



Ndungu & 2 others (Suing for and on Behalf of Themselves and 300 others Who Are Squatters and Official Allottees of Njoro Kiwanja Ndege Settlers) v Attorney General & 4 others (Environment and Land Petition E002 of 2025) [2025] KEELC 7045 (KLR) (16 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7045 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND PETITION E002 OF 2025
A OMBWAYO, J
OCTOBER 16, 2025**

BETWEEN

**ESTHER WANJOHI NDUNGU 1ST PETITIONER
SAMUEL MUGWANJIRA NJUGUNA 2ND PETITIONER
DANIEL KINYANJUI 3RD PETITIONER
SUING FOR AND ON BEHALF OF THEMSELVES AND 300 OTHERS WHO
ARE SQUATTERS AND OFFICIAL ALLOTTEES OF NJORO KIWANJA NDEGE
SETTLERS**

AND

**THE ATTORNEY GENERAL 1ST RESPONDENT
THE DIRECTOR PHYSICAL PLANNING & 3 OTHERS & 3
OTHERS 2ND RESPONDENT**

RULING

Brief Facts

1. This ruling is in respect of the 1st and 2nd Respondent's preliminary objection as raised in their grounds of opposition dated 14th July, 2025 on the following grounds:
 1. the said Petition is legally untenable, an abuse of the court process, incompetent, and ought to be dismissed with cost to the 1st and 2nd Respondents at the first instance.
 2. That the petitioners are using every trick available to drag in court a matter that was long concluded given that the matters raised in the petition were directly and substantially in issue



in the concluded NAKURU ELC 83 of 2021 involving the same parties with similar causes of action over the same subject matter.

3. That the 1st and 2nd Respondents wishes at this earliest stage to raise a Preliminary objection on a point of law seeking that the Petition dated 24th April 2025 to be dismissed as the matter offends the doctrine of Res judicata.
4. That the Honourable Court has no jurisdiction to hear this matter, ab initio, and as such the same should be struck out, the same having been heard and determined in a previously concluded suit by a court of competent jurisdiction.
5. That the petition offends the cardinal principle of law that litigation must come to an end: parties cannot litigate forever.
6. That there is a prior judgment between the same parties that was issued by a competent court in Nakuru Environment and Land Court case No. 83 of 2021 between Njoro Kiwanja Ndege vs Uhuru Welfare Association & 3 Others.
7. That it is trite law that fundamental rights and freedom set up in the Bill of Rights are only enforceable by a private individual by way of constitutional petition as against the State and State Organs, and not by private individual as against another private individual as in the instant petition.
8. That the petition is otherwise incompetent, misconceived, misplaced and is an abuse of the court process as the Petitioner's rights and fundamental freedoms have not been breached in any manner as alleged or at all and the same ought to be dismissed with costs.

Submissions

2. Counsel for the 1st and 2nd Respondents filed her submissions where she gave a background of the case and identified three issues for determination. The first issue was whether the petition offends the doctrine of res judicata and if the preliminary objection has merit. It was her submission that the court has no jurisdiction to hear and determine the petition as the matter was heard and determined in Nakuru ELC 83 of 2021. She relied on Section 7 of the *Civil Procedure Act* and the case of John Florence Maritime Services Limited & Another V Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 eKLR. She also relied on the case of Communications Commission of Kenya & 5 Others V Royal Media Services Limited & 5 Others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated) [2014] KESC 53 (eKLR). It was counsel's submission that since there is already a case involving the same parties over the same subject matter which was heard and a judgment rendered, the instant petition offends the doctrine of res judicata and should be dismissed with costs. She further submits that the Nakuru ELC Case 83 of 2021 having been heard and determined, the Petitioners filed an appeal against the said judgment vide Nakuru CoA E042 of 2025. She added that the appeal was still pending determination thus the petition offends the doctrine of res judicata.
3. The second issue was whether the Petitioners are entitled to the reliefs sought in the Petition. While submitting in the negative, counsel relied on the case of Anarita Karimi Njeru and argues that the petition fails to specifically demonstrate the infringement and violation of their constitutional rights. It was her submission that the petition has been framed in a manner similar to that of a constitutional petition but its main agenda is to set aside the PDP No. R23/2001/3 which initially allocated the suit parcel to the 5th Respondents instead of the Petitioners. She added that the issues raised in the petition were already heard and determined in ELC 83 of 2021 thus filing this case amounts to an abuse of the court process.



4. On the final issue on costs, she relies on Section 27 of the *Civil Procedure Act* and submits that costs follow the event.
5. Counsel for the 4th Respondent filed his submissions dated 22nd July, 2025 where he identified one issue for determination, whether the Petition is res judicata. He relied on Section 7 of the *Civil Procedure Act* and submits that the issue in Nakuru ELC E083 of 2021 and the instant petition involves the same suit property being the gazette (PDP) No. R23/2001/3. He further submits that even though the individuals are different, they and the Petitioners represented the group Njoro Kiwanja Ndege Settlers thus same parties. He submits that the petition was an indirect attempt to re-litigate issues that had already been conclusively determined. He added that the court already upheld the 5th Respondent's right to the suit land. He relied on the case of E.T V Attorney General & another [2012] eKLR and Mumira V Attorney General [2022] eKLR. He urged the court to strike out the petition and application with costs.
6. Counsel for the Petitioner on the other hand filed his submissions dated 15th September, 2025 where he identified two issues for determination. The first issue was whether the present Petition offends the doctrine of res judicata. He relied on Section 7 of the *Civil Procedure Act* and the case of William Kabago Gitau V Ferdinand Ndung'u Waititu [2016] eKLR and argues that the parties in Nakuru ELC E083 of 2021 and those in the instant petition are different. He submits that the parties in the previous case were three officials of Njoro Kiwanja Ndege Welfare Association suing in their capacity as office bearers of the association. He submits that in the present petition, the petitioners are three individuals suing on their own behalf and on behalf of more than 300 settlers. He cited the case of John Florence Maritime Services Limited & Another V Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 eKLR and submits that the Petitioners were never parties to Nakuru ELCC E083 of 2021. It was his submission it is trite law that for res judicata to apply, the proceedings must be directly and substantially the same as those in the former suit. He argues that it was evident from the pleadings that the grievances advanced in the Petition are premised on distinct grounds. He further submits that the Petitioners contend that the Respondents violated their constitutional principles by allocating the property to Uhuru Welfare Association deliberately excluding the Petitioners. He added that the claims raise constitutional and administrative propriety that were not raised or adjudicated in ELC E083 of 2021.
7. He submits that the Petitioners invoked the doctrine of legitimate expectation from their occupation and the Respondents prior conduct that gave them a reasonable expectation of protection of their tenure. Counsel relied on the case of Cosmas Mrombo Moka V Cooperative Bank of Kenya Limited & Another [2018] eKLR and submits that the plea of res judicata collapses for want of similarity of issues in dispute.
8. On the final issue of costs, he urged the court to award the Petitioners costs for being vexed with an objection devoid of merit.

Analysis and Determination

9. This court has considered the preliminary objection and submissions and is of the view that the main issue for determination is whether the preliminary objection is merited.
10. In the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] E.A the court held as follows:

A preliminary objection 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.” “So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are on an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

11. In the case of *George Oraro V Barak Eston Mbaja* (Civil Suit 85 of 1992) [2005] KEHC 731 (KLR) 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”. Section 7 of the *Civil Procedure Act* provides 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.”

12. It is imperative for this court to establish whether the preliminary objection on res judicata as raised by the 1st and 2nd Respondent meets the threshold enumerated in the decision in *Mukisa Biscuits* (supra).
13. It was the 1st and 2nd Respondent’s contention that the Petition was res judicata by virtue of the judgment delivered in Nakuru E083 of 2021 which involved the same subject matter and parties. The Petitioner on the other hand while arguing on the contrary contends that the parties in Nakuru E083 of 2021 and the instant Petition are different hence the doctrine of res judicata fails.
14. It is my considered view that the 1st and 2nd Respondents having raised the issue of res judicata, this court would need to receive and interrogate the evidence, at least in the form of a copy of the judgment in Nakuru E083 of 2021, to determine if the said case was heard and determined on merit and to ascertain the issues raised therein.
15. In the case of *J N & 5 others V Board of Management, St. G School Nairobi & another* [2017] KEHC 9629 (KLR) the court held that:

a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit...where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.

Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

16. It is trite law that in a preliminary objection, one must not deal with issues of ascertainment of the facts. However, in the instant case, it is this court’s view that the issue of the existence of the previously determined suit ELC E083 of 2021 as alleged is a factual issue. In the circumstance, the same would require examination of facts and evidence to be availed before this court through the ordinary course of evidence by way of either viva voce evidence or affidavit evidence.



17. The upshot of the foregoing is that the issue of res judicata as raised is not a valid Preliminary Objection to the extent that the 1st and 2nd Respondent would need to supply the court with evidence by way of affidavits. The respondents ought to have filed an application to enable the court to ascertain the facts. Consequently, the preliminary objection is dismissed with costs in the cause. Orders accordingly. It is so ordered.

SIGNED BY/FOR:

HON. JUSTICE ANTONY O. OMBWAYO

**THE JUDICIARY OF KENYA. NAKURU ENVIRONMENT AND LAND COURT
ENVIRONMENT AND LAND COURT**

DATE: 2025-10-16 10:37:26

