



**Ododa v Mitei & 3 others (Environment and Land Petition E003 of 2024)
[2025] KEELC 8060 (KLR) (20 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 8060 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND PETITION E003 OF 2024**

E ASATI, J

NOVEMBER 20, 2025

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 3, 10, 11, 12, 20, 21, 22, 23, 25, 27, 28, 29, 40, 43, 47, 48, 50, 53, 54, 55, 57, 64, 73, 75, 156, 159, 160, 161, 162, 165, 243, 244, 258, 259, 260, AND 264 OF THE CONSTITUTION OF KENYA 2010, AS READ TOGETHER WITH SECTIONS 70, 74, 75, 77, 82 & 84 OF THE REPEALED CONSTITUTION

AND

2.

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT NO.19 OF 2011

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO.3 OF 2012

AND

IN THE MATTER OF LAND ACT NO.6 OF 2012

AND

IN THE MATTER OF L.R. NO.6030/2 (I.R. NO.67092)

BETWEEN

WILLIAM AUDI ODODA PETITIONER

AND

JOSEPH KIPKOECH MITEI 1ST RESPONDENT

SIRERET FARMERS LIMITED 2ND RESPONDENT



JUDGMENT

The pleadings

1. The petitioner approached this court vide the petition dated 5th April, 2024 seeking for the following relief;
 - a. A declaration that the Honourable Court in H.C.C. No.66 of 1978 did not have jurisdiction upon the demise of Fredrick O. Odundo due to abatement and that all the proceedings and orders issued after abatement are null and void ab initio;
 - b. A declaration that the acts and omissions of the police, the District Commissioner and the Chiefs (the provincial administration) violated the Petitioner's and his family's equal protection of the law;
 - c. A declaration that the illegal, inhumane forceful eviction was in violation of the Petitioner's and his family's rights to equality before the law, human dignity, security, right to property, right of children, rights of the elderly and persons with disability and rights of persons living with HIV/AIDS enshrined in Article 26, 27, 29, 40, 43, 53, 54, 46 and 57 as read with Article 19, 20, 21 and 22 of *the Constitution* of Kenya, 2010;
 - d. A declaration that the eviction and occupation by the 1st and 2nd Respondents of the suit land violates the Petitioner's right to property under Article 40;
 - e. A declaration that failure by the 1st and 2nd Respondents to allow the Petitioner to salvage his properties, the looting, detention/confiscation of and carting away of the Petitioner's properties was a violation of his right to the property as enshrined under Article 40 as read with Article 250 of *the Constitution*.
 - f. A declaration that the 1st and 2nd Respondents, the Chief, the OCPD and the District Commissioner violated the Petitioner's right to fair administrative action in the conduct and manner of their eviction;
 - g. A declaration that the police and the District Commissioner's failure to resettle and provide security to the Petitioner was in contravention of Articles 10(2) and 27(1)(3) of *the Constitution*;
 - h. General damages at a quantum assessed by the court, taking into consideration the size of the suit land, the manner and conduct of the eviction, the conduct of the Respondents for the violations of the Petitioner's and his family's rights;
 - i. Exemplary damages against the 3rd and 4th Respondents for dereliction of their duty to the Petitioner and violating the Petitioner's rights and freedoms, abusing and disregarding the guiding principles on integrity, accountability, public trust and confidence on public state officers as well as national values and principles in Article 10 of *the Constitution*;
 - j. An order to issue as against the 1st and 2nd Respondents, their agents, workers, shareholders, directors, appointees, legal representatives, agents' proxies to grant the Petitioner vacant possession of the suit land;



- k. An order of permanent/mandatory injunction do issue against the 1st and 2nd Respondents, their families, sons, daughters, wives, agents, shareholders, directors, proxies, legal representatives, appointees and servants from dealing with, entering, occupying and possessing the suit land and an order of eviction against them do issue;
 - l. Mesne profits as against the 1st and 2nd Respondents from 22nd July, 1999 to date;
 - m. Aggravated damages;
 - n. A declaration that the entry into, trespass and occupation of the suit land is unconstitutional, illegal and a breach of the Petitioner’s constitutional right to property;
 - o. An order do issue against the 4th Respondent to ensure the eviction of the 1st and 2nd Respondents;
 - p. Costs of the petition;
 - q. Any such consequential and appropriate relief as the honourable court may deem fit to grant in the interest of justice, pursuant to Article 23 of *the Constitution*.
2. The Petitioner pleaded that he brought the petition as administrator of the estate of one Fredrick Ododa Odundo, the deceased and “on his own behalf and on behalf of his family through Moses Otieno Audi, a donee of Power of Attorney”.
 3. That the deceased was the registered proprietor of all that parcel of land within Kisumu County known as LR 6030/2 (IR 67092), the suit land herein.
 4. That the legal underpinnings of the petition were the preamble of *the Constitution*, articles 2(1), 2(4), 2(5), 3, 10, 19, 20, 21, 22, 23 and 24, 25(c), 27, 28, 29, 40, 47, 48, 50(1), 53, 54, 56, 57, 64, 159, 165(3), 258, 259(1) and 260 of *the Constitution* of Kenya, the *Land Registration Act* including section 24, 25 and 26, sections 15 and 18 of the *Auctioneers Act*, various provisions of the *Civil Procedure Act* and the Civil Procedure Rules and the *Banking Act*.
 5. The petition was supported by the averments in the Supporting Affidavit sworn by one Moses Otieno Audi on 5th April, 2024 and the annextures thereto.
 6. The petition was opposed by the 1st and 2nd Respondents vide the 1st and 2nd Respondent’s Replying Affidavits sworn by one David Chepkwony Arap Birir on 4th October, 2024.
 7. The 3rd and 4th Respondents filed Grounds of Opposition dated 8th May, 2024 filed by Felix Kajo Senior Litigation Counsel for the Attorney General.

The case of the Petitioner

8. The Petitioner’s case as stated in paragraphs 60 to 99 of the Petition are that in the early 1970s Fredrick Ododa Odundo, deceased, invited one John Yier to his farm trading as Kinda Farm to establish commercial farming business. That a dispute arose a few years later and John Yier filed a suit namely; KISUMU HCCC NO.66 OF 1978 against the deceased – seeking for dissolution of the business and reconciliation of accounts of their business.
9. That vide a consent made in the case, John Yier was awarded Kshs.2,000,000/- which the deceased paid leaving a balance of Kshs 600,000/- before he died on 22nd January, 1995. That later the said John Yier caused the deceased to be unlawfully substituted after the suit had abated. That the said John Yier also obtained an ex parte order for the sale by public auction of the deceased’s parcels of land among them



the suit land herein to recover an amount of Kshs.6,004,033 excluding costs. That under the duplim rule the balance of Kshs.650,000/- could not accumulate an interest that would be Kshs.6,004,033/- to warrant the illegal auction.

10. That Matongo Auctioneers who conducted the auction did not serve notification of sale upon the legal representative of the deceased. That Matongo Auctioneers purported to sell the suit land by public auction on 10th August, 1998 to the 2nd Respondent as the highest and successful bidder.
11. That the auction was illegal, dubious and irregular and in breach of the Auction Rules. That vide an ex parte order made on 27th October, 1998, the Public auction was declared as absolute in favour of the 2nd Respondent. That subsequently the 2nd Respondent filed another suit namely; Kisumu HCCC NO.90 OF 1999 in which the 2nd Respondent sought vacant possession of the suit land, a mandatory permanent injunction and an order that the Petitioner and others associated with him be permanently restrained from remaining on the land.
12. That on 22nd July, 1999 at 5.30p.m. the Petitioner and his family members and workers were forcefully evicted from the suit land without prior notice. That the 1st and 2nd Respondents with the concurrence of the area Chief and District Commissioner declined the Petitioner's pleas to be given time to move out and salvage his property. That in the process a female member of the family was sexually assaulted while a brother and a nephew of the Petitioner were physically assaulted. That school going children were stranded, that the family had to stay in the cold and in the dark.
13. That the eviction order was set aside vide court order of 17th September 1999. That the District Commissioner Kericho declined to provide the Petitioner with security to return to the suit land in accordance with the court order.
14. That the 2nd Respondent sought to recover a sum of Kshs.469,000/- being costs awarded in KISUMU HCCC NO.90 OF 1999 whereupon the Petitioner was arrested and committed to civil jail and only released after he paid Kshs.300,000/-.
15. That the suit No.90 of 1999 has never been heard on merit notwithstanding the dismissal of the Petitioner's defence, which ultimately denied the Petitioner a fair hearing.
16. That the judicial process leading to the dispossession of the suit land were biased, fraudulent, partial, irregular and illegal.
16. That *the Constitution* of Kenya 2010 applies to enable the Petitioner get justice for the violation of his and his family's right to property, right to dignity, right to equal right to fair and administrative action, right to access to the temple of justice and right to fair hearing which were violated by the actions and omissions of the Respondent.

The case of the respondents

18. On the part of the 1st and 2nd Respondents, it was deposed vide the Replying Affidavit sworn by David Chepkwony Arap Birir on 4th October, 2024, that sometime on or about 4th July, 1998 a firm of Auctioneers known as Matongo Investment Co. Ltd caused to be advertised in the Daily Nation, a local newspaper publication an intended sale by public auction of the suit land and another parcel of land registered in the name of the deceased.
19. That the 2nd Respondent decided to bid for the properties which he established were being sold pursuant to a court order for sale by public auction issued on 14th July, 1997 in Kisumu HCCC NO.66 OF 1978.



20. That an application dated 20th March, 1995 by the Petitioner herein and one Florida Aoko Ododa to stop the sale was dismissed vide the court ruling delivered on 28th May, 1998. That further, the Petitioner brought a suit against Matongo Auctioneers in 1997 namely; KISUMU CMCC NO.883 OF 1998 seeking for injunction to restrain the Auctioneer from selling or alienating the suit land which suit was dismissed with costs.
21. That the 2nd Respondent successfully bid for two properties on sale and paid Kshs. 750,000 for the suit land. That subsequently the Deputy Registrar of the court executed an Instrument of Transfer and Certificate of sale.
22. That an appeal by the Petitioner from the decision of the High Court dated 28th May, 1998 being Court of Appeal Civil Appeal No.289 of 2000 was struck out on 24th November, 2000.
23. That Petitioner recovered the residue of the proceeds of the sale by public auction in the sum of Kshs.1,989,986/- from the court.
24. That the Petitioner and his agents refused to vacate the suit land hence prompting the 2nd Respondent to file KISUMU HCCC NO.90 OF 1999 to force the Petitioner out in reply to which the Petitioner filed a defence raising almost all the issues raised herein.
25. That the allegations that the court orders made on 17th September 1999 were disobeyed has no foundation because if it were so, the trial court should have been moved appropriately.
26. That it is not true that the rates for the suit property are paid by the estate of the deceased.
27. That a related petition namely; KERICH ELC PET NO.2 OF 2023 was heard and determined with costs in a judgement delivered on 4th July, 2024.
28. That the allegations that the 1st and 2nd Respondent evicted the Petitioner and his family in the manner described in paragraph 18 of the Supporting Affidavit is false.
29. That the Petitioner raises no constitutional issue at all. That it has been framed and presented as a constitutional petition in order to avoid the law of limitation, since the petitioner seeks to recover land that he lost 25 years to the date of filing the petition. That the matters raised are the type that ought to be pursued in an ordinary suit brought by way of plaint. That even assuming that the Petition qualifies to be a constitutional petition, the Petitioner was duty bound to bring the Petition within reasonable time.
30. That the Petition is an abuse of the court process. That the events on which this petition is hinged took place long before *the Constitution* of Kenya 2010 was promulgated and that the circumstances of this matter do not permit the retrospective application of *the Constitution*.
31. The 1st and 2nd Respondents filed a Further Affidavit sworn on 30th April, 2025 which the court notes was filed without leave of the court and hereby expunges from the record.

The case of the 3rd and 4th Respondents.

32. The case of the 3rd and 4th Respondent as contained in Grounds of Opposition dated 8th May, 2024 is that the Petition is bad in law, incompetent, misconceived, defective and only calculated to overturn legally binding decisions of competent courts of concurrent jurisdiction through the back door. That the petition is fatally defective since the effect of the prayers sought if granted would be tantamount to successful appeal hence frivolous.



33. That the impugned eviction if at all was as a result of a court order and not ethnically actuated as alleged by the Petitioner. That the joinder of the 3rd and 4th Respondents in the Petition is baseless as the Petitioner does not establish any causal link.
34. That the petition is premised on a mistaken belief that failure by courts to deliver favourable orders to a particular litigant amount to a violation of rights, therefore a miscarriage of justice.
35. That the Petitioner is guilty of laches and impecuniosity cannot be a ground for such indolence since the government of Kenya has established framework of offering legal aid services to indigent citizens. That as a vexatious litigant, there is no guarantee that the Petitioner shall consider as justice any order from this court that is not in his favour. That the instant Petition does not meet the reasonable test threshold for granting the relief sought. That the Petitioner's grievances, if any could best be addressed by way of an appeal or review.
36. That under article 160 of *the Constitution* of Kenya 2010, the courts are enjoined to exercise and exhibit independence and not to be subject to the control and directions of any party and justice must be done to all irrespective of their status.

That the petition ought to be dismissed with costs.

Submissions for the Petitioner

37. Counsel submitted that the Petitioner's allegations against the 1st Respondent and the 3rd and 4th Respondents who filed no Replying Affidavits are uncontroverted. Counsel relied on the case of Gideon Sitelu Konchellah -vs- Julius Legapenya Ole Sunkuli & 2 Others [2018]eKLR to support the submission.
38. Counsel further submitted that contrary to the assertions at paragraph 28 of the Replying Affidavit that the issues alleged ought to be raised in a plaint, that the remedies available would be inadequate for the acts of commission and omission of the Respondents.
39. Counsel submitted that in respect to the acts of violation alleged in the petition, the provisions of the former Constitution apply mutatis mutandis the relevant and/or applicable provisions of the 2010 Constitution that have retrospective effect e.g. article 10, 40, 47, 50.
40. That the violations transpired/commenced under the former Constitution and have continued under the current Constitution 2010.
41. Counsel submitted further that the court has jurisdiction to hear and determine the petition. Counsel relied on the provisions of section 4, 13, (1)(2)(a)(d) and 19 of the *Environment and Land Court Act*, section 84 of the former Constitution as read with article 2(1)(4), 3, 22, 23, 40, 162(2)(b), 258, 259 and 260 of *the Constitution* of Kenya 2010 and case law and particularly the case of Jabir Signh Rai and 3 Others -vs- Tarlochan Signh Rai Estate of and 4 Others [2013]eKLR (Petitioner No.4 of 2013) where it was held that the Kenyan Constitution has given the High Court exclusive jurisdiction to deal with matters of violation of fundamental rights article 23 as read with article 165 of *the Constitution*.
42. Counsel further submitted that the petition had raised and established constitutional issues as required in the case of Anarita Karimi Njeru -vs- The Republic [1979]eKLR and that the petition had complied with Rule 10 of Mutunga Rules 2013.
44. Counsel submitted further that the Honourable court in HCCCC NO.66 OF 1978 and HCCC NO.90 OF 1999 did not have jurisdiction because of abatement. Counsel relied on the case of Owners of the Motor Vessel Lilian S -vs- Caltex Oil (Kenya) Ltd 1998 eKLR and Kenya Farmers Co-operative



Union Ltd -vs- Charles Murgor (deceased t/a Kaptabei Coffee Estate [2005]eKLR among others to support the submissions.

45. Counsel submitted further that the petition is not res judicata as the parties, subject matter and prayers in KERICHO PET E002 OF 2023 were different from the present case and that the Kericho Petition is a subject of appeal to the Court of Appeal.
46. Counsel submitted that the Respondents violated the Petitioner's right to access to justice and right to fair hearing as guaranteed under section 77(9) of the former Constitution and articles 48 and 50(1) of the 2010 Constitution, the right to property, right to life, right to equal protection of the law, right to fair administrative action, right not to be subjected to torture (physical or psychological), inhuman or degrading treatment as protected under section 74 of the former Constitution as read with article 25 and 29 of *the Constitution* of Kenya 2010, right to dignity, right of children and the elderly and the vulnerable.
45. On whether the Petitioner deserves the orders/prayers sought, Counsel submitted that the Petitioner has satisfied the provisions of section 107 of the *Evidence Act* and is therefore deserving of the prayers pursuant to article 23 (3) of *the Constitution*.
46. Counsel relied inter alia on the case of Charles Muturi Macharia and 7 Others -vs- The Standard Group & 4 Others (Petition No.18 [E015] of 2022, where Counsel submitted, it was held that once a petitioner has presented proof on a balance of probabilities that his/her rights were violated, the court must vindicate and affirm the significance of the violated rights even though the Petitioner may not present evidence of any loss or damage suffered as a result of the violation.

Submissions for the 1st and 2nd Respondents

47. That the petition is a gross and an unmitigated abuse and misuse of the court process and is res judicata and that the court lacks jurisdiction.
48. That the petition is related to Kericho Petition No.2 of 2023 and that the claims herein are very much part of the Kericho petition and they should have been included in the Kericho petition.
49. That the principle of res judicata under section 7 of the *Civil Procedure Act* prohibits a court from trying any suit or issue in which the matter directly and substantially in issue has been substantially in issue in a former suit between the same parties as between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit in which such issue has been subsequently raised and has been heard and finally decided by such court.
50. Counsel further submitted that the petition raises no constitutional issue at all and that it has been presented as a constitution petition in the hope of getting around the law of limitation.
51. Counsel submitted further that the petition does not meet the threshold for constitutional petitions and urged the court to dismiss the same with costs.

No submissions were filed for the 3rd and 4th Respondents.

Issues for determination

52. From the petition and the Affidavits in Support thereof and the Replying Affidavit and grounds of opposition, the following emerge as the issues for determination: -
 - a. whether the petition is res judicata;



- b. whether the acts and omissions complained of by the Petitioner constitute violation of the rights of the Petitioner and meets the threshold for constitutional petitions;
- c. whether the Petitioner is entitled to the relief sought;
- d. costs of the petition.

Analysis and determination

- 53. The first issue for determination is whether or not the petition is res judicata.
- 54. In the pendency of the proceedings, the Petitioner introduced the issue of the existence of another petition which was then pending judgement at Kericho Environment and Land Court and which the petitioner submitted was related to the current petition.
- 55. Through the proceedings herein, it has been established that the Kericho Petition was Kericho Petition Was Kericho Elc Pet No.2 OF 2023.
- 56. In paragraph 9 of the Petitioner's Supplementary Affidavit sworn on 2nd October, 2024, the Petitioner deposed that Kericho ELC Petition NO.2 of 2023, which was dismissed for want of prosecution was in respect of Kericho/Chulchila/kunyuk Block 2 (kunda)204, involving Sireret Farmers, Chemartin Tea, Kericho Land Registrar and Chief Land Registrar – as Respondents and the prayers therein were different from the prayers sought in the present petition. That the same is a subject of an appeal to the Court of Appeal at Nakuru namely; Civil Appeal No. E018 of 2024 and is thus sub-judice.
- 57. It was submitted on behalf of the Petitioner on the issue of res judicata that the Honourable Court in HCCC NO.60 of 1978 had no jurisdiction.
- 58. That in Kericho ELC Petition No. E002 of 2023, the parties were different, the prayers sought and the subject matter were different and that the Kericho petition was a subject of litigation vide Nakuru Court of Appeal Civil Appeal No. E018. Counsel relying on the case of John Florence Maritime Services Ltd and another -vs- Cabinet Secretary Transport and Infrastructure and 3 Other (Petition 17 of 2015) where it was held that for res judicata to be involved in a civil matter there must be a former judgement or order which was final, that the judgement or order was on merit and rendered by a court with jurisdiction over the subject matter and there must be identical parties, subject matter and action.
- 59. On behalf of the 1st and 2nd Respondent, it was deposed in paragraph 22 of the Replying Affidavit sworn by David Birir on 4th October, 2024 that Kericho ELC Petition No.2 of 2023 was filed by the petitioner herein through Moses Otieno Audi sometimes in May, 2023 against the District Land Registrar, Kericho, the Chief Registrar, Kericho, the Chief Land Registrar, the 2nd Respondent's sister company M/s Chemertin Tea Company Limited seeking more or less the same orders that he seeks herein and directed at other properties that were also sold to the 2nd Respondent at the same auction namely; LR No.kericho/chilchila/kunyak/block 2 (kinda)203 and 204.
- 60. That the Kericho Court heard the petition and dismissed it with costs vide the judgement delivered on 4th July, 2024.
- 61. It was deposed further that there was absolutely no reason why the Petitioner did not include his complaint regarding the suit property herein in Kericho petition No. 2 of 2023. That the properties were bought at the same time by the same party, pursuant to one order of the court. That the petition herein is an abuse of the process of the court. That the Petitioner only introduced new parties in the present petition in an attempt to escape the dragnet of res judicata.



62. That the principle of res judicata in section 7 of the *Civil Procedure Act* prohibits a court from trying any suit or issue in which the matter directly or 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 suit in which such issue has been subsequently raised and has been heard and finally decided by such court. Counsel referred the court to Explanation 4 under Section 7 of the *Civil Procedure Act* which provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
63. Counsel submitted further that a question of res judicata is a jurisdictional question, so that if a suit is barred under the principle, the court has no jurisdiction to try it.
64. Referring the court to the case of Dina Management Limited -vs- County Government of Mombasa & 5 Others (Petition 8(E010) of 2021)[2023] KESC 30 (KLR), Counsel submitted that the principle of res judicata is a general principle that applies to all classes of proceedings however commenced.
65. I have considered the pleadings, facts and submissions placed before court.
66. The existence of Kericho ELC Petition No.2 of 2023 and the fact that the same has been heard and determined and judgement delivered is not denied.
67. Similarly, the fact that both the current petition and Kericho ELC Petition NO.2 of 2023 arise from the same transaction namely; the sale by public auction pursuant to a court order of property claimed by the Petitioner and the eviction of the Petitioner and his relatives therefrom, is not denied
68. What is contested is whether the present petition is res judicata, given the existence, prosecution and decision of the Kericho ELC Petition NO.2 of 2023 and the previous suits and appeals in the high Court and the Court of Appeal referred to by the parties in the current petition.
69. I have read a copy of the petition in Kericho ELC Petition NO.2 of 2023 and the judgement in respect thereof. I find that the facts upon which the two petitions are based are the same. That all that the Petitioner did was to split the matters arising from the same cause of action and file the two petitions.
70. The substantive issues in the present petition and which the petitioner seeks this court to determine relate to; jurisdiction of the High Court in HCCC NO. 66 OF 1978 and KSM HCCC NO. 90 OF 1999, the propriety of the decisions of the High Court in the two cases in giving an order for sale of the suit land by public auction, certifying the sale by public auction and sanctioning transfer of the suit land in favour of the successful bidder, the issuance of orders of eviction against the petitioner from the suit land and to pay costs of the suit and the manner in which the eviction was conducted.
71. These issues which were the core issues in Kericho ELC Petition NO. 2 of 2023 have already been decided vide the judgement delivered on 4th of July 2024. The Court already found in Kericho ELC Petition No. 2 of 2023 that those were issues that required a full hearing rather than constitutional interpretation.
72. I find that the petition herein is res judicata in terms of the provisions of section 7 of the *Civil Procedure Act* explanation 4 whereof provides that

“ Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”



73. The next issue of determination whether the acts and omissions complained of by the Petitioner constitute violation of the rights of the Petitioner and meets the threshold for constitutional petitions;
74. The factual background of the petition has already been highlighted herein.
74. The Petitioner's case is that the actions and omissions complained in the petition amount to violation of the Petitioner's constitutional rights and hence the filing of the petition.
75. It was submitted on behalf of the Petitioner that the issues raised are on violation of human rights to which the provisions of the former Constitution shall apply mutatis mutandis the relevant or applicable provisions of *the Constitution* 2010 that have retrospective effect e.g. articles 10, 40, 47 and 50.
76. Referring to the case of Anarita Karimi Njeru -vs- the Republic [1979]eKLR, Counsel submitted that the petition had raised and established constitutional issues.
77. On behalf of the 1st and 2nd Respondent the matters that the Petitioner present to the court as a constitutional petition are, if true, ordinarily refractions of statutory rights and statute law that the courts are able to deal and have indeed dealt with in the exercise of their usual jurisdiction donated by the law. That the issue in the petition are simple question of whether the rules of Civil Procedure were followed in the process by which the suit property was attached and sold and the decree and subsequent orders of the court executed. That the petition facts, the test of constitutional avoidance which is a doctrine that dictates that a court will not determine a constitutional issue when a matter may be properly decided on another basis.
78. I have considered the facts presented in the petition and documents in support thereof and the responses thereto.
79. The Petition revolves around the decision in Kisumu HCCC No.66 of 1978 and how the same was executed. The petition also complains about the prosecution, decision and execution of the decision in Kisumu HCCC No.90 of 1999. Evidence placed before court is that the Petitioner appealed against the decisions in the suits which appeal did not succeed. The actions complained of were based on court decisions that have therefore not been overturned.
80. The threshold for constitutional petitions as set in the case of Anarita Karimi Njeru vs Republic [1979] eKLR that;
- “If a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”
81. The Petitioners are expected to identify the constitutional rights infringed, violated or threatened to be infringed or violated and to demonstrate with some degree of precision the manner of the infringement/violation or threat.
82. In present petition, the petitioner has referred to several articles of *the Constitution* of Kenya and the rights and fundamental freedoms provided for thereunder. However, the manner in which those rights are alleged to be infringed has not been identified or pleaded with specificity. The complaints are focused on court orders, judgements and decrees that have not been overturned through the channels established by *the Constitution* and statute. I find that the matters raised do not amount to constitutional issues for which redress should be pursued through a Constitutional petition. As the



court found in Kericho ELC petition No. 2 of 2023 the petition offends the doctrine of Constitutional Avoidance.

83. The next issue for determination is whether the Petitioner is entitled to the relief sought.
84. The relief sought is highlighted hereinabove and in view of the determinations on issue numbers 1 and 2 herein, the petitioner is not entitled to the relief sought.
85. Costs follow the event and no reason has been demonstrated for the court to order otherwise.

Conclusion

86. Having determined that the petition is res judicata and that it fails to meet the threshold for constitutional petitions, which determinations divest the court of jurisdiction, the court finds that the petition is improperly before the court and that it lacks merit. The petition is hereby dismissed. Costs to the 1st and 2nd Respondents.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED VIRTUALLY THIS 20TH DAY OF NOVEMBER, 2025.

E. ASATI,

JUDGE.

In the presence of:

Maureen - Court Assistant.

Audi for the Petitioner.

Otieno David for the 1st and 2nd Respondents.

