applicant**, hence the basis for the plea of *res judicata*.
- 15.** In the said matter, the 1st respondent herein was the 2nd respondent, while the petitioner, the 3rd respondent, and the interested party herein were the interested parties. The judicial review application had been brought regarding a **Provincial Appeals**

Tribunal Committee Appeal No. 9 of 2009, said to have been adopted by the 1st respondent as a decree in **Kitale CMC Court Case No. 42 of 2008**. It was deposed that the petitioner had allegedly purchased **6 acres** of plot **No. 49** Maeni Farm from Elijah Waswa Tabalia.

- 16.** The orders sought in the judicial review were of *certiorari* and *prohibition*, to quash the provincial appeals award that had been adopted as judgment, order, and decree by the 1st respondent in case **No. 42 of 2008** on **13/10/2021**, ordering the eviction from plot **No. 49** Maeni Farm.
- 17.** In **Republic -vs- Rift Valley Provincial Land Disputes Appeal Committee & Another: Kiberenge & 2 Others Ex parte Application ELC Misc. Appl. No. 1 of 2022 KEELC 43 10 KLR (9th June 2025) (Judgment)**, this court determined whether or not to quash an adoption of a judgment, order, or decree in **Kitale CMC Land Case No. 42 of 2008** and the issuance of an eviction order dated **13/10/2021**, regarding plot **No. 49** Maeni Farm.
- 18.** The ex parte applicants had complained of being condemned unheard, violation of their rights to a fair hearing, under the Fair Administrative Action Act.

The court made a finding that a party alleging breach of their constitutional rights has to demonstrate such a breach, violation, or infringement through tangible evidence.

- 19.** The court held that a party aggrieved by the adoption of an award or decree by the 1st respondent had a right to lodge an appeal or seek judicial review before the High Court, before the expiry of **6** months as per **Order 53** of the Civil Procedure Rules. The court observed that the eviction had been implemented regarding plot **No. 49** Maeni Farm, by the time judicial review was commenced, and if there was any complaint, a party against whom such an execution is raised should have filed proceedings under **Order 22** of the Civil Procedure Rules, or challenged the eviction under **Section 152 A-I** of the Land Act.
- 20.** The court held that it was within the jurisdiction of the 1st respondent to adopt the award as a decree of the court and also execute the same within the law. The court found no evidence of alleged impropriety in the decision, order, or decision-making process of the 1st respondent or substantiation of the proprietary

rights of the ex parte applicants, regarding plot **No. 49** Maeni Farm.

- 21.** This petition was filed on **18/6/2025**. It seeks a declaration that the orders made by the 1st respondent on **13/10/2021** were made contrary to **Articles 2, 3(1), 20, 25(C), 27(1), 40, 50 and 159(2)** of the Constitution, that the same offended **Article 40** of the Constitution as to ownership rights of the petitioner and for the court to quash the same. The grounds are set out in paragraphs **30-75** of the petition. Strangely, the petitioner, having been an active participant in the judicial review up to its conclusion, has not mentioned any previous proceedings over the subject matter, contrary to **Rule 10(2)(e)** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Failure to make a candid disclosure and all material and essential facts could militate against the person concealing that evidence or facts from the court.
- 22.** Courts must be strict on how disclosure of material facts by a party seeking a remedy, more so when he has concealed important material facts from the

court. See **Motor Vessel Lillian 'S' -vs- Caltex Oil (K) Ltd [1989] KECA 48.**

23. Concealing material facts, according to Nyarangi JA in **Motor Vessel Lillian 'S'**, may result in a party being penalized by a court. In **Speaker of National Assembly -vs- Karume [1992] KECA 42 KRL, (29th May 1992) (Ruling)**, the court said that material facts capable of affecting the manner in which the court exercises the discretion had been concealed, hence the need to stay the order of the High Court.

24. The petitioner terms the preliminary objection as requiring the production of evidence to substantiate it. The petitioner has not disputed that there is a judgment on the merits regarding the same issues it is called upon to relitigate or determine again.

25. In **Independent Electoral and Boundaries Commission -vs- Maina Kiai & Others [2017] KECA 477 [KLR]**, the court observed that *res judicata* is properly raised if:-

(i) *The suit or issue was directly and substantially in issue in the former suit.*

- (ii) The former suit was between the same parties or parties, under whom they or any of them claim.*
- (iii) The parties were litigants under the same title.*
- (iv) The issue was heard and finally determined in the former suit.*
- (v) The issue was handled and determined by a competent court to try the subsequent suit.*

26. In this petition, the court is being called to revisit the same issues between the same parties, over the same title and subject matter, regarding the same or similar parcels of land.

27. Litigation as held in **William Koross -vs- Hezekiah Kiptoo Kones & Others [2015] eKLR**, has to come to an end. A successful party should not be vexed twice, especially when reaping the fruits of its success. An unsuccessful party must learn to let go. Justice and good conscience require that a party who has succeeded on an issue should not be harassed by the multiplicity of proceedings involving the determination of the same issues.

28. The petitioner is estopped in law from going around the decision of this court dated **9/6/2025**. The court

has the mandate to debar and stop the petitioner from vexing the respondents twice by reopening a concluded issue.

29. The upshot is that I find the preliminary objection to be a pure point of law requiring no evidence on such uncontested facts. It is upheld, and the petition is dismissed with costs of **Kshs. 50,000/=**, to be paid to the interested party. I decline to declare the petitioner a vexatious litigant for lack of enough material to justify such a drastic order.

30. Orders accordingly.

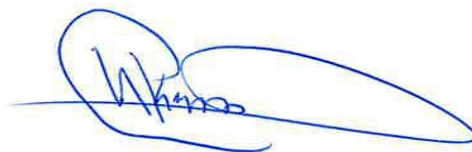
Ruling dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 24th day of September 2025.

In the presence of:

Court Assistant - Dennis

Petitioner present

Miss Odeyo for Attorney General present



**HON. C.K. NZILI
JUDGE, ELC KITALE.**

ORIGINAL