REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONSTITUTIONAL PETITION NO E032 OF 2025

PHILOSOPHER DR JOHANNES ODHIAMBO SWA MAKADUOL (*suing on his own behalf and on behalf of Luo Community Development [LUCODE] Society Worldwide Union***) ..... PETITIONER**

- VERSUS -

PRESIDENT OF THE REPUBLIC OF KENYA .....…..... 1ST RESPONDENT

THE CABINET SECRETARY –

AGRICULTURE MINISTRY ..... 2ND RESPONDENT

THE NATIONAL ASSEMBLY ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

PRIVATIZATION COMMISSION AUTHORITY ..... 5TH RESPONDENT

AGRICULTURE & FOOD AUTHORITY/KSB ..... 6TH RESPONDENT

R U L I N G

1. This ruling is on the Motion dated **28/11/2025.** The same was brought under ***Articles 22, 23, 47, 48, 50 (1), 159, 165 (3), 258 of the Constitution and Rules 3,4,19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ("Mutunga Rules").***
2. The applicant sought the following conservatory orders: -

a) ***That the public interest overwhelmingly supports issuance of Conservatory Orders and Declaration that the Respondents jointly acted ultra vires in purporting to replace or vary the 2015 parliament-approved privatization policy model unilaterally.***

b) ***A declaration that the purported extensive public participation including the one allegedly conducted at Kisumu alone was invalid because it was just a mere few selected politically correct persons who were invited to hold stakeholder consultation not public participation meeting as deceitfully claimed by the respondent.***

c) ***An order of Certiorari quashing in entirety the decision adopting the leasing policy model be issued.***

d) ***An order of Mandamus compelling the respondents to revert to and implement the existing 2015 privatization model unless lawfully amended or repealed by parliament.***

e) ***An order of Mandamus be issued by the Honourable Court to the respondents to produce or deposit all documents related to the contested leasing policy making process together with all its resultant leasing tenders documents for court's perusal including expert advises available in their custody***.

3. The application was based on the grounds set out on the face of the Motion as well as the supporting affidavit of **PHILOSOPHER DR JOHANNES**

ODHIAMBO SWA MAKADUOL sworn on the **28/11/2025.** He deposed that the respondents arbitrarily crafted, developed, designed and rushed to adopt the impugned 2023/2024 lease policy model by restructuring and commercializing 5 state owned sugar companies in Nyanza & Western Kenya without mandatory consultations with the relevant state commissions and other bodies.

4. That the 3rd respondent's approval process was fatally flawed as it failed to include public participation. That the respondents continue to frustrate, exploit, enslave and or distress the affected parties, defraud the Nation with the implementation of the arbitrary leasing model.

5. That the 2015 Parliament approved Privatization Model remains the only lawful and valid restructuring and commercializing sugar sector policy and has never been amended or repealed, rendering the purported leasing model ultra vires and unconstitutional.

6. The 4th respondent entered appearance on its behalf and that of the 1st, 2nd & 6th respondent. They opposed the application vide Grounds of Opposition dated **16/10/2025** in which they contended that the leasing of the Public Sugar Companies was undertaken strictly in compliance with the Constitution statute and established public procedures.

7. That parliament expressly vacated the privatization model approved in 2015 and approved the leasing model and consequently parliament issued a

certificate dated **14/09/2024** thereby conclusively validating the leasing process and any allegation to the contrary is misleading, unfounded and legally untenable.

8. That public participation was adequately conducted and the same was judicially affirmed in the judgment of **Barasa v Cabinet Secretary, Ministry of Treasury & Economic Planning & 3 Others (Petition E065 of 2024) [2025] KEHC 1455 (KLR) (Constitutional & Human Rights) (28 February 2025) (Judgment)**.

9. That the approval of the privatization model by Parliament in 2015 was formally vacated and Parliament thereafter granted approval for leasing for the 5 state-owned sugar companies on **14/09/2023**.

10. That the Ministry established a Transition Committee comprising representatives of workers' unions from the sugar companies, farmers, supplier, forward sales representatives, investors and County Governments to work on their various interests and concerns.

11. That all issues raised in the present application were previously raised, heard and conclusively determined in **Barasa v Cabinet Secretary, Ministry of Treasury & Economic Planning & 3 Others (Petition E065 of 2024) [2025] KEHC 1455 (KLR) (Constitutional & Human Rights) (28 February 2025) (Judgment)** thus the present application was *res judicata*, frivolous and an abuse of the court process.

12. The 3rd respondent similarly opposed the Motion vide Grounds of Opposition dated **10/12/2025**. It was contended that the orders sought by the petitioner are similar to those sought in the petition thus final in nature and cannot be issued at an interlocutory stage before the substantive hearing of the Petition.

13. That the petitioner has failed to meet the test for the grant of conservatory orders set out by the Supreme Court of Kenya in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR**. That the 3rd respondent enjoys a presumption of constitutionality in respect of all its actions which presumption the petitioner has not rebutted and the said presumption is only rebuttable upon a substantive hearing of the petition.

14. That the petition has not pleaded his case with a specific degree of precision as required under Rule 10 (2) of the Mutunga Rules and as set out by the Court of Appeal in the cases of **Anarita Karimi Njeru v Republic [979] KEHC 30 (KLR)** and re-affirmed in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] KECA 445 (KLR)**.

15. That the issues raised in the petition are *res judicata* as the same issues were heard and determined in **Barasa v Cabinet Secretary, Ministry of Treasury & Economic Planning & 3 Others (Petition E065 of 2024) [2025] KEHC 1455 (KLR) (Constitutional & Human Rights) (28 February 2025) (Judgment).**

16. That to the extent that the petition seeks to quash the leasing model for public sector sugar companies, which already entered into force, the application is overtaken by events and is thus moot.

17. That the issuance of conservatory orders halting the decision to lease sugar companies was heard and determined by this Honourable Court in **Kisumu High Court Constitutional Petition No. E016 of 2025 Atyang & 3 Others v Cabinet Secretary, Ministry of Treasury and Economic Planning & 3 Others [2025] KEHC 5990 (KLR)**.

18. On the **17/12/2025**, the parties made oral submissions in support of their respective cases.

19. The petitioner submitted that this is a public interest application and human rights matter. That the Motion sought judicial review over unconstitutional and unlawful decisions and actions caused by the respondents against public interest.

20. That the leasing policy, formulation, development, coordination, approval and implementation were not done procedurally as set out in the Constitution but unconstitutionally and ultra vires as there was no public participation including the County Governments.

21. It was submitted on behalf of the 1st, 3rd, 4th & 6th respondents that the issues raised by the petitioner were dealt with in ***Petition E065 of 2024 (supra)*** and

the Court found that there was adequate public participation and cannot be relitigated.

22. That the petitioner seeks orders of certiorari which are final orders that should be brought within 6 months and is thus time barred.

23. It was submitted on behalf of the 3rd respondent that it was in agreement with the submissions made on behalf of 1st, 3rd, 4th & 6th respondent. That the issues raised by the petitioner are *res judicata* and thus the application ought to be struck out or subsumed in the petition as it is in the public interest.

24. The 5th respondent similarly aligned itself with the submissions made by the other respondents. That the application sought to alter a statutory and policy process before determination of the petition and as such the same should be dismissed.

25. In rejoinder, the petitioner submitted that the application was not about public participation but national policy development co-ordination and implementation.

26. That *res judicata* does not matter as what he was asking for was conservatory orders to await the hearing of the petition. That the constitutional basis of the application was clear. That the policy was arbitrarily formulated escaping gaps required in national coordination.

*27.*I have considered the application, the responses and submissions filed in respect thereof. The first issue for determination is whether the Motion is *res judicata*.

28. ***Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya*** defines the doctrine of *res rudicata* 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."***

*29.*The Civil Procedure Act also provides explanations with respect to the application of the *res judicata* rule. In the dicta in **re Estate of Riungu Nkuuri (Deceased) [2021] eKLR** the court stated as follows: -

> ***"The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the Civil Procedure Act. In Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined***

thereunder must be satisfied conjunctively for the doctrine to be invoked. 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 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."

30. In **Attorney General & another ET vs (2012) eKLR,** it was held that: -

"The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other

parties or causes of action in a subsequent suit". In that case, the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated:

> ***'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata…'"***

31. In essence therefore, the doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction.

32. I have considered the instant application as well as the judgment in ***Barasa v Cabinet Secretary, Ministry of Treasury & Economic Planning & 3 Others supra.*** After comparing the application and the said judgment this Court is not satisfied that the issues raised were the same. In the Barasa case, what was being challenged was the process of leasing the sugar factories. In the present case, the petitioner is challenging the policy shift from the previous 2015 model to a new 2023-2024 leasing model. He alleges constitutional breaches in the process of that policy shift.

33. What baffles the Court is that, the respondents urged that both the Petition and the Motion be dismissed whilst the Petition has not been argued. What was before the Court is whether or not conservatory orders should issue. The Petition needs to be responded to before it can be addressed.

34. It may be true that two previous decisions may have addressed the issue of public participation on the leasing process. However, as already alluded to, the issue of policy shift, its constitutionality and the whole process resulting therefrom was never in issue. The 1st, 2nd and 4th annexed some Certificate to their Grounds of Opposition. With due respect, that is highly irregular. That is not how evidence is produced. Evidence is by affidavits and not submission or otherwise.

35. In this regard, the Court finds that the application is not res-judicata as argued by the respondents.

36. The other pertinent issue is that, the prayers sought in the present application are the same or similar to those sought in the main Petition. Granting the prayers sought would determine the Petition with finality. There would be no issue left for determination at the trial of the Petition. The objective of conservatory orders is to preserve the subject matter of a suit pending the main trial.

37. In the present case, granting the orders sought would determine the main Petition without having heard the same. It would render the Petition moot

yet there are serious issues of constitutional breaches and documents alluded to by the parties which MUST be scrutinized by the Court before making any firm determination on the issues in contention.

38. The upshot of the above is that the Motion dated **28/11/2025** is hereby struck out for seeking final orders at an interlocutory stage. Since this is public interest litigation, I would make no order as to costs. Let the parties focus on the main Petition.

It is so ordered.

DATED and **DELIVERED** at Kisumu this **19th** day of **February, 2026**.

A. MABEYA, FCI Arb

JUDGE