



Oyatsi v Peony Management Company Limited & 3 others (Petition E033 of 2023) [2025] KEELC 7004 (KLR) (9 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7004 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

PETITION E033 OF 2023

JG KEMEI, J

OCTOBER 9, 2025

**IN THE MATTER OF ARTICLES 22(1) , 23 & 258 OF THE CONSTITUTION
AND IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OF
FUNDAMENTAL FREEDOMS UNDER ARTICLES 60(1) (B), 64, 66(1), 40
AND 27(1) (2) OF THE CONSTITUTION**

BETWEEN

DESTERIO OYATSI PETITIONER

AND

PEONY MANAGEMENT COMPANY LIMITED 1ST RESPONDENT

GAO YU INTERNATIONAL LIMITED 2ND RESPONDENT

STANLEY GIBSON KADIRI 3RD RESPONDENT

FURAHA MARWA 4TH RESPONDENT

JUDGMENT

1. The Petitioner herein filed a Constitutional Petition dated 27/6/2023 (hereinafter referred to as “the present Petition”) against the Respondents seeking for the following: -
 - a. A permanent injunction to restrain the Respondents jointly and/or severally from depriving or denying or howsoever interfering with the Petitioner’s security of his land rights over the Petitioner’s private land LR No. 330/561 Nairobi.
 - b. A permanent injunction to restrain the Respondents jointly and/or severally from unlawfully occupying or using, in any manner or howsoever the Petitioner’s private land LR No. 330/561 Nairobi.



- c. A mandatory injunction that the Respondents, jointly and severally, comply with the provisions of the Physical Planning and Land Act and do demolish or pull down and remove all illegal structures or developments that the Respondents unlawfully constructed on the Petitioner's land LR No. 330/561 Nairobi and thereafter restore the affected portion of the Petitioner's private land to its original state prior to the illegal construction.
 - d. The Respondents, jointly and severally, do pay compensation to the Petitioner for unlawfully enjoying land rights on the Petitioner's private land LR No. 330/561, Nairobi and for denying or depriving the Petitioner of his said land rights or security of land rights over or relating to the Petitioner's said private land LR No. 330/561 Nairobi from 1/1/2012 until the date when the Respondents will cease or stop the said violation of the Petitioner's Constitutional rights.
 - e. This Petition be consolidated and be heard and/or be determined together with High Court Petition No. E018 of 2021 filed by the 1st Respondent against the Petitioner and three others named therein concerning the same land and some of the matters raised herein.
 - f. The costs of this Petition or case be paid by the Respondents.
2. The grounds and/or facts upon which the Petitioner seeks the above-mentioned orders are that the Petitioner is the beneficial and/or registered owner of the property known as LR No. 330/561 Nairobi (hereinafter referred to as "the suit property"). The Petitioner asserts that the 1st Respondent owns the adjacent parcels of land known as LR Nos. 330/1348 and 1349 Nairobi. The Petitioner states that the suit property borders and abuts Hatheru Road, whereas the 1st Respondent's parcels border and abut both Hatheru Road on one side and Gitanga Road on the other.
 3. The Petitioner asserts that the Respondents have unlawfully encroached on his property, thereby breaching his land rights protected by the Constitution. The Respondents also constructed structures there without lawful authority and forcibly used the land as access to their own. He contends that this Court dismissed the Respondent's claim for an easement based on adverse possession in ELC No. 79 of 2020. Furthermore, the Court upheld his counter-claim in that case and ordered the 1st Respondent to compensate him for the unlawful constructions and encroachment.
 4. Pursuant to the Decree in ELC No. 79 of 2020, the Petitioner asserts that he took steps to demolish the illegal structures, but the Respondents obstructed him. He states that the Respondents also filed another suit before this court, being ELC Petition No. E18 of 2021, alleging that the Petitioner violated their rights by demolishing the said structures and interfering with their occupation. Based on this, the Petitioner seeks the said orders, asserting that the Respondents have committed the alleged unlawful and criminal actions both jointly and severally.
 5. The Affidavit of the Petitioner Desterio Oyatsi, sworn on 27 June 2023, further supports the Petition. The Petitioner reiterates the various legal provisions allegedly contravened by the Respondents, alongside the facts outlined in the Petition. The Petitioner has submitted the Decree issued in ELC No. 79 of 2020, marked "DO1", which shows that the 1st Respondent encroached upon his land. He maintains that the unlawful occupation and interference with the boundary features undermine his right to enjoy his land rights over the suit property. He asserts that the Respondents should recognise that, in the absence of a contractual agreement concerning the disposition of his interest in the suit property, and considering that their claim of adverse possession has been dismissed, their occupation remains unlawful.
 6. He further accuses the Respondents of illegally carrying out development without the necessary approvals. He adduces the Letter dated 14/12/2022, marked as "DO2," from the 1st Respondent in



- which it admits the encroachment and the portion thereof. He argues that if the Respondents had sought the requisite approvals, the development would have taken place on their land, but instead, they used the permits to erect structures on his land. He states that despite the provisions of the Physical Planning and Land Use Act, the Respondents have refused to demolish the illegal structures.
7. Further to the Decree, the Petitioner states that the Respondents are aware that their land is not landlocked. They claim that the court ordered the creation of an easement over his land under Section 98 of the [Land Registration Act](#). Based on this, the Respondents should have requested him to grant an easement. He argues that the Respondents know such a request would likely be refused, as their parcel is not landlocked and they can access it via Hatheru Road or Gitanga Road. He contends that, since the court did not grant the Respondents an easement under Section 140 of the [Land Act](#) and they have not complied with Section 98 of the same Act, they have no right to use his land to access their parcel. He submits photographs labelled "DO3" showing instances where hired goons, employed by the Respondents, pulled down his gate.
 8. To further support his claim, the Petitioner submitted a copy of the Survey Plan marked as "DO4," on which his parcel is labelled as 'A' and the Respondent's parcel as 'B'. The Plan clearly shows the location of Hatheru Road and demonstrates that Hatheru Road ends at the boundary of their respective parcels. He asserts that the Plan confirms the Respondents' land adjoins Gitanga Road on the northern side, providing an alternative exit for them. Additionally, he relies on a sketch plan illustrating the boundaries of the respective parcels and their routes to Hatheru Road.
 9. The Petitioner further accuses the 3rd Respondent of making false statements under oath in ELC Pet. No. E018 of 2021, claiming there is a shared road on his property which they are entitled to. He submits the Affidavit in that case as exhibit 'DO6'. Regarding the illegal structures, the Petitioner states that he sought permission from Nairobi County Government to demolish the swimming pool and boundary wall, which had been unlawfully built on part of his property by the Respondents. However, the demolition was not completed due to the lack of necessary equipment. Concerning the generator and guardhouse, the Petitioner asserts these were not demolished because of the electrical installations present in the generator house.
 10. The deponent asserts that the Respondents have unlawfully occupied his land and benefited from it since 2012 up to the present. He cites Section 103 (2) of the [Land Registration Act](#) and contends that the Respondent should compensate him for each day they have unlawfully occupied, and continue to do so. He states that the compensation should be calculated as a lump sum of Kshs. 5,000,000 and Kshs. 1,000 for each day the Respondents have unlawfully occupied the land from 2012 until the unlawful occupation ceases.

Response by the 1st, 3rd and 4th Respondents

11. The 1st, 3rd and 4th Respondents, in opposition to the Petition, filed a Replying Affidavit sworn by Mutua Patrick Nzioka, the Chairman of the Board of Directors of the 1st Respondent, dated 17/08/2023. The deponent states that they filed the suit ELC Case 79 of 2020 against the Petitioner, who also filed a Counter-claim. The issues raised herein are related to that suit, and the court has made a determination thereon. The deponent asserts that the Petition is fatally defective both in form and substance, having been lodged as an Appeal against the decision in ELC Nairobi Case No. 79 of 2020. He argues that the Petition is res judicata, given the court's judgment that finally declared the rights of the parties. Without an Appeal, the decision remains on record.



12. The Respondents contend that the Petitioner has incorrectly invoked constitutional provisions, as the remedies sought are civil in nature and could be obtained through a regular suit rather than a constitutional petition.
13. The deponent states that, in an attempt to undermine the issued Decree, the Petitioner unlawfully engaged the County Government of Nairobi, which later demolished part of the perimeter wall. The Petitioner's actions are the subject of ELC Petition No. E018 of 2021, a matter currently awaiting determination before this court. They oppose the prayer for consolidation of this matter with Petition No. E018 of 2021 on the basis that the issues raised are different.
14. The deponent further argues that no new issues are raised in the current Petition; nor are there any identifiable constitutional issues throughout the Petition that would warrant its admission and adjudication between the parties involved. He contends that the Petition does not meet the criteria of a Constitutional Petition and should therefore be dismissed.

Petitioner's Further Supporting Affidavit

15. In further support of the Petition, the Petitioner filed additional Affidavits dated 17/5/2024 and 3/7/2024, in which he stated that after filing this Petition, the Respondents began constructing the boundary wall on his land. He included photographs to substantiate this. He also states that the construction works and unlawful activities carried out by the Respondents are in breach of the temporary injunctive orders issued on 23/11/2023. To enforce compliance with the order, he closed the gate on his land to prevent the Respondents from using it to access the property. He claims that the Respondents forcefully pulled it down and continue to use the access road. The Petitioner attaches the Court of Appeal proceedings, in which the Respondents allegedly admitted that they continue to use the access road despite the issuance of injunctive orders.
16. The Petitioner further adduced minutes of the general meeting of the 1st Respondent held on 7/5/2022, in which he asserts that the respondents acknowledged that the Judgment of 30/11/2020 did not grant them any land rights at all. He avers that granting such rights would alter the measurements of his registered land. Concerning the minutes of the 1st Respondent's Annual General Meeting held on 7/5/2022, produced during the proceedings by the 4th Respondent on 8/12/2023, he states that the meeting discussed the boundary issue and that a select committee was appointed and tasked with engaging him on the matter. He further observes that if the Petitioner declines, the developer was to confirm the official boundary as indicated in the Survey Map. The minutes also show that the Respondent resolved to apply for an easement.
17. He asserts that, in accordance with the said Judgement and Section 98 of the [Land Registration Act](#), the Respondents may apply for an easement, and, subject to his agreement, it can be granted through a written easement instrument duly registered under the said statute.
18. The Petitioner claims that, due to the Respondents' ongoing unlawful use of his land, he values the generated benefits and the compensation owed to him at Kshs. 204,773,500/= as of 31/12/2024.

1st, 3rd and 4th Amended Answer to Petition and Counter-claim

19. In further response to the Petition, the 1st, 3rd, and 4th Respondents submitted an Answer to the Petition dated 15/8/2023, amended on 25/7/2024. They state that the constitutional provisions have been improperly invoked, as civil remedies are available to the Petitioner. Additionally, the cited statutory provisions are not considered fundamental rights under the Bill of Rights, and any claim of breach of these provisions can be addressed through a civil suit.



20. The 1st Respondent further aver that it filed ELC 79 of 2020 against the Petitioner, in which issues of encroachment on the boundary wall, its developments, and the easement enjoyed by the residents were addressed. They state that judgment was entered, and none of the parties appealed the decision. In view of the judgment entered on 30/11/2020, this petition is therefore res judicata. Furthermore, the issues raised herein were previously raised as a counterclaim and were duly adjudicated upon by the court, resulting in a final decision.
21. Alternatively, they pray for a declaration to be issued confirming their entitlement to a prescription order regarding the access road, which has existed for more than 20 years and has been used peacefully without interruption.

1st, 3rd and 4th Respondents Counter-claim

22. In their Counter-claim, the 1st, 3rd, and 4th Respondents state that in 2011, the 2nd Respondent sold 110 residential units to the 1st Respondent. At the time of purchase, the bona fide purchaser acquired various units within LR No. 330/1348 and 1349, which were clearly enclosed by a perimeter wall. A dispute later arose over the perceived encroachment of the boundary wall and the easement. This dispute led to the filing of ELC 79 of 2020.
23. The 1st, 3rd, and 4th Respondents assert that the Petitioner's own conduct acquiesced in the use of the access entrance as constructed, hence an order for prescription of the access road should be issued. They argue that the Petitioner is estopped from seeking any contrary relief. They therefore pray for the following orders.
 - a. A declaration to issue that the dispute between the parties herein was heard and determined by a Court of jurisdiction in Nairobi ELC No.79 of 2020.
 - b. A declaration that the Plaintiffs are entitled to the access road, which has been in existence for over 20 years.
 - c. Costs of the Petition.

1st, 3rd and 4th Respondents' Supplementary Affidavit

24. The 1st, 3rd, and 4th Respondents filed a Supplementary Affidavit dated 25 July 2024, sworn by Mutua Patrick Nzioka. In accordance with the judgment in ELC No. 79/2020, whereby the 1st Respondent was mandated to pay reasonable compensation, the area was appraised, and the quantum of compensation was determined to be Kshs. 11,500,000/= as per the Court Order issued on 4 March 2024 by Justice Oguttu Mboya. Subsequently, the Petitioner furnished his bank details via the letter dated 20 March 2023, and the payment was duly remitted.
25. The deponent further affirms that the previous owner of land parcels No. 330/1348 and 1349, in Nairobi, where Peony Estate was constructed, informed him that in 2006, prior to selling the property to the 2nd Respondent, the Petitioner was granted a Consent to realign the boundary, which he failed to do. The said Consent is presented as exhibit "MPN 2." He contends that the Petitioner acquiesced to the construction of the Estate and all associated developments, which were purchased by the residents of the 1st Respondent, without any notice of defects in title or value.

Petitioner's Supplementary Affidavit

26. In response to the Respondent's Amended Answer to the Petition and the assertions contained in their Supplementary Affidavit, the Petitioner filed a Supplementary Affidavit sworn on 30/7/2024.



The Petitioner states that the land subject to these proceedings was registered under the repealed Government [Land Act](#), and the title to the land was, and remains, protected under Section 107 of the [Land Registration Act](#) and Section 162 of the [Land Act](#).

27. He argues that the consent presented as exhibit “MPN 2” was not registered under the repealed [Land Act](#). Therefore, the court cannot rely on it to effect any transfer or disposition of his land rights over the said portion. He also reiterates that the Respondents recognised the existence of official boundaries between the two parcels in their meeting of 7/5/2022, as evidenced by the minutes arising from it.
28. The Petitioner maintains that the official boundary of their land is registered and protected under the [Survey Act](#) and the [Land Registration Act](#). He contends that the 1st Respondent’s claim, which was dismissed in ELC No. 79 of 2020, is barred from bringing a new claim of land rights over their property.
29. The 2nd Respondent did not participate in the proceedings.
30. By consent of the parties, the Petition was canvassed through Affidavit evidence with cross-examination of the Petitioner. The Petitioner testified on 7/4/2025.

Petitioner’s evidence

31. The Petitioner, Desterio Oyatsi, testified as PW 1 and was the only witness supporting his case. In his evidence-in-chief, he stated that he filed the petition to protect his right to the property in question. He explained that despite a judgment being entered in his favour and a decree issued in ELC 79 of 2020, the Respondents have continued to occupy the land. He asserted that this petition is therefore to satisfy the said decree.
32. He stated that the court has the authority to order compensation because the Respondents have deprived him of the use of his land. He asserted that he had not given consent to any easement on his property.

Cross-examination by counsel for the 1st and 3rd Respondents

33. During cross-examination by counsel for the 1st and 3rd Respondents, the Petitioner stated that he acquired the land in 2001/2002 after conducting due diligence. He asserted that the title remains unchanged since then. He also mentioned that he discovered the encroachment prior to filing the suit in 2020. Additionally, he confirmed the existence of the consent to have the boundary marked with its designated beacons. However, he could not recall the exact date of the consent, as he was not a party to it.
34. PW 1 confirmed that he had not lodged an appeal against the judgment issued on 30 November 2020 in ELC 79 of 2020, as he was not aggrieved by it. He referred to the judge’s directions in the Judgement, which stipulated that a valuation be conducted and that compensation be payable to the defendant. He confirmed that he had filed an application before Justice Mboya, who granted his request for a payment of Kshs. 11.5 million, a sum he has received. He stated, however, that he is currently before the court because the respondents continue to encroach upon his property. He further mentioned that following the payment, the respondents were expected to vacate his land.
35. During cross-examination by Counsel for the 4th Respondent, the Petitioner confirmed that the 1st Respondent is a legal entity capable of suing and being sued. He stated that the 4th Respondent is one of the apartment owners. The Petitioner testified that the 4th Respondent uses his land to access his apartment, although he is not the only one. He argued that the 4th Respondent swore the Affidavit in his capacity as an officer of the 1st Respondent and that he sued him personally. He averred that the officials of the 1st Respondent are now elected. It was his testimony that, at the time of initiating



this suit, the 4th Respondent was no longer an officer of the 1st Respondent. He asserted that the 4th Respondent was sued because of his individual responsibility for using his land. He maintained that the money he received was for compensation in accordance with the Decree in the previous suit.

36. During re-examination, the Petitioner confirmed that he signed the consent attached to the Supplementary Affidavit sworn by Patrick Mutua Nzoka. He stated that the boundary was to be restored to its original position. He maintained that there are no rights of encumbrance registered against his property. The Petitioner then concluded his case.

Parties Submissions

37. The court directed the parties to file their submissions in support of their respective cases. The Petitioner's submissions are dated 28/5/2025, 02/4/2025, and 26/6/2025. The 1st and 3rd Respondents' submissions are dated 23/6/2025, while the 4th Respondent's submissions are dated 24/6/2025.
38. The court has considered the respective submissions accordingly.

Analysis and determination

39. Having considered the Petition, the supporting Affidavit thereto, the responses in opposition to the Petition as well as the rival submissions by the parties, it is my considered view that the issue that arises for determination are;
- a. Whether the petition herein is res judicata;
 - b. Whether this Petition offends the doctrine of constitutional avoidance
 - c. Whether the Petitioners are entitled to the reliefs sought
 - d. Costs of the petition.

Whether the Petition herein is res judicata;

40. The principle of res judicata is provided in Section 7 of the *Civil Procedure Act* 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.”
41. The Supreme Court in Kenya in the case of Commercial Bank Limited vs. Muiri Coffee Estate Limited & another (2016) eKLR explained the doctrine of res judicata as follows:
- “(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights...”
42. Similarly, the Supreme Court in the case of John Florence Maritime Services Ltd & Another – vs- Cabinet Secretary for Transport & Infrastructure & 3 others (2021) eKLR, affirmed the issue of res judicata in reference to constitutional Petitioners and stated that;



54. The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine 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.
55. It emerges that, contrary to the respondent’s argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of *res judicata* is not affected by the substantial-justice principle of Article 159 of *the Constitution*, intended to override technicalities of procedure. *Res judicata* entails more than procedural technicality, and lies on the plane of a substantive legal concept.
56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of *res judicata*, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):
57. The principle of finality or *res judicata* is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted in the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”
43. The Court went on to observe that:
- “For *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.”
44. Odunga, J (as he then was) in the case of Gladys Nduku Nthuki – vs- Letshengo Kenya Ltd (2022) eKLR, made reference to a number of decided cases in his exposition. Explaining the rationale of the doctrine, he referred to the Court of Appeal decision in IEBC – vs- Maina Kiai & 5 Others (2017) eKLR, where the court stated that;
- “The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectra of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”



45. Justice Odunga further noted that the Court of Appeal in the Maina Kiai case had quoted with approval the Indian case of Lal Chand – vs- Randha Kishan Air 1977 SC 789 that had discussed the rationale of res judicata in the following words;

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”

46. Regarding the applicability of the doctrine of res judicata in constitutional petitions, Mumbi Ngugi, J. (as she then was) in the case of Tassia Plot Owners Association – vs- Managing Trustees of NSSF & Another (2015) eKLR, made reference with approval to the decisions of Lenaola J (as he then was) in the case of Okiya Omtata Okuiti & Another –vs- The A.G. & Another Petition No. 593 of 2013, where he stated that;

“While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights- based litigation and the reason is obvious.”

47. In the case of Wycliffe Gisebe Nyakina –vs- AG & Another Petition No. 403 of 2014, the learned Judge stated that;

“While the courts in constitutional litigation must apply the principle of res judicata sparingly they must also be vigilant to guard against litigants who are clearly evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the same court.”

48. The conclusion of the above holdings by Lenaola J (as he then was) is that the principle of res judicata applies in constitutional petitions just as in civil suits.

49. It is clear from the materials submitted to this court that the Petitioners' claim against the Respondents concerns an alleged encroachment on his property, thereby breaching his land rights as set out in *the Constitution*. The Petitioner testified that the purpose of this petition is to protect his right to property regarding the suit land. Despite a judgment delivered in his favour and a decree issued in ELC 79 of 2020, the Respondents have continued to occupy the land.

50. The Respondents, on the other hand, contend that the petition herein raises issues that have already been determined within ELC 79 of 2020. They assert that the issues of encroachment were addressed in the aforementioned case.

51. In its judgement in ELC 79 of 2020, the court made the following conclusive findings;

“30. The Plaintiff argued that the Defendant had acquiesced and allowed the Plaintiff to use his land as an access road for 23 years without leading any evidence on how it arrived at the 23 years. The statutory period for the creation of an easement under Section 32 of the *Limitation of Actions Act* is 20 years. The Plaintiff pleaded that the homeowners in Peony Estate bought the apartments in 2012, which was eight years before this dispute arose.



The Plaintiff's claim to a right of easement or adverse possession over the Defendant's land brought under the *Limitation of Actions Act* fails.

31. The Court agrees with the Plaintiff that the Defendant acquiesced and slept on his rights when he allowed the Plaintiff to use his land to access Hatheru Road from the time Peony Estate in 2012 was constructed up to now. The Defendant by his conduct acted in a manner that may fairly be regarded as a waiver of his claim to the portion of his land that the Plaintiff's development encroached on. Until November 2019, he neglected to ascertain where the beacons of his land were. The Defendant who acquired his own land in 2002 must have known about the development of Peony Estate next to his property. It would be unreasonable for the Defendant to demand to have part of the Plaintiff's development demolished so that the Plaintiff can create an access from its land directly to Hatheru Road for its use. The Defendant's delay in asserting his remedy and lapse of time militate against the Defendant being granted the orders he sought in the counterclaim. In light of the nature of the Plaintiff's development on the land, and without any other access to Hatheru Road, it would not be fair to grant the reliefs the Defendant sought.
32. The order that commends itself to the court is for the parties to have an easement created in favour of the Plaintiff for the portion of the Defendant's land which the Plaintiff has been using to access Hatheru Road in accordance with Section 98 of the *Land Registration Act*. The Plaintiff will pay consideration for the creation of the easement.
33. For the portion of the Defendant's land that the Plaintiff's development has encroached on, parties are directed to undertake a valuation of the land affected within 60 days of the date of this judgment, with a view to determining its value for purposes of the Plaintiff compensating the Defendant. If parties do not agree on the value of the portion affected within this timeframe, they will file submissions for the court to determine the reasonable compensation payable to the Defendant.
34. The Defendant is awarded the costs of the suit. The Plaintiff will also meet the costs for the valuation and for the preparation and registration of the easement.

52. Without unduly emphasising the matter at hand, it is beyond dispute that the issues presented in the Petition resemble those in Nairobi ELC 79 of 2029 in all four aspects. In the absence of an appeal, the decision remains binding on the parties involved. Furthermore, the Petitioner does not deny having received the compensation.

53. This court finds that the Petitioner's purpose in filing this petition is to re-litigate an issue that has already been resolved by a court with proper jurisdiction, simply by giving it a superficial rebranding and calling it a constitutional petition. The petition is res judicata and therefore constitutes an abuse of the court's procedural process.

Whether this Petition offends the doctrine of constitutional avoidance

54. Assuming the Court is wrong on the first issue, is there a proper Petition before the court's? A constitutional petition is not the appropriate forum to settle contested ownership disputes over properties if another lawful method exists. This is known as the doctrine of constitutional avoidance.



The reason for this doctrine is that, in a case like this, the court is generally asked to identify violations of or threats to fundamental rights rather than to decide disputes over property ownership between competing parties.

55. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others* [Petition 14, 14A, 14B & 14C of 2014 [Consolidated]] [2014] KESC 53 [KLR] [29 September 2014] [Judgment] discussed the principle of Constitutional avoidance 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 entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 [3] SA 867 [CC] the Constitutional Court Kentridge AJ, 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 U.S. 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 U.S.288, 347 [1936]].

258. From the foundation of 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.”

56. The doctrine of constitutional avoidance fundamentally holds that if a legal remedy exists to resolve a dispute, a court acting as a constitutional court does not have the jurisdiction to hear and decide on that dispute. The party should rely on and pursue the appropriate forum to settle the matter. This applies regardless of whether the time to approach that other forum has expired when the issue is raised. It is the responsibility of the party, who should have used that other forum, to have done so within the allotted time, rather than disguising the issue as a constitutional one to avoid the time limit. The passage of time, to the extent that it makes the claim time-barred in that other forum, does not turn the issue into a constitutional matter.

57. The Petitioner has accused the Respondents of continuous encroachment on his property despite the Decree issued in ELC 79 of 2020. In my view, the Petitioner is alleging ongoing trespass by the Respondents onto his land. The primary issue, and the core of this dispute, is whether there is an ongoing trespass on the Petitioner’s land.

58. The court in *Valentine Odhiambo & 2 others –vs- HF Development & Investment Ltd & Another* [2021] eKLR, struck out a petition because it attempted to constitutionalize an ordinary civil matter, offending the doctrine of constitutional avoidance.

59. The issue of encroachment is one that the law allows to be addressed through the institution of a suit to be adjudicated by the Court sitting in its civil jurisdiction, as specified, rather than as a constitutional matter through a constitutional petition. To resolve such an issue, evidence would be presented at trial for the court to decide.



60. In light of the above reasons, this Court finds that the Petition is not only res judicata but also conflicting with the doctrine of constitutional avoidance.

Whether the Petitioners are entitled to the reliefs sought

61. The Petitioner has requested several orders in the Petition. The Court, having determined that the Petition is res judicata and that it contravenes the doctrine of Constitutional avoidance, finds it has no jurisdiction to grant the orders sought.

62. I, however, observe that one of the prayers requested is for this petition to be consolidated with Petition ELC No. E018 2021. Consolidation of matters should have been sought as an interim order rather than a final one. It goes without saying that the parties did not address the court on this matter, and therefore, I hasten to make no orders in this regard.

63. Final orders for disposal;

- a. In conclusion, the court finds that this petition is res judicata. Secondly, the constitutional jurisdiction of the court has been improperly invoked in an otherwise civil matter that can be resolved through a civil suit.
- b. The Petition is hereby dismissed in its entirety.
- c. The Petitioner shall meet the costs of the Petition.

64. It is so ordered..

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF OCTOBER 2025 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mr Otieno for the Petitioner

Ms Wangoi HB for Mr Nyagaka for the 1st and 3rd Respondents

N/A for the 2nd Respondent

Wangoi HB for Mr Chisengo for the 4th Respondent

C/A – Ms Yvette Njoroge

