



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. E101 OF 2025

**IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT OF
THE PETIONER'S CONSTITUTIONAL RIGHTS UNDER
ARTICLES 10,19,20,21,22,23,24,25,27,40,47,48,50 AND
244 OF THE CONSTITUTION OF KENYA.**

AND

**IN THE MATTER OF SECTIONS 25 AND 28 OF THE LAND
REGISTRATION ACT NO. 3 OF 2012.**

AND

**IN THE MATTER OF SECTION 4 OF THE LAND ACT NO. 6 OF
2012**

AND

IN THE MATTER OF THE CONTINUING FAILURE BY STATE INSTITUTIONS TO REMEDY KNOWN FRAUDULENT TRANSACTIONS AFFECTING L.R. NO. 12422/204 (ORIGINAL TITLE) AND L.R. NO. 12422/319 (NOW PROPOSED NAIROBI BLOCK 189/948)

BETWEEN

MARGARET WAIRIMU MAGUGU (Suing as the Administratrix of the estate of the Late Arthur Kinyanjui Magugu).....PETITIONER

VERSUS

**CHIEF LAND REGISTRAR.....1ST
RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS....2ND
RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....3RD
RESPONDENT**

**DIRECTOR OF SURVEY OF KENYA.....4TH
RESPONDENT**

**THE ATTORNEY GENERAL OF KENYA.....5TH
RESPONDENT**

**KARURA INVESTMENT LIMITED.....6TH
RESPONDENT**

**LAW SOCIETY OF KENYA.....INTERESTED
PARTY**

RULING

1. Before the court for determination is the 1st, 2nd, 4th and 5th Respondents **Preliminary Objection** dated **16th December 2025** in which the Honourable Attorney General raised several issues. Firstly that this court is *functus officio* as it has delivered a decision in respect of this matter, secondly that the Petition is statute barred as the limitation period for fraud begins to run when the fraud could have been discovered; thirdly that the Petition offends the doctrine of Constitutional avoidance as it does not meet the test for a Constitutional Petition as laid out in the **Anarita Karimi Njeru case**; Fourthly, that the Petition is an outright abuse of the process

of the court and lastly that the Petition is *Res Judicata* in light of the Court of Appeal decision in **Margaret Wairimu Magugu (suing as the administratrix of the late Arthur Magugu versus Karura Investment Ltd and 4 others.**

2. Simultaneously the matter comes up for hearing of the Petitioners application dated **1st December 2025** in which the Petitioner seeks various injunctive reliefs as follows;

1) **THAT** the Application be certified as urgent and be heard *ex-parte* in the first instance.

2) **THAT** pending the hearing and determination of the Application herein, this Honourable Court be pleased to issue conservatory orders in the nature of a temporary injunction restraining the 6th Respondent, its directors, agents, servants, employees, representative, successors-in-title, assignees, or any person or entity claiming through it or under its authority from selling, transferring, alienating, charging, leasing, subdividing, developing, demolishing, constructing upon, occupying, or in any manner whatsoever dealing with the suit

property known as **L.R. NO.12422/319 (and any subsequent conversion title, including Nairobi Block 189/948 and/or its subdivisions)** or any portion thereof.

3) **THAT** pending the hearing and determination of the Petition herein, this Honourable Court be pleased to issue conservatory orders in the nature of a temporary injunction restraining the 6th Respondent, its directors, agents, servants, employees, representatives, successors-in-title, assignees, or any person or entity claiming through it or under its authority from selling, transferring, alienating, charging, leasing, subdividing, developing, demolishing, constructing upon, occupying, or in any manner whatsoever dealing with the suit property known as **L.R NO.12422/319 (and any subsequent conversion title, including Nairobi Block 189,948 and/or its subdivisions)** or any portion thereof.

4) **THAT** pending the hearing and determination of the Petition herein, this Honourable Court be pleased to issue conservatory orders restraining the 1st Respondent from registering or effecting any transfer, charge, subdivision, conversion, or any other dealings whatsoever affecting **L.R. NO. 12422/319 (and any subsequent conversion title, including Nairobi Block 189/948 and/or its subdivisions)** or any portion thereof.

5) **THAT** pending the hearing and determination of the Petition herein, this Honourable Court be pleased to issue conservatory orders restraining the 4th Respondent from approving, processing, or issuing any new deed plans, survey records, or cadastral documents affecting **L.R. NO. 12422/319 (and any subsequent conversion title, including Nairobi Block 189/948 and/or its subdivisions)** or any subdivision thereof.

6) **THAT** pending the hearing and determination of the Petition herein, this Honourable Court be pleased to

issue a mandatory conservatory order compelling the 1st Respondent to place a caveat or restriction on the register against **L.R. NO. 12422/319 (and any subsequent conversion title, including Nairobi Block 189/948 and/or its subdivisions)** prohibiting any further transactions thereon until the final determination of this Petition.

7) THAT pending the hearing and determination of the Petition herein, this Honourable Court be pleased to issue conservatory orders restraining any person, body, or institution from issuing any approvals, consents, permits, or authorizations for any development, construction, change of user, or subdivision affecting **LR. NO.12422/319 (and any subsequent conversions title, including Nairobi Block 189/948 and/or its subdivisions).**

8) THAT the costs of this Application be provided for.

9) **THAT** this Honourable Court be pleased to grant any such other or further relief as it may deem just and expedient in the circumstances.

3. The application is supported by the affidavit of the Petitioner Margaret Wairimu Magugu in which she deposes that the Petition is founded on continuing violations by the Respondents from 2018 to date in respect of **LR NO 12422/9 (IR NO 37277)**. She details violations under various Articles of the Constitution namely, **Articles 10, 19, 20 ,21,22, 23,24, 25, 27, 40, 47,48,50 and 244.**
4. The 6th Respondent filed grounds of opposition and a detailed Replying Affidavit in which Sureshchandra Raichand Shah a director of the 6th Respondent highlighted in detail the several cases that have previously been filed by the Petitioner herein whom he termed a vexatious litigant who has now filed her 7th case in an attempt to litigate issues that have already been determined.
5. Counsel for the Petitioner submitted on the various issues raised in the preliminary objection. Counsel started by

submitting that the Preliminary Objection does not meet the test of a proper preliminary objection as it requires delving into issues of fact. On the question of *functus officio* counsel submits that this court is not functus as this **Petition** is not **ELC 159 of 2017** or **HC PETITION E 241 OF 2024**. Further, that the cause of action is different on the basis of the alleged continuing violations. Regarding the Limitation Period for fraud, Counsel argues that the Petitioner has actively been pursuing the matter since 2018 and the 1st Respondents own officers have now confirmed fraud. He distinguishes this case from previous court determinations.

6. On the Constitutional Avoidance doctrine, Counsel submits that the issues herein raise genuine Constitutional issues that can only be adjudicated in this court. He outlines the various Constitutional provisions upon which the Petition is brought. Lastly on the issue of Res Judicata counsel submits that the previous determinations have been dismissed for want of jurisdiction and technicality and that this Petition is based on continuing violations. Counsel submitted that the Petitioner

has never been heard and a determination made based on the evidence.

7. Senior Counsel Ahmednasir, for the 6th Respondents points out that this is the 7th attempt at litigation by the Petitioner. Counsel submits that there is a Judgement on merit, between the same parties which settled the issues herein. Senior Counsel argues that there must be finality in litigation. That the court made a determination on the issue of fraud and found that it was meant to circumvent the statutory limitations. Counsel urged the court to find that this Petition is an abuse of the process of court.

8. The counsel for the Honourable Attorney General in presenting the Notice of Preliminary Objection referred the court to numerous decisions to wit; **Telkom Kenya Ltd Vs. John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom K Ltd) (2014) eKLR; Communications Commission of Kenya & 5 Others Vs. Royal Media Services Limited & 5 Others (2014) eKLR; Gabriel Mutava & 2 Others Vs. Managing**

**Director Kenya Ports Authority & another (2016) eKLR;
Muchanga Investment Ltd Vs. Safaris Unlimited
(Africa) Limited & 2 Others (2009).**

9. Having considered the submissions by learned counsel and the pleadings herein the court frames the following issues for determination;

- **Whether the Preliminary Objection is on a pure point of law**
- **Whether the court is *functus officio***
- **Whether doctrine of Constitutional avoidance applies**
- **Whether this Petition is Res Judicata**
- **Whether this Petition is an abuse of the process of the court**
- **Whether the application for conservatory orders is merited**

10. It is trite law that for a preliminary objection to be valid; firstly, it must raise a pure point of law. Secondly, the objection should be argued on the assumption that all the

facts pleaded by the party against whom it is raised are correct. Lastly, an objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, Law JA stated as follows: ***“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

11. The Court also takes into account the fact that a preliminary objection must stem from the pleadings and should not deal with disputed facts nor should it derive its foundation from factual information. See the case of **Oraro v Mbaja [2005] 1KLR 141**, where it was held that: ***–“Anything that***

purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

12. It has severally been the expressed view of this court as captured in previous determinations that courts should be very cautious in determining Res Judicata on the basis of a **Preliminary Objection**. In **ELC Petition number 27 of 2024** I observed ***“From the outset I note that the Respondent has not filed any documents to oppose the Petition. It did not therefore have an opportunity to plead any facts which could have supported its contention. This resulted in the attempt to plead factual matters in the submissions”.***

13. I ascribe to the school of thought that save for in the clearest of cases where the pleaded facts are undisputed the issue of Res Judicata should not be raised as a preliminary objection. This is because carrying out an inquiry under section 7 require analyzing facts which are often disputed.

I have previously cited with approval the case of **Henry Wanyama Khaemba vs Standard Chartered Bank Ltd & Another (2014) eKLR**, and **George Kamau Kimani & 4 Others vs County Government of Trans Nzoia & Another (2014) eKLR**.

14. However, in the instant case, the circumstances are slightly different. The Preliminary Objection is primarily hinged on previous litigation by the parties herein. This litigation is not contested. Indeed, the Petitioner disclosed them in the Petition. I therefore find that the court can consider the merits of the Preliminary Objection in light of the uncontested facts.

15. On the question of *functus officio* the Court of Appeal in the case of **Telkom Kenya Limited Versus John Ochanda (suing on his own behalf 1990 former employees of Telkom Kenya Limited 2014 (KLR))** set out the parameters that render a court *functus officio*. From my reading of the binding precedent the following principles were enunciated therein; a matter must not be reopened before a court that

rendered the final decision in the same matter; that a court can only exercise decision making powers once in respect of the same matter; this doctrine does not apply to correction of clerical errors or where there is an error in expressing the manifest intention of a court.

16. A critical ingredient of the doctrine of *functus officio* therefore is that it must be the same matter which the court had earlier made a decision upon. The doctrine of *functus* cannot apply to a different case such as in the present case.

17. The doctrine of Constitutional avoidance that has been enforced by our courts propounds that matters which should be settled in other forums should not be framed as Constitutional issues.

18. Before turning to the facts of the case before me I will consider decisions by the Supreme Court and Court of Appeal which have dealt with almost similar facts. Two of these decisions were cited by counsel for the 1st, 2nd, 4th and 5th Respondents. In the case of **Communications Authority & 5 others and Royal Media Services & 5 others**

[2014] KESC 53 (KLR) the Supreme Court had this to say ...
[355]However, notwithstanding our findings based on the common law principles of estoppel and res-judicata, we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the Court and have their grievance resolved on the basis of Articles 22 and 23 of the Constitution.

19. The Supreme Court furthers emphasizes the central role of the Judiciary in the post 2010 Constitution. The court reflects on the poignant words of Kenya's distinguished constitutional lawyer, Professor Yash Pal Ghai who in one of his unpublished reflections has stated that: *"Perhaps realizing its own ambitious project, and hence its vulnerability and fragility,*

the Kenyan Constitution sets, through the judiciary, its barricades against the destruction of its values and weakening of its institutions by forces external to itself. Such is the responsibility of Kenya's judiciary."

20. In the case of **Gabriel Mutava v Managing Director Kenya Ports Authority & another (2015) eKLR**; the Court of Appeal restated the Supreme Courts position as follows; "a corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done. In the case of **Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others, Petition No. 14, 14A, B & C of 2014**, the Supreme Court delivered itself thus on the issue:-

"[256] 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).”

21. In the end the Court of Appeal concluded *‘In saying all these, we are not oblivious to the fact that a party is entitled to sue under the Constitution even if there is an alternative remedy, and or other mechanism for the resolution of the*

dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.

22. These two decisions are crystal clear that where there is an alternative remedy constitutional litigation should be the last resort. However the authorities do not support a permanent refusal to engage the Constitution when constitutional issues properly arise. It is clear that the Judiciary must never forfeit its role as the custodian of the values, rights and principles of our Constitution. Each case must be determined on its own merits, while taking into account the responsibility placed on the Judiciary by the 2010 Constitution.

23. The doctrine of *res judicata* is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation.

The case of **John Florence Maritime Services Ltd Vs. Cabinet Secretary & 3 Others (2021) eKLR (Petition 17 of 2015)** provides useful instruction on the doctrine of *Res Judicata* in Constitutional Petitions. The Supreme Court restated holdings of various superior courts on the issue of *Res Judicata* as captured below;

24. In **Okiya Omtatah Okoiti & Another v. The Attorney General and Another Petition No. 593 of 2013 [2014] eKLR** where Lenaola J. (as he then was) stated *inter alia...* ***"I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same***

parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.”

25. In **Wycliffe Gisebe Nyakina v. Attorney General & another [2014] eKLR**, Gikonyo, J. held as follows: ***“I reiterate the sentiments above and I must also state that while the Courts in constitutional litigation must apply the principle of res judicata sparingly, they must also be vigilant to guard against litigants who are clearly evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the same Court. That being my finding and looking at the Petition before me, I do not think that it is res judicata and I will say why shortly.”***

26. In **William Kabogo Gitau v. Ferdinand Ndung’u Waititu [2016] eKLR Onguto, J.** held as follows:

59. *In the cases of Aggrey Chiteri v. Republic [2016] eKLR and Edward Okongo Oyugi & 2 Others v. The 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]: “[11] The 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 off 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.”

27. After citing several authorities from within and outside Kenya the Supreme Court in the end had this to say [83] *However, though the doctrine of res judicata lends itself to promote the orderly administration of justice, it should not be at the cost of real injustice. In the Danyluk Case from Canada the court*

*cited the dissenting opinion of Jackson J.A., in Iron v. Saskatchewan (Minister of the Environment & Public Safety), 1993 CanLII 6744 (SK CA), [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21 where he stated: “The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.” [84] Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. **(The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and***

against exercise of such discretionary power. [85] In the alternative a litigant must demonstrate special circumstances warranting the Court to make an exception)” Emphasis mine.

28. In light of this clear holding the court in this case will consider the totality of the circumstances herein to determine whether there is substantial injustice that is likely to result if the court declines to hear this Petition or whether are special circumstances warranting an exception by the court. Ultimately this will also answer the question whether this Petition is an abuse of the process of the court.

29. The elements for *Res Judicata* as restated in the John Maritime case are; **a) There is a former Judgment or order which was final;**
b) The Judgment or order was on merit;
c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d) There must be between the first and the second action identical parties, subject matter and cause of action.

30. The litigation history of this matter as captured by the pleadings by both the Petitioner and the 6th Respondent is as follows;

- **ELC 159 of 2017 Margaret Magugu versus Karura Investments. The Respondent raised a Preliminary Objection which was allowed and the suit struck out on for limitation and for being an abuse of the process of the court and on;**
- **Civil Appeal Number 3 of 2018 Margaret Magugu versus Karura Investments which upheld the Environmental and Land Court decision.**
- **ELC OS E001 of 2024 seeking leave to file the suit out of time. This was withdrawn.**
- **ELC E 124 of 2024 withdrawn by the Petitioner because according to her she thought the High Court was the correct court to hear the matter.**

- **Milimani HCCHRPET No E 241 of 2024 was dismissed for want of jurisdiction.**
- **A complaint at the National Land Commission in 2016 was dismissed.**
- **A complaint was made to the National assembly.**

31. There is no doubt that the parties in the previous proceedings were the same or at least parties claiming under them. There is also no doubt that the Petitioners Civil claim was dealt a fatal blow in **ELC 159 of 2017** after a Preliminary Objection was raised on limitation and abuse of process of court. The Court of Appeal decisively upheld the determination on Limitation. No determination was made in respect of the other proceedings save for **Milimani HCCHRPET No. E 241 of 2024** which was dismissed for want of jurisdiction. The proceedings were terminated for one reason or another which the Petitioner has explained. The fate of this Petition turns on one element only and that is whether the issues being raised in this Petition have been

substantively heard and determined in the previous proceedings.

32. In this case the Petitioner raises various issues which have never been considered in a court of law. Public officers' inaction, Institutional silence, conflicting reports which have never been explained, concealment of records, confirmed documented discrepancies. I do not wish at this interlocutory stage to delve deeply into the material that was presented before the court in the affidavit in support and the Replying Affidavit on record but for illustrative purposes I will mention a few; The forensic reports by Bernard Cheruiyot and Geoffrey Chania; the letter by the Director of Survey dated 17th March 2023. Can the proceedings that have taken place so far be said to have resolved these issues especially in light of the Constitutional provisions I will shortly highlight?

33. Kenya's transformative constitution Article 1 states all sovereign power belongs to the people of Kenya and shall be exercised only in accordance to this constitution. **Article 10 (2) of the Constitution** outlines the national values and

principles of governance which include; patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability and sustainability.

34. The Kenyan people were even more specific on the values and principles of public service set out in **Article 232** to include ;

(a) high standards of professional ethics;

(b) efficient, effective and economic use of resources;

responsive, prompt, effective, impartial and equitable;

(c) provision of services;

(d) involvement of the people in the process of policy making;

(e) accountability for administrative acts;

(f) transparency and provision to the public of timely, accurate information.

35. The Kenyan people through the Constitution they enacted hold public servants on whom they have bestowed authority to a higher level of service and commitment. This is extremely important in the context of land which in this country has been an instrument of injustice and cause of distress and pain to many. The injustice is sometimes carried forward from generation to generation. While significant steps are being taken to reform the land sector it is in the public domain that the role of public officers in addressing land issues have come into sharp focus in recent decisions of the superior courts.

36. The Constitution of Kenya has placed public officers under unprecedented scrutiny. The Court emphasizes that constitutional scrutiny of public officers is not adversarial to public service. Where officials act lawfully and in good faith, judicial review vindicates rather than undermines their offices. The Petitioner challenges the conduct of the institutions herein and insists that they have not been responsive on issues relating to the suit property.

37. Were the actions cited by the Petitioner limited to the period before the Judgement in ELC and the appeal therefrom, then my finding would have been different. However some of the documentation and communication by public officers confirming discrepancies issued as late as 2023. These alleged continuing violations which were not denied by affidavit can only be adjudicated through hearing the constitutional petition.

38. I therefore find that there are special circumstances as envisaged by the Supreme Court to warrant exemption of the doctrine of *Res Judicata*.

39. In view of my findings above I find that the Petitioner's relentless attempts to be heard cannot be said to be an abuse of the court process. Hearing the Petition will not only avail her a chance to be heard but will also provide the Respondents with an opportunity to vindicate their substantive rights.

40. Regarding the conservatory orders, I will not grant any orders in view of the previous ELC and Court of Appeal

decisions. Consequently the court makes the following orders;

a. The Preliminary Objection is dismissed.

b. The application for conservatory orders is dismissed. The Court will give directions on the hearing of the Petition.

c. Each party is to bear their own costs for the Preliminary Objection and application.

Dated, Signed and Delivered virtually at Kajiado this 12th day of February 2026.

JUDY OMANGE

JUDGE.

IN THE PRESENCE OF:

Mr. Kariuki for the Petitioner.

Ahmednasir SC for 6th Respondent.

Mr. Allan Kamau for 1st, 2nd, 4th, and 5th Respondent.

Peter - Court Assistant.

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