

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC PETITION NO. 44 OF 2018

NANCY WANJA GATABAKI.....1ST

PETITIONER

NANCY WANJA GATABAKI,

JOSEPHINE BEATRICE GATHONI AND

SUSAN ESTHER WANGARI (as the administrators

of the estate of the late

DR. SAMUEL MUNDATI GATABAKI).....2ND

PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST

RESPONDENT

THE CABINET SECRETARY FOR

THE MINISTRY OF LANDS.....2ND

RESPONDENT

THE CABINET SECRETARY FOR

THE MINISTRY OF TRANSPORT &

INFRASTRUCTURE DEVELOPMENT.....3RD

RESPONDENT

CHIEF LAND REGISTRAR.....4TH

RESPONDENT

NATIONAL LAND COMMISSION.....5TH

RESPONDENT

KENYA URBAN ROADS AUTHORITY.....6TH

RESPONDENT

CHIEF VALUER, COUNTY

GOVERNMENT OF NAIROBI.....7TH

RESPONDENT THE DIRECTOR OF SURVEY.....

.....8TH RESPONDENT

THE DIRECTOR OF CITY PLANNING.....9TH

RESPONDENT EQUITY BANK (KENYA) LIMITED.....

.....10TH RESPONDENT

RULING

1. Before me is the notice of motion dated 26th June, 2025 filed by the 10th respondent/ applicant, and it is expressed to be brought under **Rule 19 of the Constitution (Protection of Rights and Fundamental Freedoms)** Practice and Procedure Rules, 2013 seeking the following orders:-

1. ***Spent.***
2. ***Pending the hearing and determination of this application, the time within which the 10th respondent is required to file a response to the second further amended petition dated 4th April, 2025 be suspended.***
3. ***The second further amended petition dated 4th April, 2025 be struck out.***
4. ***The costs of this application and of the second further amended petition be awarded to the 10th respondent.***

2. The application is premised on the grounds inter alia that the second further amended petition is an abuse of the court process. The application was supported by the affidavit of Kariuki King'ori, the legal manager of the 10th respondent/applicant sworn on even date. He deposed that the 1st petitioner had instituted High Court

Civil Suit 352 of 2011 which matter was settled vide a consent by both parties.

3. He further deposed that the 1st petitioner never challenged the charge made in favour of the Bank by Muga Developers Limited but it had negotiated that the bank would not exercise statutory power of sale over 3.6 acres allocated to her. Further, that the deceased Dr. Samuel Gatabaki had instituted High Court Civil Suit 151 of 2017 upon which after his passing the petitioners took over the proceedings as co-administrators of the estate.
4. The 10th respondent/applicant further deposed that on 21st December, 2021 the petitioners' advocate signed a consent letter in HCCC No. 151 of 2017 to settle the matter which consent was adopted as a judgment of the court. Further, that part of the consent was that the petitioners would withdraw all claims against the bank relating to the charge including HCCC. No. 151 of 2017 and Civil Appeal E282 of 2021.
5. He deposed that the petitioners attempt to set aside the consent judgment was dismissed on 18th October, 2022, and they instituted High Court Civil Suit No. 30 of 2020 formerly ELC 364 of 2019.

6. The 10th respondent/applicant deposed that the court vide a ruling dated 30th November, 2020, struck out the said suit for being time barred and *res judicata*, and that the petitioners filed an appeal E282 of 2021 which they later withdrew. Further, that the petitioners also instituted ELC No. E176 of 2023 which the court on 2nd November, 2023 had it struck out for being *res judicata*. He added that the allegations made in the 2nd further amended petition and the orders sought are similar to those in 30 of 2020 and ELC E176 OF 2023 which were struck out for being *res judicata*.
7. He further deposed that the petitioners are attempting to relitigate an issued already settled and determined by the court on several occasions, and that the petitioners were aware of the facilities advanced to Muga Developers Limited and secured a charge over LR 28223/33 since 2011 but they never alleged any fraud or misrepresentation. He urged the court to strike out the 2nd further amended petition as prayed.
8. The application was opposed vide the replying affidavit of Nancy Wanja Gatabaki, the 1st petitioner/respondent sworn on 21st July, 2025. She deposed that the application is an abuse of the court process, and further, that the petition was heard and determined

vide the judgment delivered on 23rd September, 2024 where the court partially allowed the amended petition and cross petition.

- 9.** The 1st petitioner/respondent further deposed that the 10th respondent/applicant moved this court vide an application dated 22nd October, 2024 seeking orders including review and setting aside of the judgment and that they be joined to the proceedings. She added that the application was allowed on 16th January, 2025 and that the petitioners were directed to file and serve a further amended petition to include the 10th respondent/applicant.
- 10.** She further deposed that the 10th respondent/applicant had been accorded time to file and serve its documents but failed to do so within the fixed timelines. Further, that the 10th respondent/applicant was seeking to circumvent the court process by filing the instant application to strike out the 2nd amended petition which didn't have anything to do with its alleged interest.
- 11.** She further deposed that the suits cited by the 10th respondent/applicant involved difference causes of action, different parties and sought distinct reliefs from those in the present suit. She added that none of the referenced cases was on

compensation for the illegal excision of a portion of LR No. 5980/2.

- 12.** She averred that the core issue in the further amended petition is just and fair compensation for compulsory acquisition of portions of LR No. 5980/2 and LR No. 4508/1 for the construction of the northern bypass through the actions of the 1st to 9th respondents. The 1st petitioner/respondent deposed that the doctrine of *res judicata* was not applicable in the present proceedings. She gave a summary of the case and the listed the prayers sought in HCCC No. 352 of 2011, HCCC 151 of 2017, HCCC 39 of 2020, ELC No. E176 of 2023.
- 13.** She also deposed that the issues concerning LR 5980/1 alleged by the 1st to 6th respondents to be public land were introduced in the cross petition which claims have never been determined on merit. She urged the court to dismiss the application with costs.
- 14.** The application was canvassed by way of written submissions. The petitioners/respondents' filed their written submissions dated 18th September, 2025 where they raised five issues for determination. The first issue was whether the 10th respondent's/applicant's plea to suspend time after lapse of court-

given timelines and after refusal of further indulgence is competent and merited. While submitting in the negative, they relied on **Order 45 of the Civil Procedure Rules, Section 80 of the Civil Procedure Act, Article 159(2) (d)** of the constitution and the **Nick Salat case**.

15. On the second issue on whether striking out the petition is available on the facts and in law, they submitted in the negative, and maintained that the issues raised in the petition were evidential matters that ought to be tested during trial and not a platform for striking out a petition.
16. On the third issue on whether the plea of *res judicata* is available to the 10th respondent/applicant, they submitted in the negative as the plea was untenable. They urged the court to dismiss the same so that the real dispute is heard and determined on merit.
17. The fourth issue was whether the court had jurisdiction to determine commercial lending disputes grounded on charges/mortgages. While submitting in the affirmative, they relied on the cases of **Samuel Kamau Macharia V Kenya Commercial Bank KENYA COMMERCIAL FINANCE COMPANY LIMITED [2003] KEHC 725 (KLR), Republic V Karisa Chengo & 2 others [2017] KESC 15 (KLR)** and the Court of Appeal case

in **Cooperative Bank V Patrick Kang'ethe Njuguna & 5 others** [2017] KECA 79 (KLR).

- 18.** On the final issue on whether the motion amounts to an abuse of the court process warranting dismissal with costs, they submitted in the affirmative. They submitted that the 10th respondent/applicant had obtained exceptional joinder post judgment then repeatedly defaulted on filing directions after which when the court fixed a hearing date, filed the present application to suspend time and strike out the petition. They relied on the case of **Muchanga Investments Limited v Safaris Unlimited (Africa) Limited & 2 others** [2001] KECA 242 (KLR) and submitted that the application sought to re-open doors the court already closed for good case management. They urged the court to dismiss the application with costs.
- 19.** The 10th respondent/applicant filed its written submissions dated 24th September, 2025. It submitted that the petition was *res judicata* and that it attempts to re-litigate matters that have already been settled on several occasions. Further, that the petition was an abuse of the court process and cited the case in **Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & 2 Others** [2009] eKLR.

20. The 10th respondent/applicant further submitted that the petitioners/respondents were aware that the court allowed their prayer to revoke the amalgamation of LR Nos 5980 and 4508/1 to form LR 28223. It was submitted that the petitioners/respondents being aware that the said parcels were not in existence, instituted the proceedings based on their assertion that they were owners of the said properties.
21. It also submitted that the petition was *res judicata* as it sought to have the court consider matters that have already been determined with finality in HCCC 352 of 2011, HCCC 30 of 2020 and ELC E176 of 2023. It cited the case of **E.T V Attorney General & Another [2012] eKLR** and submitted that the present case was the petitioners/respondents' 5th attempt to litigate on the same issue. In conclusion, the 10th respondent/applicant urged the court to allow the application as prayed.
22. I have considered the application, the replies thereof and the written submissions filed by the 10th defendant/applicant and the 1st petitioner/respondent. The sole issue for determination is *whether the application is merited*.
23. It is not in dispute that on 16th January, 2025, the court set aside the judgment on the petition delivered on 23rd September, 2024. It is also not in dispute that the applicant was joined as the 10th

respondent in the Further Amended Petition dated 13th April, 2023. The court went further and directed the petitioner/respondent to file a further amended petition to include the applicant as the 10th respondent.

24. In William Kabogo Gitau v Ferdinand Ndung'u Waititu [2016] eKLR Onguto, J held as follows:-

“In the cases of Aggrey Chiteri v Republic [2016] eKLR and Edward Okongo Oyugi & 2 others v Attorney General [2016] eKLR, this court held that the doctrine of res judicata applied with even force to constitutional litigation though it was important that caution is exercised lest a person whose rights were being violated a fresh was unjustly locked out from the wheels and seat of justice. So said the court in Edward Okongo Oyugi & 2 others v The Attorney General [supra]:11The application of the principle of res judicata has the potential of locking out a person from the doors of justice or even reaching the out-stretched arms of justice if the claim is disposed of without venturing into the merits. Consequently, the factors and circumstances ought always be nit-picked and caution exercised. The court ought to be in no doubt that the principle is applicable to the facts and circumstances of each case.”

25. In the case of **John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)**, the Supreme Court held as follows: -

“The court in hearing a constitutional petition may very well arrive at the same conclusion as the court hearing a judicial review application. However, the considerations right from the outset are different, the procedures are different, the reliefs that the court may grant are different, the court will be playing fairly different roles.” (with emphasis)

26. The 10th respondent/applicant outlined a number of suits which it alleged that the courts have previously determined similar issues that have been raised in the further amended petition. While bearing in mind the above authorities, and the fact that the 10th respondent/applicant was joined in these proceedings having claimed interest, it is only fair and in the interest of justice that it files a response to the further amended petition. In my view, the issues raised in this application can well inform its’ response.

27. In the circumstance, I find that in ensuring that each party is afforded a fair hearing, it would be in the interest of justice for the court to disallow the instant application to enable each party ventilate its claims.

28. The upshot of the above is that the notice of motion dated 26th June, 2025 lacks merit and it is hereby dismissed. Costs shall be in the cause.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 15TH DAY OF DECEMBER, 2025.**

**HON. MBOGO C.G.
JUDGE
15/12/2025.**

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Ndamburi holding brief for Mr. Paul K. Muite (senior counsel),

Mr. Gatheru Gathemia and Mr. Gideon Muturi for the Petitioner

Mr. Lawson Ondieki for the 10th Respondent/Applicant

*Ms. Munda for the 7th and 9th Respondents/Applicants in the
application dated 21/11/2025*

Ms. Wanini for the 5th Respondent