



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELCL PETITION CASE NO E001 OF 2024

KISING’U KINYILI

STANLEY

MAUNDU.....PETITIONERS

MUSYIMI

VERSUS

GERALD

MUSANGI.....1ST

RESPONDENT

ATTORNEY

GENERAL.....2ND

RESPONDENT

RULING

1. This ruling addresses the notices of preliminary objection (POs) against the substantive petition, which are dated 12/03/2024 and 13/09/2024, respectively, filed by the second and first respondents and together with a notice of motion dated 20/02/2025, filed by the petitioners. Additionally, another application, dated 5/01/2024, was reserved for ruling today; however, it has now been determined to have been spent.

2. The second respondent's PO raises the following points of law for determination *in limine* and seeks to have the petition be struck with costs to it on the grounds that:

a. The petition is res judicata; thus, this court lacks jurisdiction to entertain it.

b. That the court is functus officio to determine the matter.

c. The petition is an abuse of the court, incompetent and ought to be struck out with costs.

3. As for the first respondent, his PO raises the following grounds:

-

a. The petition as drawn does not meet the threshold of constitutional litigation as it does not disclose any public law issues.

b. That issues raised touching on matters of ownership can only be adequately addressed by a civil suit.

c. The issues on the decision of the deputy county commissioner as the appeal minister and

reinstating the decisions of the county arbitration board and the committee were extensively heard and determined in Judicial Review No. 69 of 2017.

d. The court lacks the requisite jurisdiction to entertain this matter.

e. That the petition is misconceived, incompetent and an abuse of the court process and ought to be struck out.

4. In the motion, the petitioners seek the following orders in his motion: -

a. THAT the honourable court be pleased to grant the petitioners leave to amend their petition dated 5/01/2024, as per the annexed draft amended petition.

b. THAT the cost of this application be in the cause.

5. The motion is supported by the grounds outlined in the body thereof and the supporting affidavit of Kising'u Kinyili, sworn on 20/02/2025, where he informs the court that the matter is at preliminary stages with no hearing date set, and pleadings are not yet closed. The sought amendments aim to clarify issues in

the petition, enabling parties to litigate based on the actual facts and law. They do not prejudice respondents and will facilitate a complete resolution of all issues, serving the interests of justice.

6. In response, the first respondent, in a brief reply via his replying affidavit sworn on 18/03/2025, maintains that the motion is intended to rectify anomalies in the petition as raised in his PO, and alleges malice in the actions taken, as the amendments being sought were introduced late in the proceedings, specifically on 20/02/2025. He also appreciated that the courts exercise judicious discretion in granting such orders.
7. The POs and motion were canvassed through the written submissions filed by the parties' legal representatives, namely **Ms M.M.Mutua & Co. Advocates** for the petitioners, dated 29/09/2025; **Ms Kithuka & Nafula Co. Advocates** for the first respondent, dated 28/10/2024; and **Mr Kuria** for the second petitioner, dated 8/10/2024.
8. Nevertheless, despite directives on page limits, the petitioners' submissions failed to adhere to the orders of the court and, guided by the Supreme Court of Kenya's decision in **Okoti & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others [2023] KESC 69 (KLR)**, this court hereby strikes out these submissions. Regarding the other set of submissions, after identifying and considering the

issues for determination, this ruling will, in its analysis and determination, later examine the arguments presented concerning the specific issue and consider relevant law and judicial precedents upon which they rely in support of their arguments.

9. Accordingly, after reviewing the POs, the motion, its grounds, affidavit, annexures, along with the respondents' submissions, the issues to be addressed sequentially requiring resolution are as follows: a) **whether the petitioners should be allowed to amend their pleadings**, and b) **whether the POs have satisfied the legal requirements and are merited.**

a) Whether the petitioners should be allowed to amend their pleadings.

10. The legal framework governing the amendment of constitutional petitions is found in our **Rule 18** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ("the Rules")**, which states.

"A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court."

11. The decision to grant or deny leave to a party to amend pleadings is at the discretion of the court, based on law, evidence, and reason. Typically, the court permits

amendments deemed necessary to ascertain the real issues in dispute or to prevent the proliferation of lawsuits, provided there has been no undue delay, no new or conflicting cause of action is introduced, and no vested interest or accrued legal right is compromised. Moreover, the amendment may be granted without causing injustice to the opposing party.

12. The question of amending pleadings is not new and has been addressed in many court rulings. The general rule is that courts typically permit amendments at any stage of proceedings, provided they do not cause injustice or prejudice to the opposing party. If there is some prejudice, it can often be offset by an award of costs.
13. The purpose of amending pleadings is to allow the parties to modify their pleadings to ensure that litigation proceeds based on the actual facts and intended relief, rather than on inaccurate assertions or claims. The authority to amend enhances the court's ability to focus on the case's substantive merits rather than being constrained by procedural formalities.
14. The first respondent's replying affidavit acknowledged that the court has discretion to allow such a motion. While this court concurs that the respondent's PO may have prompted the motion, it is the considered view of this court that, as the matter has not yet undergone pretrial directions regarding the substantive hearing of the petition, granting leave to the petitioners to amend their pleadings would serve the interests

of justice, as all issues in dispute will be addressed conclusively. Furthermore, the respondents shall be granted leave to amend their documents accordingly. Hence, this court finds that such relief is merited.

b) Whether the POs have satisfied the legal requirements and are merited.

15. The granting of the motion has effectively addressed the first respondent's legal point that the constitutional petition does not meet the requisite legal threshold; therefore, this ground will not be considered under this head. Now, turning to the POs, the respondents addressed the second aspect of this issue without addressing the first limb, and they have entrusted the matter to the court for resolution.

16. Nevertheless, in regards to the first limb, the well-cited decision of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696** has long established the tests that a PO must satisfy, and it is vital to reaffirm the relevant principles derived from the landmark case, which articulated that:

“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 ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

17. In affirming **Mukisa Biscuit (*Supra*)**, the Supreme Court of Kenya in **Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others [2015] KESC 23 (KLR)** emphasised the following on the threshold of a PO: -

“Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

18. Thus, based on these principles, when addressing this issue, the court will inquire whether the points of law are clear; whether the facts are settled and correct; do not necessitate further ascertainment; and whether the court is not being asked to exercise its prudent discretion.

19. The respondents' submissions adequately address the issues of *res judicata* and *functus officio*. This court has had an opportunity to consider the decisions referenced by the parties, which they contend oust this court's jurisdiction, namely **Kising'u Kinyili v Gerald Musangi [2022] KEELC 546 (KLR)** and **Kising'u Kinyili v Ministry of Lands and Physical Planning & another [2018] KEELC 1122 (KLR)**. Accordingly, although their arguments appear to be meritorious, these grounds involve factual matters that would necessitate the presentation of evidence.
20. In the court's considered opinion, the parties should have filed a notice of motion, presenting copies of these decisions and their pleadings, in order to prevent any allegations of the court engaging in the arena of litigation and also to provide the petitioners with an opportunity to respond to the factual issues.
21. As for ground (b) of the first respondent's grounds, this court finds that it is tied to the grounds of *res judicata* and *functus officio* as the petitioners already moved the court in a civil suit in **Kising'u Kinyili v Gerald Musangi [2022] KEELC 546 (KLR)**, which was struck out for want of jurisdiction. In the circumstances, this court finds that the grounds raised in the POs do not meet the legal threshold. The respondents will be permitted to approach the court appropriately, as this court disapproves of abuse of its process.

22. Flowing from the findings and reasons, the court finds that the notice of motion dated 20/02/2025 merited. The POs are dismissed. Costs shall be in the cause. Ultimately, the following final disposal orders are issued:

a. The petitioners shall, within 14 days from the date hereof, file and serve the amended petition on all the parties.

b. The respondents shall thereafter be at liberty to file their responses within fourteen (14) days of service of the amended petition.

c. The respondents' POs dated 12/03/2024 and 13/09/2024 are hereby dismissed.

d. The respondents are hereby granted leave to file formal applications within 14 days hereof, raising the issue of whether this court has jurisdiction to entertain the entire petition.

e. Costs shall be in the cause.

It is so ordered.

Delivered and Dated at Machakos this 24th February, 2026.

**HON. A. Y. KOROSS
JUDGE
24.02.2026**

**Ruling delivered virtually through Microsoft Teams Video
Conferencing Platform**

In the presence of;

Ms Kanja Court Assistant

Miss Wambui Kabuu for 1st respondent.

Mr. Kuria for 2nd respondent.

No appearance for petitioners.