

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELCLC E085 OF 2025

KENNETH TONUI.....1ST PLAINTIFF

SAUL GEHNDA MBELA2ND
PLAINTIFF

ANN NTAGUTHI CHIRA3RD PLAINTIFF

BERNAD NUTHU KABUTU.....4TH
PLAINTIFF

DAVID NAMALALE MAMATI.....5TH
PLAINTIFF

JOHN LOTO SEGELAN.6TH PLAINTIFF

JAMES NDIRANGU MURAGE7TH
PLAINTIFF

HARRIET RINGAI.....8TH PLAINTIFF

JOSEPH KIMATU MUNYAO.....9TH
PLAINTIFF

GERALD KABUI MWANGI.....10TH PLAINTIFF

JANE MORAGWA ONKUNDI.....11TH

PLAINTIFF

MARK KINOTI UHURU ANGATWA12TH

PLAINTIFF

CHRISTINE NASIPWANI WASIKE13TH PLAINTIFF

JANE MORAGWA ONKUNDI KARORI.14TH

PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF

KAJIADO.....DEFENDANT

RULING

*(In respect of the Plaintiffs' Motion dated 4th July, 2025 seeking
conservatory orders)*

Introduction

1. Before this court for determination is the Plaintiffs' Notice of Motion application dated 4th July, 2025 brought under the provisions of Article 159 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act

and Order 40 Rule 1 of the Civil Procedure Rules seeking for the following order;

1) *Spent*

2) *Spent*

3) *THAT this Honorable Court be pleased to issue a conservatory order prohibiting the respondent whether by itself, its agents, employees, servants and or assigns from demolishing, evicting, harassing, threatening and in anyway interfering with the APPLICANTS' and the Applicants' tenants use occupation and quiet enjoyment of the Applicants' property known as NGONG/NGONG/10690, NGONG/NGONG/10687, NGONG/NGONG/10688, NGONG/NGONG/10670, NGONG/NGONG/10660, NGONG/NGONG/13139, NGONG/NGONG/10654, NGONG/NGONG/10659, NGONG/NGONG/10648, NGONG/NGONG/10680, NGONG/NGONG/10681, NGONG/NGONG/10683, NGONG/NGONG/10643, NGONG/NGONG/10669 & NGONG/NGONG/27186 pending the hearing and determination of this suit.*

4) THAT costs be provided for.

2. The Motion which is premised on the 12 grounds on the face of it is further supported by the affidavit of Kenneth Tonui sworn on 7th July, 2025 who deposes that the Plaintiffs are the registered owners of

NGONG/NGONG/10690, *NGONG/NGONG/10687,*
NGONG/NGONG/10688, *NGONG/NGONG/10670,*
NGONG/NGONG/10660, *NGONG/NGONG/13139,*
NGONG/NGONG/10654, *NGONG/NGONG/10659,*
NGONG/NGONG/10648, *NGONG/NGONG/10680,*
NGONG/NGONG/10681, *NGONG/NGONG/10683,*
NGONG/NGONG/10643, *NGONG/NGONG/10669* &
NGONG/NGONG/27186, upon which they have constructed permanent residential houses wherein they reside and even rented some. It is contended that following the issuance of a notice a dated 11th May, 2023 by the Defendant through its department of Lands, Planning, Urban Development and Municipalities, land owners along Fatima Road, 5th Avenue and Helena Estate were notified to demolish their structures within

14 days failure to which demolition would be undertaken without further notice because they had allegedly encroached a road reserve by 6 meters.

3. The Plaintiffs accuse the Defendant of earmarking their houses and perimeter walls for demolition beyond the 6-meters' mark without following due process. They deny encroaching onto the road reserve currently utilized as an access road within the estate and its neighborhood. Further, the Plaintiffs assert that they are apprehensive that the Defendant will at any time proceed to demolish their houses since temporary orders issued barring them from interfering with their quiet possession of their respective suit properties lapsed after the dismissal of their *claim in Kajiado ELC Petition Case No. E001 of 2023; Kenneth Tonui & 13 Others v The County Government of Kajiado* through a judgment delivered on 19th June, 2025. The court is entreated to issue the orders sought because if demolition is undertaken, the Plaintiffs will be greatly prejudiced.

Defendant's case

4. The Defendant prays for the striking out of the Plaintiffs' application with costs through the Replying Affidavit sworn by one Joshua Lemaikai on 30th September, 2025. The deponent asserts that the application is bad in law

and is an abuse of court process meant to frustrate restoration of unlawfully and illegally encroached road reserves by the Plaintiffs. According to the Defendant, this court lacks the requisite jurisdiction to determine this suit for it is *functus officio* and the suit offends the principle of *Res Judicata*. The issues raised in the suit and in the application are similar to those canvassed and determined through the judgment delivered in *Petition Kajiado ELC Petition Case No. E001 of 2023*. The Defendant opines that if the Plaintiffs were aggrieved with the decision, they ought to have lodged an appeal or review against it instead of relitigating the matter yet again before the same court. According to the Defendant, the suit is also premature because the Plaintiffs have not exhausted the alternative disputes resolution mechanism stipulated under Section 40(4) of the Physical and Land Use Planning Act.

5. The deponent avers that the Defendant commissioned survey works between 5th to 7th June, 2023 to establish the extent to which the Plaintiffs had illegally and unlawfully encroached access roads within Helena Estate, in Kajiado North sub-county its neighborhood through erection of permanent structures. Although the Plaintiffs were notified through a notice issued on 11th May, 2023 of the said survey works and that all offending

structures encroaching the road reserves would be demolished, they prematurely instituted *Petition Kajiado ELC Petition Case No. E001 of 2023* instead of complying with the directive.

6. According to the Defendant, the notice never specified that houses would be demolished. Reference is made to Section 56(a) of the Physical and Land Use Planning Act and Regulation 32 of the Physical and Land Use Planning (Building) Regulations to assert that the Defendant is justified to proceed with demolition of all offending structures. With respect to the Plaintiffs' photographic evidence in support of their application proclaiming that their properties were earmarked for demolition, the Respondent alleges that the photographs do not have any probative value because they are not admissible under Section 106B(4) of the Evidence Act for the reason that they are not accompanied by a certificate of electronic evidence neither does they prove that the Plaintiffs have not encroached the road reserve nor that they actually owned such properties.
7. Premised on the above assertions, the Defendant/Respondent maintains that the Plaintiffs are not deserving of the orders sought.

Court's directions

8. When the application came up for hearing on 9th October, 2025, Counsel for the Plaintiffs and the Respondent were directed to file their respective submissions. The directive was fully complied with.

Issue for determination

9. Upon careful examination of the application, responses by Respondent and rival submissions, the key issues for determinations are as follows;

(a) Whether the Plaintiffs' application offends the doctrine of res judicata;

*(b) Whether the Plaintiffs have exhausted the appropriate statutory alternative dispute resolution mechanism before instituting this suit;
and*

(c) Whether the Plaintiffs have made out a prima facie case to warrant issuance of conservatory orders.

Determination

10. The doctrine of *Res Judicata* has extensively been invoked and argued by all the parties in their respective submissions. Under Section 7 of the Civil Procedure Act (Cap. 21), *Res judicata* is expounded 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.”

11. The logic behind this doctrine of res judicata was explained by the Supreme Court in *John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)* as follows;

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent

courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature.”

12. The conditions to be satisfied for *Res judicata* claim to be merited were elaborated in *Independent Electoral and Boundaries Commission v Kiai & 5 others [2017] KECA 477 (KLR)* by the Court of Appeal as follows;

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(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.”

13. The Defendant has faulted the Plaintiffs for attempting to re-litigate their claim for the second time before this court hence violating the doctrine of *Res Judicata*. It is further argued that this court is *functus officio*, it lacks the requisite jurisdiction to entertain the Plaintiffs' claim for it raises comparable issue as those heard and determined through a judgment in respect to the Plaintiffs' lawsuit in *Petition Kajiado ELC Petition Case No. E001 of 2023*. In the Petition, the Petitioners had instituted legal proceedings against the County Government of Kajiado and National Land Commission as the 1st and 2nd Respondents respectively. The Petition was instituted by the 14 Petitioners who are now the 14 Plaintiffs in this present suit. Through the Petition, they sought for a declaration that the intended demolition of their

properties by the Respondent was illegal, irregular and unprocedural and that their forceful eviction and demolition without relocation or compensation violated their rights, and those of their tenants and families. They further sought for a permanent injunction restraining any demolition or forceful eviction by the Respondents.

14. The Petition was grounded on allegations that as residents and owners of properties located at Helena Estate in Kajiado North Sub-County, the Petitioners had erected permanent residential houses wherein they resided with their families and even tenants. However, the 1st Respondent issued them with a 7 days' notice dated 11th May, 2023 requiring them to demolish their houses failure to which it would demolish them on the basis of having encroached onto road reserves. It was pleaded that on 27th June, 2023, bulldozers were positioned by the 1st Respondent ready for demolition. The Petitioners contended that the legitimate process was not followed thus contravening their rights to private property.

15. In its defence, the 1st Respondent avowed that the Petitioners had illegally and unlawfully encroached on a road reserve by erecting structures without its approval. As a result, the demolition notice was warranted. Survey works

had been commissioned to be undertaken between 5th to 7th June, 2023 though publication of the notice dated 11th May, 2023.

16. While rendering a judgment on 19th June, 2025, **Lady Justice Komingoi J** noted that the Petition was attributed to the 1st Respondent's public notice dated 11th May, 2023. The trial court proceeded to dismiss the Petition for being incompetent and noted that the Petitioners had not demonstrated how the notice violated their rights neither did they satisfy the well set out principles with respect to constitutional petitions. While determining the issue whether the Petitioners' rights and fundamental freedoms had been breached, violated and infringed upon, the court stated as follows'

"I agree with the 1st Respondent's averments that not all structures were targeted for demolition but only the offending structures. In my view this notice availed the Petitioners the best opportunity to engage the 1st Respondent on how best to resolve the issue of encroachment. There is no mention of demolition of any houses. The road reserve is to serve all members of the public. It is public land and cannot be subject of any compulsory acquisition as it is already public land."

17. In the current suit, the 14 Plaintiffs' claim against the Kajiado County Government is for general damages and a permanent injunction restraining it from interfering with the use, occupation and quiet enjoyment of their respective properties by themselves or their tenants. According to their Plaint dated 4th July, 2025, it is alleged that the Defendant is likely to demolish their earmarked residential houses erected on the suit property wherein they reside and or have rented out. According to the Plaintiffs, their structures which are inside their respective parcels have not encroached onto the road reserve as alleged by the Defendant.

18. I have keenly scrutinized the pleadings in both matters; the claimants are identical and the contested issue is the County Government's Notice dated 11th May, 2023 requiring demolition of structures by land owners within Fatima road reserve. In the constitutional petition, the Plaintiffs questioned the manner in which the notice was issued by alleging that it violated their private proprietary rights because the procedure for compulsory acquisition had not been followed. In the current suit, the Plaintiffs deny encroaching onto the road reserve. The only inconsequential variance in is that the claimants did not enjoin the National land Commission as a Defendant in the current suit.

19. The issue of relitigating comparable suits camouflaged as new suits was discussed by Majanja J, in the case of Samuel Njau Wainaina vs Commissioner of Lands and 6 others [2012] KEHC 5643 (KLR), where the Judge stated as follows;

“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 a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and 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., in the case of Njangu v Wambugu and Another Nairobi HCCC 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 on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.”

20. The current suit was instituted immediately after the dismissal of the Plaintiffs’ petition. Even though the prayers sought in both lawsuits may not be exactly identical on the face value, the subject matter and the object of the suit is the same as that of the earlier petition. The plaintiffs are in this second matter trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.

21. On this issue, the court fully agrees with the Defendant’s arguments that the suit is res judicata. Consequently, the application by the Plaintiffs which is grounded on the suit is incompetent and unmerited. Having arrived at this conclusion, I see no need to discuss the other issues identified. This finding is enough to dispose of the Plaintiffs’ application and I dare say, the entire suit.

22. Consequently, the Plaintiffs’ application dated 4th July 2025 is hereby dismissed with costs to the Defendant.

23. For avoidance of any doubts, the interim orders issued earlier on in this matter are vacated.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 26th Day of February 2026.

M.D. MWANGI
JUDGE

In the virtual presence of:

Ms. Ngetich for the Plaintiffs/Applicants

Ms. Ndambuki h/b for Mr. Otieno for the Defendant/Respondent

Court Assistant: Mpoye

M.D. MWANGI
JUDGE