REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CONSTITUTIONAL PETITION NO. E008 OF 2025

IN THE MATTER OF ARTICLES 6(3), 22, 23, 50, 157 AND 165 OF THE CONSTITUTION

AND

IN THE MATTER OF CONTRAVENTION OF SECTION 3(1) AND 4(2) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT

AND

IN THE MATTER OF A THREAT TO THE RIGHTS OF ACCUSED PERSONS CONTRARY TO ARTICLES 25(C), 47, 48 AND 50 OF THE CONSTITUTION

SIMON KACHAPIN KODOMUK.....1ST PETITIONER
MARY CHEPTUR NGORIAKES.....2ND PETITIONER
MATHEW PKANAN ARUSIO.....3RD PETITIONER
FRANCIS KIPKEMOI TIKOL.....4TH PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT
THE ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

RULING

1. This Ruling is in respect to a Preliminary Objection based on an allegation of ***Res Judicata***, and/or whether this Court is ***functus officio***, there being in existence, a Ruling already rendered in a related matter by my brother, **Nyakundi J**.

2. The Petitioners are former officials of the County Government of West Pokot, while the 2nd Respondent is the body constitutionally mandated to investigate and prevent corruption, economic crimes and related offences. In execution of its duties, the 2nd Respondent, upon conducting investigations over allegations that some officials of the County Government had embezzled funds allocated to bursary programs, demanded a refund of Kshs 297,299,150/- from the Petitioners, being allegedly monies embezzled as aforesaid. The Respondents then instituted prosecution of the Petitioners in **Eldoret MCACEC No. E004 of 2024** before the Chief Magistrate's Court at Eldoret. In response, the Petitioners challenged the Respondents' decision to charge them at Eldoret, instead of Kapenguria. Pursuant thereto, the Chief Magistrate **Hon. D. Mikoyan** formulated issues for consideration on the objection which he then remitted to the Presiding Judge at this Eldoret High Court for determination. As a result,

the file, **Eldoret High Court Criminal Revision No. E009 of 2025** was opened on or about 14/02/2025. From the record, I gather that the issues framed were premised as follows:

a) **The Court frames an issue for the Presiding Judge High Court Eldoret to give guidance on whether this Court has locus and otherwise, jurisdiction to hear and determine the charges herein.**

b) **Upon the Presiding Judge's directions, this Court will then proceed to determine issues (b) and (c) should this Court be found to have jurisdiction to hear and determine the charges.**

c) **Matter be mentioned on 20/03/2025 before this trial Court for directions and virtual Court option is available. Accused's bond extended.**

d) **File be placed before Hon. Deputy Registrar within next 24 hours.**

3. However, subsequently on or about 10/03/2025, the Petitioners, separately filed their own action before this Court, namely, the Constitutional Petition instituted as **Eldoret High Court Constitutional Petition No. E008 of 2025**, in which they sought declarations as follows:

a) **A declaration that the obligation of the State in Article 6(3) of the Constitution applies to the judiciary disregarding the constitutional imperative of decentralization of services.**

b) **A declaration that the decision of the DPP and the EACC to charge the Petitioners in the Chief Magistrate's Court in Eldoret yet there is a fully fledged Court at Kapenguria violates Article 48 of the Constitution.**

c) **A declaration that the decision of the DPP and the EACC to charge the Petitioners in the Chief Magistrate's Court in Eldoret yet there is a fully fledged Court at Kapenguria violates Section 4(2) of the Anti-Corruption and Economic Crimes Act.**

d) **A declaration that the Respondents violated Article 50(2) of the Constitution by subjecting the Petitioners to trial before a Court that lacked proper jurisdiction.**

e) **A declaration that the DPP violated Article 157(11) by exercising prosecutorial powers without due regard to access to justice, public interest, the interests of justice, and the need to prevent abuse of the legal process.**

f) **An order directing the DPP and EACC to withdraw the charges from the Chief Magistrate's Court at Eldoret and institute at the Chief Magistrate Court at Kapenguria.**

In the alternative to prayer F;

g) **An order to issue transferring the entire file in *Eldoret MCACEC E004 Of 2024: Republic Versus Simon Kodomuk And 3 Others*, from Eldoret Law Courts to Kapenguria Law Courts in line with Article 6(3) and 48 of the Constitution, Section 4 of the Anti-Corruption and Economic Crimes Act, 2003, and Section 81 of the Criminal Procedure Code.**

h) **The Respondents to bear the costs of the Petition.**

4. The Petition does not however disclose whether the Petitioners, while filing this Petition, were aware of the existence of the earlier commenced **Eldoret High Court Criminal Revision No. E009 of 2025**. Be that as it may, the Presiding Judge, **R. Nyakundi J**, on 2/09/2025 rendered his Ruling in **Eldoret High Court Criminal Revision No. E009 of 2025**, in which found no justifiable reason to find fault with the criminal case being tried at the Chief Magistrate Court at Eldoret, instead of Kapenguria, in West Pokot County.

5. One would have ordinarily expected that by the said Ruling rendered by **Nyakundi J** in **Eldoret High Court Criminal Revision No. E009 of 2025**, the instant action, namely, **Eldoret High Court Constitutional Petition No. E008 of 2025**, would have also fallen by the wayside considering that the issues in both proceedings and determined appeared, on the face thereof, to have been the same and/or similar. This was however not to be. I say so because when this matter came up before me for directions on 17/04/2025, which incidentally was the first time that this Court was being informed of the existence of **Eldoret High Court Criminal Revision No. E009 of 2025**, as well the said Ruling rendered by **Nyakundi J** on 2/09/2025, **Mr. Peter Wanyama**, appearing for the Petitioners, insisted on proceeding with this matter. **Mr. Lucas Tanui**, appearing for the 1st Respondent, and **Ms. Githinji**, appearing for the 2nd Respondent, had accused the Petitioners of material non-disclosure in that when filing the Petition, they concealed from the Court the fact of the existence of the said **Eldoret High Court Criminal Revision No. E009 of 2025**, and also the subsequent delivery of the Ruling rendered by **Nyakundi J** on 2/09/2025. **Mr. Wanyama**, in response, denied that his clients failed to disclose material facts and submitted that the Chief Magistrate, on his own, framed an issue before the Presiding Judge, which

step the Petitioners found to be strange as it is not an avenue known in law. He acknowledged "seeing" the Ruling by **Nyakundi J** and stated that his clients had since filed a Notice of Appeal against it. According to him, that Ruling is not binding on this Court, is merely persuasive, and this Court should not follow it.

6. In the circumstances, I gave the Respondents leave to file formal Notices of Preliminary Objections upon which this Court would then make a determination. Pursuant thereto, the 1st Respondent, through **Mr. S.G. Thuo, Principal Prosecution Counsel**, filed the Notice of Preliminary Objection dated 19/09/2025, premised as follows:

> **"….. the 1st Respondent shall move the Honourable Court at the hearing of this matter …. to have this matter dismissed pursuant to the Ruling delivered on 2/09/2025 by R. Nyakundi J sitting at the Eldoret High Court vide Eldoret HCCCREV No. E009 of 2025 …… that was based on the same set of facts that has effectively rendered the present matter to be res judicata and spent."**

7. By the consent of the parties, it was agreed that the Preliminary Objection be heard and determined first. Pursuant thereto, the same was canvassed by way of written Submissions. The Petitioner filed the Submissions dated 19/09/2025, while the Petitioner filed the Submissions dated 16/10/2025. On the part of the 2nd Respondents, I have not come across any Submissions filed by or on its behalf in respect to the Preliminary Objection, either in the physical Court file, or in the Judiciary Case Tracking System (**CTS**).

1st Respondent's Submissions

8. **Mr. Thuo**, Counsel for the 1st Respondent basically submitted that in light of the Ruling by **Nyakundi J** dismissing the contentions raised by the Petitioners, this action is now spent, and the Court is ***functus officio***. He cited the Supreme Court decision in the case of **Odinga vs Independent Electoral and Boundaries Commission & 3 Others (2013) KESC 8 KCR (CIV)**, and also the Court of Appeal case of **Telkom Kenya Ltd vs John Ochanda [2014] eKLR**. He urged that allowing the current proceedings to continue would be inviting this Court to occasion upon itself judicial embarrassment and ridicule, and would set a very bad precedent within the legal circles whose damage would last for decades to come.

Petitioners' Submissions

9. On his part, **Mr. Wanyama** submitted that the trial Court, instead of deciding on the point of law challenging the territorial jurisdiction of that Court to preside over the matter, ***suo motu***

referred the matter to the High Court. Regarding the Ruling rendered by **Nyakundi J** in **Eldoret High Court Criminal Revision No. E009 of 2025** on the reference initiated by the trial Magistrate, he submitted that it was rendered without the Petitioners' being heard or accorded any notice of the proceedings. On the submission that this action is now ***functus officio*** or ***res judicata***, he urged that the Petition raises fresh Constitutional questions, and more importantly, the Petitioners were not parties to those proceedings, and were never afforded an opportunity to be heard. He thus termed the Preliminary Objection as resting on an irregular and procedurally defective Ruling that cannot lawfully oust this Court's jurisdiction. He then contended that the Preliminary Objection fails to meet the legal threshold under **Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd (1969) EA 696** as it raises factual issues that require evidentiary scrutiny. On the allegation of ***Res Judicata***, Counsel cited **Section 7** of the **Civil Procedure Act**, and submitted that the Petition herein concerns violation of the Petitioners' constitutional rights to a fair trial, access to justice, and due process, issues that were never heard or determined in **Eldoret High Court Criminal Revision No. E009 of 2025**, that the Petitioners were not parties to that reference and were never accorded a hearing before the Ruling was rendered. He cited the Supreme Court case of **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport & Infrastructure & 3 Others [2021] eKLR**, in which, he submitted, it was held that application of ***Res Judicata*** should not defeat the ends of justice.

10. In response to the submission that the matter had been heard and finally determined, Counsel denied that this is the position since the High Court never heard the parties, or considered their respective positions, and that the Ruling of **Nyakundi J** was not a determination on the substance of the Petitioner's constitutional grievances but rather, on a procedural application that did not resolve the alleged violation of fundamental rights. He thus maintained that the Ruling **J** does not operate to bar these proceedings but the same remains properly before this Court for substantive determination. In respect to limitations on application of the doctrine of ***functus officio***, Counsel cited the case of **Raila Odinga v IEBC & Others (Supreme Court)** and **Jersey Post Ltd v Al Thani**. He urged that the Petition does not seek to reopen, revise, or appeal the decision in **Eldoret High Court Criminal Revision No. E009 of 2025**, and further cited the case of **Kenya Commercial Bank v Benjoh Amalgamated Ltd [2017] eKLR**, and also the case of **Gichuhi & Another (suing as the managers of the estate of Margaret Wanjiru Gichuhi) Wanjohi & 5 Others [2022] KEECL 13697 (KLR)**.

Determination

Eldoret High Court Constitutional Petition No. E008 of 2025

11. The issue for determination herein is "**whether the Ruling rendered in Eldoret High Court Criminal Revision on 2/09/2025 rendered this Petition as spent, whether, as a result, the matters herein are now *Res Judicata*, and thus, whether, as a consequence, this Court is now *functus officio***."

12. The import of Preliminary Objections was restated by the Supreme Court in the case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR,** in the following terms:

> **"… The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."**

13. Before I interrogate the merits of the Preliminary Objection, I need to first address the question whether the challenge raised meets the threshold for what should constitute a "***Preliminary Objection***". In that respect, the Supreme Court, in the case of **Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others**, while following the oft-cited decision of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696,** restated the following:

> **"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 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 … 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".**

14. The challenge raised by the 1st Respondents being one that touches on the doctrine of ***Res Judicata***, and thus by extension, this Court's jurisdiction, there is no doubt that it, indeed,

fits well within the circumstances contemplated as constituting a "Preliminary Objection". All that this Court requires to look at is the Ruling rendered in **Eldoret High Court Criminal Revision on 2/09/2025**. I thus disagree with Counsel for the Petitioners' contention that this mere act of perusing that Ruling is akin to this Court interrogating factual issues, and thus amounting to evidentiary scrutiny. In any case, the Petitioners do not deny the existence of that Ruling, or its contents. The 1st Respondent therefore easily surmounts this first hurdle.

15. Regarding merits of the Preliminary Objection, the doctrine of ***Res Judicata*** is described in **Section 7** of the **Civil Procedure Act** in the following terms:

> **"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."**

16. On its part, the **Black's Law Dictionary 10th Edition** defines ***"Res Judicata"*** in the following terms.

> **"An issue that has been definitely settled by judicial decision … the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties…"**

17. In determining whether a matter or suit is ***Res Judicata***, the Court of Appeal in the case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR,** pronounced itself as follows:

> **"[F] or the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;**
>
> **a) The suit or issue was directly and substantially in issue in the former suit.**
>
> **b) That former suit was between the same parties or parties under whom they or any of them claim.**
>
> **c) Those parties were litigating under the same title.**

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

18. The Court went further to state as follows:

"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre 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 commonsensical 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 or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

19. From the foregoing, it is clear that for a matter to be termed ***Res Judicata***, the matters in issue must be similar to those which were previously in dispute in a previous between the same parties, and the same have been determined on merits by a Court of competent jurisdiction. It is also the position that the doctrine of ***Res judicata*** exists to protect parties from being endlessly dragged into litigation over the same issue or subject matter that has already been conclusively determined by another Court.

20. In his said Ruling, **Nyakundi J** found as follows:

"11. In the instant case there is absolutely no evidence that the Chief Magistrate Hon. Mikoyan is not a gazetted Judicial Officer under Section 4 of the *Anti-Corruption and Economic Crimes Act*. It is also necessary to mention that as a senior ranking Judicial Officer he also has by dint of the law personam and subject matter jurisdiction. The bone of contention is on the canon of the local area where the alleged offence was committed. It is about geographical and territorial contestation by the accused persons. Whether this matter is tried at Eldoret or at the local area in West Pokot, the system of law applicable remains the same. It is also of significance that I have had the privilege of crisscrossing Uasin Gishu, West Pokot and Turkana Counties as a circuit Judge for Lodwar High Court. From the record the accused persons were arraigned in court on 24th September

2024 and to the best of my knowledge West Pokot County had no Judicial Officer duly appointed by the Chief Justice in consonant with Section 4 of the enabling statute.

.....

14. **As I said earlier elsewhere in this ruling, the burden of proof rests on the Applicants or Accused persons to show that the other forum is clearly or distinctly more appropriate than Eldoret Law Courts. It will be the duty of the Director of Public Prosecutions working in collaboration with the Anti-Corruption Commission to mitigate factors that include availability of witnesses, convenience and expenses incurred to meet the threshold of the trial being commenced and concluded within a reasonable time. Regard must also be had that the concept of local area or district has now been flattened by the adoption of Virtual Courts. In formulating the components of virtual courts under the Blueprint - Social Transformation through Access to Justice by the Chief Justice there is now Mahakama Popote throughout the Republic capable of being used by litigants of all levels with less limitation.**

15. **The question which lingered in my mind as I internalized the reference made by the Chief Magistrate of this Court is about the two doctrines or concepts to wit; that Eldoret Magistrate's Court is a forum non-competens to try the 29 counts particularized in the charge sheet as against the accused persons and the same should be replaced with the Forum Conveniens in West Pokot County described as the local area where the offences were committed. Therefore, is the forum more convenient and preferable for serving the ends of justice? In my true appreciation of the issues raised in this application the notion of the ends of justice runs through for the jurisdiction of the learned Chief Magistrate at Eldoret has not been invoked irregularly."**

16. **For all the foregoing reasons, the Applicants/Accused persons motion to dismiss Eldoret Chief Magistrate's Court as a Forum Non Conveniens lacks merit in its entirety and the session Chief Magistrate Hon. D. Mikoyan is properly seized of personam and subject matter jurisdiction to hear and determine issues in the information of the charges preferred by the Director of Public Prosecution. The motion is lost and the Chief Magistrate shall expedite the trial of the accused persons to meet the threshold of Article 50 2 (e) of *the Constitution*.**

21. Looking at this matter, I have no hesitation in finding that all the elements of ***Res Judicata*** are present in it. The issue still intended to be litigated in this Petition is the same that was directly in issue before **Nyakundi J** in **Eldoret High Court Criminal Revision No. E009 of 2025**, which was between the same parties litigating under the same title. Further, **Nyakundi J** finally determined that same issue in the said **Eldoret High Court Criminal Revision No. E009 of 2025**, and the Judge was also competent to so determine the issue as he did.

22. Of course, **Mr. Wanyama** contended that the application of ***Res Judicata*** is excluded herein because the Chief Magistrate ***suo motu*** referred the matter to the High Court, and the High Court, too, never invited the parties to address it or make submissions, and thus the parties were never heard before the High Court rendered its decision. While this appears to be a persuasive argument, it does not change the fact that the Ruling by **Nyakundi J** remains a valid and binding decision of the Court, and until it is set aside, either on Review or by the Court of Appeal, it possesses the full of force of the law, and must be recognized.

23. Further, even if the Ruling of **Nyakundi J** is deemed as not giving rise to a finding of ***Res Judicata*** within the strict meaning of that term, this Petition would still be caught up by the closely related principle of ***Issue estoppel***. This principle was explained by the House of Lords in the case of ***Arnold & Others v National Westminister Bank PLC (1991) 2 A.C*** in the following terms:

> "**Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."**

24. The ***Issue estoppel*** principle therefore prevents a party from re-litigating an issue of fact or law that has already been determined in earlier proceedings between the same parties or their privies, or which ought to have been brought or raised at the same time with the rest, even if the subsequent proceedings involve a different cause of action. Like ***Res Judicata*** therefore, ***Issue estoppel*** bars a party from asserting a fact that is contrary to a previous determination made by the Court. The basis thereof, as the old age says, is that "***there must be an end to litigation***"

25. What **Mr. Wanyama** is asking me to do is to interrogate and review the decision of my brother **Nyakundi J** so as to reach the decision that the same was arrived at unprocedurally

and against the tenets of fair trial, and I should thus ignore it, and treat it as non-existent. That, I decline to do! Reviewing the decision of a Court of concurrent jurisdiction would be tantamount to this Court sitting as an Appellate forum on the decision. The law abhors the practice of a Judge sitting to review a judgment or decision of another Judge of concurrent jurisdiction. I do not possess jurisdiction in that respect and as such, any argument to the contrary must fail. I therefore find that the High Court at Eldoret, through **Nyakundi J**, having already pronounced itself in the matters before this Court, is now ***functus officio*** and bereft of the jurisdiction to re-open the same decision it had already dealt with, for fresh litigation.

Final Orders

26. In the circumstances, I rule and order as follows:

i) The Notice of Preliminary Objection dated 19/09/2025 is upheld. Consequently, the Petition herein dated 7/05/2025 is struck out.

ii) As costs follow the event, the 1st Respondent is awarded the costs of the Petition.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF NOVEMBER 2025

……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Mr. Sakari Kibiti h/b for Peter Wanyama for the Petitioner
Ms. Baithahu h/b for Ms. Githinji for the 1st Respondent
Ms. Muriithi for the 2nd Respondent
Court Assistant: Brian Kimathi