



REPUBLIC OF KENYA



**Ng'eno v Jesang & another (Petition E033 of 2024)  
[2025] KEHC 18269 (KLR) (1 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18269 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
PETITION E033 OF 2024  
PN GICHOHI, J  
DECEMBER 1, 2025**

**BETWEEN**

**JOSEPH KIPRONO NG'ENO ..... PETITIONER**

**AND**

**EDNA JESANG ..... 1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner moved this Court by this Petition dated 9<sup>th</sup> December, 2024, seeking for the following reliefs;-
  - a. A declaration that the Respondents' actions, as enumerated and particularized in the Petition, violated the Petitioner's rights and freedoms under Articles 27 (1), 28, 29 (d), and 40 of *the Constitution* of Kenya.
  - b. An order for compensation of the Petitioner by the Respondents by way of general damages for the violation of his Constitutional Rights and Freedoms as envisaged under the aforementioned Articles.
  - c. An order for costs.
2. The Petitioner describes himself and the 1<sup>st</sup> Respondent as adults and citizen of Kenya. The 2<sup>nd</sup> Respondent is described as the Hon. Attorney-General, who is obligated under Article 156 (6) of *the Constitution* to uphold the rule of law and defend the public interest.
3. The legal foundation of the Petition is described as follows;-



- i. *The Constitution* is supreme as provided for under Article 2(1) of *the Constitution*, binds all persons and state organs, and any contravening act is invalid as stated in Article 2(4) of *the Constitution*.
  - ii. Every person is obligated to respect, uphold, and defend *the Constitution* as provided for under Article 3 of *the Constitution*.
  - iii. Every person has the right to equal protection and benefit of the law guaranteed under Article 27 (1) of *the Constitution*.
  - iv. Every person has inherent dignity and the right to have it respected and protected provided for under Article 28 of *the Constitution*.
  - v. Every person has the right to freedom and security of the person, which includes the right not to be subjected to torture Article 29 (d) of *the Constitution*.
  - vi. Every citizen's right to own property is protected, and the state cannot deprive a person of property except in accordance with the law as stated in Article 40 of *the Constitution*.
  - vii. *The Constitution* must be interpreted to promote its purposes, values, and principles, advance human rights, permit the development of the law, and contribute to good governance as provided for under Article 259 of *the Constitution*.
4. The factual basis of this Petition is that the Petitioner and 1<sup>st</sup> Respondent got married in September 1980 under Kipsigis customary law and formalised their marriage on 9<sup>th</sup> September 1989 at the Catholic Church. Together, they were blessed with four children who are all now adults.
  5. He states that their marriage irretrievable broke down and was dissolved on 11<sup>th</sup> August, 2023, by a decree nisi and absolute issued by Hon Orange (Magistrate) vide Nakuru CM Divorce Petition No. E157 of 2022.
  6. The Petitioner gave a history of his career and property acquisition and stated that he was a pilot in the Kenya Air Force until 1982 when he lost his job. Following the loss of his employment, he did menial jobs and matatu operations with little to no assistance from the 1<sup>st</sup> Respondent. However, in 1984, he secured a pilot job in Mombasa. From the proceeds of this new job, he acquired aircraft through a bank loan by 1989, and later bought another aircraft, a house at Kshs. 2.6 million, and a restaurant business at Kshs. 800,000 with furnishing worth Kshs. 500,000, which he solely funded.
  7. That in 1993, he purchased the subject land being LR No. Nakuru/Nyota Pendele/Tregana Scheme/108 (Nyota Farm) solely from his aircraft business and pilot salary. His Mombasa hospitality business later collapsed due to challenges in the tourism sector and his Mombasa house was auctioned as a result.
  8. He stated that after his Mombasa house was auctioned, he relocated his family to Nyota Farm, where he commenced massive developments like fencing, stocking livestock, and building a water well. He further sold remaining Mombasa properties to pay for his children's private school and university education, as the 1<sup>st</sup> Respondent did not support him.
  9. He stated that during that period, he sought and secured a difficult job in South Sudan in 2006, channelling all his earnings to educating his children and developing Nyota Farm. However, that instead of growing their assets together, the 1<sup>st</sup> Respondent used proceeds from the farm's developments to purchase and develop her own residential property in Keringet.



10. He stated that upon his retirement in May 2017, he was suddenly unwelcomed at his home. That the 1<sup>st</sup> Respondent became violent, allegedly storming the bedroom with a machete, mistreated him, and chased him out of the property in 2018, forcing him to sue her. That he secured interim restraining orders in Nakuru CM ELC No. 81 of 2019, but were never extended instead were used to effectively evict him on 18<sup>th</sup> February, 2020.
11. Following the eviction, the petitioner stated that the 1<sup>st</sup> Respondent vowed to use the police from Keringet and Sirikwa Police Stations, to restrain him from entering the subject suit land. Therefore, that he has now been rendered homeless. On further follow up with the Court, Hon. E. Juma (CM) on 6<sup>th</sup> June, 2024, confirmed the orders were not extended and dismissed the 1<sup>st</sup> Respondent's contempt application.
12. In a subsequent matrimonial cause, Nakuru High Court No. E004 of 2020, Justice Nyaga declared the suit land was matrimonial property vide his Orders of 19<sup>th</sup> July, 2024, and order for the 1<sup>st</sup> Respondent to be given 10-acre share of Nyota Farm while he retains the remainder 30 acres. That the judge in the matrimonial cause found that the 1<sup>st</sup> Respondent made no monetary contribution to the Nyota Farm purchase, yet she used all means to evict the Petitioner.
13. He stated that despite the Court findings, the 1<sup>st</sup> Respondent continued to mentally and psychologically torment him, sold over 20 Friesian cows he kept on the property, and vandalized the fence and the dwelling house. That he reported the destruction of the property to the police since 2018 but no permanent action has been taken. In addition, that the 1<sup>st</sup> Respondent has turned their adult children against him as they did not visit him when he was ill in July/August 2024.
14. The Petitioner states that the actions of the 1<sup>st</sup> Respondent and police officers have affected him psychologically and mentally, hence, he has suffered damages in the form of legal and court fees from the suits filed by the 1<sup>st</sup> Respondent and seeks compensation.
15. He stated that he sued the, Attorney-General (2<sup>nd</sup> Respondent) because the officers of the National Police Service sided with the 1<sup>st</sup> Respondent, assisting in the forced eviction, causing the Petitioner pain and suffering.
16. As a result, he has approached the court for enforcement of his rights, contending that the Respondents' actions violated his rights under Articles 27 (1), 28, 29 (d), and 40 of *the Constitution*.
17. As regard violation of Article 27 (1), he stated that constant harassment by the 1st Respondent, with police assistance by summoning and detaining him without trial every time he tried to visit his property, contravenes the right to equality and freedom from discrimination.
18. That in being evicted, denied use and occupation of his property, and being rendered homeless, he was deprived of his dignity as a human being guaranteed under Article 28 of *the Constitution*. Further that being chased out of his property, denied access to the matrimonial home, having his children turned against him, filing multiple suits, and being rendered homeless, forcing him to seek refuge at his grandfather's land, subjected him to mental and psychological torture in violation of his right under Article 29 (d) of *the Constitution*.
19. He argued that the Respondents denied him his right to own, possess, use, and occupy his property; Nakuru/Nyota Pendele/Tregana Scheme/108 by blocking access using lapsed court orders in violation of his right to property guaranteed under Article 40 of *the Constitution*.
20. In support of the Petition, he swore an Affidavit on even date reiterating the factual basis of the Petition stated in the Petition and urged this Court to grant the prayers sought in the Petition.



21. The 1<sup>st</sup> Respondent opposed the Petition and filed a Replying Affidavit sworn on 19<sup>th</sup> March, 2025. She affirmed the marriage and subsequent dissolution as set out by the Petitioner.
22. She deponed that all issues regarding the matrimonial property were determined with finality in Nakuru High Court Matrimonial Cause No. E004 of 2020 and that the execution of the decree is ongoing.
23. She denied being violent; on the contrary that the Petitioner has on several occasions abused her verbally and physically. Further, she argues that any issues in regard to the proceedings in Nakuru CMCC ELC CASE NO. 81 OF 2019 must be raised within that case and not by way of a Constitutional Petition.
24. She stated that the Petitioner was only arrested after criminal actions were reported to the police, particularly after he physically assaulted her, and on other occasions when he was in contempt of Court Orders in NKU CMCC ELC NO. 81 OF 2019.
25. She termed the Petitioner's claim for compensation for legal costs suffered in defending suits she filed as absurd, scandalous, and misplaced stating that the issue of costs is determined in the specific suits.
26. She re-iterated that the parties' rights to the property that gave rise to the complaints in the Petition have been determined with finality and further, that the Petitioner has failed to demonstrate how he has been treated unequally or denied equal benefits of the law under Article 27, nor how his inherent dignity under Article 28 has been threatened or taken away in any manner not contemplated by law.
27. She deponed that the Petitioner has not demonstrated that he has undergone any physical or psychological torture contrary to his right under Article 29 (d) of *the Constitution*.
28. It is contended that the Petitioner's right to acquire and own property under Article 40 of *the Constitution* is intact, as the property in dispute has been distributed by the Court, and the Petitioner received the lion's share of 30 acres, while she got only 10 acres.
29. She stated that she chose not to appeal the judgment in Nakuru High Court Matrimonial Cause for the sake of peace, as the Petitioner had become ungovernable.
30. In conclusion, she asserted that no constitutional issues are raised in the Petition, She therefore prayed for its dismissal with costs.
31. In addition to the Replying Affidavit, the 1<sup>st</sup> Respondent filed a Preliminary Objection dated 19<sup>th</sup> March, 2025 on the ground that this matter is res judicata, Nakuru High Court Matrimonial Cause NO. E004 OF 2020 and therefore an abuse of the process of this Court and ought to be struck out.
32. The Petition and the Preliminary Objection were both canvassed together by written submissions.

### **Petitioner's Submissions**

33. They are dated 29<sup>th</sup> April, 2025 and filed on 5<sup>th</sup> May, 2025 and framed four issues for determination;
  - a. Whether the Petition meets the threshold of Constitutional Petitions.
  - b. Whether the petitioner is entitled to the reliefs sought in the petition.
  - c. Whether the 1st Respondent's Notice of Preliminary Objection is merited.
  - d. Who shall bear the cost of this suit



34. On whether the petition has met the threshold for a constitutional petition, it was submitted that the Petition has met the threshold set in *Anarita Karimi Njeru v Republic* 1979 eKLR by highlighting with specificity, the specific Articles violated and presenting them in a narrative with a Supporting Affidavit and annexures in support of his case.
35. He submitted that 1<sup>st</sup> Respondent harassed and chased him out of his property using interim orders that were never extended in Nakuru Chief Magistrate's Court ELC No. 81 of 2019, evicted him from his matrimonial home, rendering him homeless, and vowed to use police at Keringet Police Station and Sirikwa Police Station to restrain him from entering the property
36. He therefore submitted that the infringement of the Bill of Rights elaborated in paragraphs 4-10 of the Petition justifies invoking the court's Constitutional jurisdiction, as Article 22(1) of *the Constitution* grants every person the right to institute court proceedings claiming a right or fundamental freedom has been denied, violated, infringed, or threatened. Further that the Petition adequately conveys the manner of infringement, complaint, and constitutional provisions infringed, as held in *Anarita Karimi Njeru v Republic* (supra).
37. He argued that under Article 23(3) of *the Constitution*, a Court may award remedies in Bill of Rights proceedings, including a declaration of rights and an order for compensation. On that basis, he sought declare that the Respondents' actions are in violation of his rights under Articles 27 (1), 28, 29 (d), and 40 of *the Constitution*, and an order for compensation of general damages for the violation of these same Constitutional Rights and Freedoms.
38. He maintained that the issues are constitutional in nature and worthy of determination citing *Pius Kibet Tott v Uasin Gishu County Government & 9 others* [2018] eKLR, which noted that the petition was brought under various Articles, including Article 22, which deals with the enforcement of the Bill of Rights.
39. On the specific violations of his right, the Petitioner submitted with regard to violation of his right under Article 27(1) of *the Constitution*, he was constantly harassed by the 1<sup>st</sup> Respondent with the help of the police at Keringet and Sirikwa Police Stations by summoning and detaining him without trial every time he tried to visit his property.
40. He argued that as a citizen and the owner of land reference number, Nakuru/Nyota Pendele/Tregana Scheme/108 and which has erected his matrimonial home, was entitled to equal protection, but law enforcement officers became instruments of his persecution instead. In support of this right, he placed reliance in the case of *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae)* (Petition 16 of 2019) [2023] KESC 17 (KLR) where it was stated;
 

“ Article 2 obligates a state party to: "respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status". Article 26 of the ICCPR: "not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status".
41. The Petitioner submitted that he was deprived of his dignity by being evicted from his property, denied use and occupation, and rendered homeless, contrary to Article 28 of *the Constitution* which states: "every person has inherent dignity and the right to have that dignity respected and protected". In



support of this reliance was placed in the case of ANN v Attorney General (Petition 240 of 2012) [2013] KENSC 6004 (KLR), the court stated:-

“ Article 28 provides that 'Every person has inherent dignity and the right to have that dignity respected and protected'. While it does not define the term 'dignity' or 'human dignity', the Constitution of Kenya underscores the place of human dignity in the enjoyment of all other human rights. This is in keeping with the international treaties and jurisprudence in other jurisdictions which place human dignity at the centre of and as the basis for recognition and protection of all human rights”.

42. He argued that the Petitioner's status as a human being was diminished by the forced eviction from his matrimonial home and land, and the court is urged to grant the prayers sought. Further that he was mentally and psychologically tortured by being chased out of his property, denied access to his matrimonial home, having his children turned against him, being rendered homeless, and forced to seek refuge at his grandfather's land, contrary to Article 29 (d) of the Constitution which states: "Every person has the right to freedom and security of the person, which includes the right not to be....(d) Subjected to torture in any manner, whether physical or psychological".

43. On violation of his right to property under Article 40 of the Constitution, it was argued that the 1<sup>st</sup> Respondent and the police from Keringet and Sirikwa Police Stations evicted him from his property, forcing him to seek refuge at his grandfather's land, a direct violation of his property rights as the legal owner of Nakuru/Nyota Pendele/Tregana Scheme/108. In support of this right, reliance was placed on the case of Gichuhi v County Government of Kirinyaga & 2 others (Constitutional Petition 2 of 2017) [2024] KEELC 5961 (KLR) where the court held:-

“ The right to hold property is a constitutional and human right, and no person should be deprived of his property except in accordance with the provisions of the Constitution or Statute. The condition precedent to taking away anyone's property is that the authority must ensure compliance with the Constitution and Statutory provisions”.

44. He submitted that in this case, there was no contention that the Petitioner is the lawful owner of Nakuru/Nyota Pendele/Tregana Scheme/108, thus his rights to ownership and possession is guaranteed and should not be violated. In support of this right, he cited the Supreme Court in Rutongot Farm Ltd vs. Kenya Forest Service & 3 others (2018) eKLR that articulated the position thus:-

“ Once proprietary interest has been lawfully acquired, the guarantee to protect the right to property under Article 40 of the Constitution is expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution”.

45. Further reliance was placed in the case of Wilfred Juma Wasike & 11 others v Ministry of Interior And Co-ordination & another [2022] eKLR that having found Constitutional rights were infringed, the Court must consider appropriate relief under Article 23 of the 2010 Constitution, which reliefs include;(a) a declaration of rights; (b) an injunction; (c) a conservatory order; (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; (e) an order for compensation; and (f) an order of judicial review.



46. In support of his prayer for compensation of general damages, the Petitioner cited the case of *Kooba Kenya Limited v County Government of Mombasa* [2022] eKLR , where the court stated that:
- “...it is clear that courts can award damages where there has been a breach and or infringement of bill of rights. The damages serve as a form of compensation and redress for the violation or infringement of a right. This is because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms...”.
47. In further support of his prayer for compensation, he cited the case of *Florence Wakiuru Muchiri & another v Attorney General* [2017] EKLK, where the court held:-
- “I note that arriving at the award of damages is not an exact science, and also I am aware that no monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed.[24] When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under is discretionary.[25]”.
48. He submitted that contrary to the 1<sup>st</sup> Respondent’s argument that the compensation sought is for costs of previous suits, the Petitioner argued that the reliefs sought herein is for general damages specifically for the violation of his Constitutional Rights and Freedoms under Articles 27 (1), 28, 29 (d), and 40. He thus urged this court to grant the reliefs as sought in the Petition.
49. On quantum of damages, he cited the case of *Tryphosa Jebet Kosgey v Elgon View Hospital* [2016] eKLR , noting the high awards made by courts in cases of serious violations, including torture, inhuman and degrading treatment, and loss of liberty. AS an example, he cited *Koigi Wamwere v Attorney General, Court of Appeal, Nairobi, Civil Appeal 86 of 2013* [2015] eKLR case where damages were reviewed upwards to Kshs 12,000,000.
50. Accordingly, he submitted that considering the potential income he lost by not accessing his land, the period he was homeless due to forced eviction, and all other violations, an award of Kshs. 20,000,000/= by way of general damages is submitted as appropriate compensation.
51. On the Preliminary Objection that this Petition is res judicata, to Nakuru High Court Matrimonial Cause No. E004 of 2020, the Petitioner submitted that the same is misconceived, and should be dismissed for not meeting the legal threshold as set *Mukisa Biscuits Manufacturing Co. Ltd -V- West End Distributors Ltd* (1969) EA 69 and further reiterated in *Kirema & 2 others (Sued as Administrators of the Estate of Jane Wanjiku Mburu) v Gachanja & 3 others (Environment and Land Appeal 59 of 2024)* [2025] KEELC 3384 (KLR) that 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.
52. Further he highlighted the test for Res Judicata as articulated in Section 7 of the *Civil Procedure Act* and elaborated in *Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd* [2017] eKLR, that the elements are conjunctive and all must be present, that is :



- (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 those under whom they claim ,
  - (c) Those parties were litigating under the same title ,
  - (d) The issue was heard and finally determined in the former suit , and
  - (e) The former court was competent to try the subsequent suit.
53. Further, he emphasised that the law requires a conjunctive test for a plea of res judicata to be successful, with the requirement that the suit or issue was directly and substantially in issue in the former suit being of importance. Accordingly, that the petition is not res judicata because the issues are not the same as those in Nakuru High Court Matrimonial Cause No. E004 of 2020, which dealt with the division of matrimonial property, not the enforcement of the Petitioner's constitutional rights.
54. He thus prayed for Notice of Preliminary Objection to be found without merit, untenable, and be dismissed with costs.

### **1<sup>st</sup> Respondent's submissions**

55. She listed the issues for determination thus:-
- a. Whether the Petition by the Petitioner raises any Constitutional issues/ whether the Petition has met the threshold of a Constitutional Petition.
  - b. Whether the Petitioner has established a violation of his rights under *the Constitution* as claimed in the Petition.
  - c. Who should bear the costs of the Petition?
56. On the first issue, it was submitted that a Constitutional Petition is a legal action filed to challenge the constitutionality of an Act of Law or action, or to seek enforcement of a fundamental right. That the Petitioner herein bases his Petition on claims of mental and psychological torture from detention at police stations and alleged eviction, denial of property rights, and loss suffered from court and legal fees in multiple suits. However, that no evidence has been produced to prove the Petitioner was incarcerated in a police station, and even if it occurred, there is nothing unconstitutional about a person being incarcerated in a Police Station.
57. On the allegations of eviction from the homestead, she argued that this is baseless reason being that she filed a civil suit, Nakuru CM ELC NO. 81 OF 2019, seeking injunctive relief to restrain the Petitioner from harassment, which was granted, hence the Petitioner should have raised any issues or challenged the constitutionality of that suit in the same court. He submitted that there was nothing in the circumstances of that case worthy of a constitutional petition.
58. She maintained that the Petitioner's allegations that the property rights have been violated are baseless reason being that the Matrimonial property in question, that is land parcel Nakuru/Nyota/Pendele/Tregana SCHEEM/108, was the subject of Matrimonial Cause No. E004 of 2020, where the parties' rights were clearly defined. She argued that since the property was found to be matrimonial, the Petitioner could not lay exclusive claims and therefore had no exclusive property rights capable of being violated. Any property rights issues should have been fully litigated within the Matrimonial Cause and not as a Constitutional Petition.



59. The 1<sup>st</sup> Respondent submitted that the issue of costs arising from litigation is not a Constitutional matter, as courts grant or deny costs as a matter of judicial discretion in that particular suit. The Constitutional Court lacks jurisdiction to award costs in cases already determined by competent courts.
60. The 1<sup>st</sup> Respondent maintained that the Petition does not meet the threshold for Constitutional Petitions, established in *Anarita Karimi Njeru -vs- The Republic* [1979] eKLR and restated in *Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 Others* [2013] EKLR as it raises no constitutional questions worthy of consideration and therefore, it ought to be dismissed.
61. It was further submitted that the Petitioner cannot have a case against the 1<sup>st</sup> Respondent a private individual for breach of Fundamental Rights. In this reliance is placed on *Teitiwinnang And Ariong And Others* (1987) L.r.c Const.517 Cited In *Njogu -vs- Kuria & 3 Others* (2023) KEHC 3970 (KLR), where the Court stated:
- “Dealing now with the question can a private individual maintain an action for declaration against another private individual on individual or individual for breach of the fundamental rights provisions of *the Constitution*. The right and duties of individuals and between individual are regulated by private law. *The Constitution* on the other hand is an instrument of Government. It contains rules about Government of the country. It is my view therefore that the duties imposed by *the constitution* under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual or a group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual so as to give rise to an action against the fundamental rights provisions of *the Constitution* no action for a declaration that there has been a breach of duty under the provisions can be or be maintained in the case before me, and I so hold”
62. On that basis, it was submitted that the disputes between the Petitioner and the 1<sup>st</sup> Respondent are private and have been, and ought to be, adjudicated as ordinary suits, not constitutional petitions. Further that not every matter raises constitutional questions, however attractive that may be to the Petitioner. It was thus argued that the Petition is abuse of the Court process. She urged Court to find the Preliminary Objection has merits and uphold it.
63. On whether the Petitioner has established a violation of his rights under *the Constitution* as claimed in the Petition, the 1<sup>st</sup> Respondent argued that though the particulars of violation are stated in the Petition, the Petitioner did not provide evidence of his alleged arrest and confinement at Keringet and Sirikwa Police Stations and failed to show how such actions were unconstitutional.
64. Further he submitted that the allegation of denial of human dignity under Article 28 has not been established, as the Petitioner was kept out of the matrimonial home via Court Orders, which he should have challenged in that suit.
65. Further, that the allegation of denial of access to property under Article 40 is baseless because the parties' rights have been conclusively determined in the Matrimonial Cause, and the Petitioner should raise any property rights questions with that Matrimonial Court.
66. It was therefore submitted that no material was presented before this Court to ascertain the alleged violation of the Petitioner's rights under Articles 27 (1), 28, 29(d), and 40 of *the Constitution*, thus, this Petition ought to be dismissed. In support of this reliance was placed on the case of *Osman And*



Anor -Vs- Mohamud & Others 2024) Keelc 957 (KLR), which reaffirmed the Anarita Karimi Njeru principle and cited the Mumo Matemu judgment, which stated at paragraph 44:

“(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case.”

67. On costs, it was submitted that Costs follow the event. Therefore, that since the Petition has no merits, it ought to be dismissed with costs to her.

### **Analysis and Determination**

68. After considering Petition, the Supporting and replying Affidavit, the preliminary Objection and the rival submissions, the issue for determination are;

1. Whether this petition is res judicata.
2. Whether the Petition meets the threshold of a constitutional petition as stated in Anarita Karimi case.
3. Whether the Petitioner is entitled to the reliefs sought.

69. On the first issue, the preliminary objection was that the Petition herein is res judicata, Nakuru High Court Matrimonial Cause No. E004 of 2020.

70. Regarding the doctrine of res judicata Section 7 of the *Civil Procedure Act* provides as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

71. Further, the Court of Appeal in Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR had to say:- “Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory preemptory preclusion of a certain category of suits.”

72. The rationale of res judicata is therefore to bring an end to litigation, save precious judicial time and to ensure that courts do not make conflicting decisions in respect of the same matters. This position was confirmed by the Court of Appeal in Independent Electoral and Boundaries Commission v Maina Kiai & 5 others (Supra), which further listed the following elements to be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

1. The suit or issue was directly and substantially in issue in the former suit.
2. That former suit was between the same parties or parties under whom they or any of them claim.
3. Those parties were litigating under the same title.
4. The issue was heard and finally determined in the former suit.
5. 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.



73. Applying the above elements to the facts of this case, this Court notes that indeed Matrimonial cause, Nakuru High Court No. E004 of 2020 was between the Petitioner herein and the 1<sup>st</sup> Respondent and the issue for determination was division of matrimonial Property being Nakuru/Nyota Pendele/Tregana Scheme/108.
74. The issue of violation of the Petitioner's rights were not litigated. Further, the 2<sup>nd</sup> Respondent is now included and the reliefs sought are different. The Petitioner's argument is that as a citizen and the owner of land reference number, Nakuru/Nyota Pendele/Tregana Scheme/108, he is entitled to protection of the law. The Petition herein therefore cannot be said to be res judicata.
75. Regarding the threshold for grant of orders in a constitutional Petition, the Court in the celebrated case of Anarita Karimi Njeru v Republic [1979] eKLR held as follows:-
- “We would, however, again stress 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.”
76. Pursuant to the above, the Appellant has reasonably stated his grievance. His main allegations regarding the violation of his rights are that the 1<sup>st</sup> Respondent, with the assistance of police officers from Keringet and Sirikwa Police Stations, infringed upon his fundamental rights that is :- Equality and freedom from discrimination (Article 27(1)) by subjecting him to constant harassment, including being summoned and detained without trial every time he tried to visit his property; Human Dignity (Article 28) by forcibly evicting him from his matrimonial home, denying him use and occupation, and rendering him homeless; Freedom and Security of the Person (Article 29(d)) by subjecting him to mental and psychological torture through being chased out of his home, having his adult children turned against him, and being forced to seek refuge elsewhere; and finally, Right to Property (Article 40) by denying his right to own, possess, use, and occupy his land, Nakuru/Nyota Pendele/Tregana Scheme/108, by blocking access using court orders that had lapsed.
77. In support of his case, the Petitioner has annexed several documents. These include the Title Deed confirming ownership of the subject property, photographic evidence purporting to show a residential house allegedly constructed by the 1<sup>st</sup> Respondent using proceeds derived from the Petitioner's Nyota farm, a copy of the Judgment in the Matrimonial Cause which awarded him a substantial share of the subject property, photographs of cattle previously owned by him, relevant Occurrence Book (OB) entries, and copies of text message exchanges allegedly with his children.
78. However, the Petitioner has failed to adduce any evidence demonstrating constant harassment by the Respondents. Further, no documentation has been filed to substantiate the claim that he was either summoned to or unlawfully detained at a police station as a result of the Respondents' actions.
79. Similarly, the Petitioner has neither tendered any formal orders of eviction from the property nor produced any evidence to show that the 1<sup>st</sup> Respondent has wrongfully denied him entry to the matrimonial home.
80. Given that the Matrimonial Cause was determined, awarding the Petitioner a significant portion of the subject property, it was incumbent upon the Petitioner to assert his right to possession of his property, including seeking enforcement of the decree, if he was indeed being denied access as alleged.



81. The only issue between the parties is on enforcement of the Matrimonial causes Orders. That being the case, it is now settled that the procedural law relating to constitutional matters requires that where there exist ample statutory avenues for resolution of a dispute, the statutory options for redress must be followed and the constitutional Court will decline to entertain the dispute and that is the principle of constitutional avoidance.
82. The principle bars the practice of bringing ordinary disputes to the constitutional Court. This Position was reinforced by 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) where the apex Court discussed the principle of Constitutional avoidance as follows:-

“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.”

83. In this case, the Petitioner’s array of allegations, including that the Respondents blocked him from accessing his matrimonial home, are private matters between the Petitioner and the 1<sup>st</sup> Respondent. They concern execution of the Court Orders issued by H. Nyaga J in the Matrimonial cause. They are not constitutional issues to be handled by this Court. There exists an alternative, sufficient and adequate forum for the Petitioner to litigate his grievance and not a Constitutional Court.
84. In conclusion, the Court makes the following orders:-
1. The Petition herein be and is hereby struck out .
  2. This being a matter emanating from a family dispute, each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 1<sup>ST</sup> DAY OF DECEMBER, 2025**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of-

Mr Kamau h/b for Mr Langat for Petitioner

N/A by Mr. Mugambi for 1<sup>st</sup> Respondent

N/A by Attorney General

Kamau, Court Assistant

