

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC L PETITION NO. E002 OF 2025

OKIYA OMTATAH OKOITI

PETITIONER

= VERSUS =

**JOSEPH OUMA OGALLO &
ELIZABETH MULANDA OMONDI (sued as the Administrators
of the Estate of OGALU ORIMA OGALO) 1ST & 2ND
RESPONDENTS**

COLLINS ONYANGO AMUKOA 3RD

RESPONDENT

DAVID OKUMU OTIENO 4TH

RESPONDENT

FRANCIS OMONDI ACHOLA 5TH

RESPONDENT

BRIAN OCHIENG OWUOR 6TH RESPONDENT

COUNTY GOVERNMENT OF BUSIA 7TH

RESPONDENT

THE REGISTRAR OF LANDS, BUSIA 8TH

RESPONDENT

= AND =

**THE ETHICS & ANTI-CORRUPTION
COMMISSION 1ST INTERESTED
PARTY**

THE NATIONAL LAND COMMISSION 2ND INTERESTED

PARTY

**THE CONTROLLER OF BUDGET 3RD INTERESTED
PARTY**

**THE AUDITOR GENERAL 4TH INTERESTED
PARTY**

**THE COUNTY COMMISSIONER BUSIA 5TH INTERESTED
PARTY**

**THE HON. ATTORNEY GENERAL 6TH INTERESTED
PARTY**

J U D G M E N T

1. This judgment was due for delivery on 3rd December 2025. However, following my transfer to Iten Court, which was effective 15th January 2026, I had to prioritize finalizing my part-hard cases. That has caused the delay in delivery of this judgment. The same is regretted.
2. **OKIYA OMTATAH OKOITI** (the Petitioner) is a human rights defender and the Senator Busia. He has filed this Petition against **JOSEPH OUMA OGALLO, ELIZABETH MULANDA OMONDI, COLLINS ONYANGO AMUKOA, DAVID OKUMU OTIENO, FRANCIS OMONDI, ACHOLA, BRIAN OCHIENG OWUOR, COUNTY GOVERNMENT OF BUSIA**, (the 1st to 8th Respondents) and also impleaded the **ETHICS AND ANTI-CORRUPTION COMMISSION**,

THE NATIONAL LAND COMMISSION, THE CONTROLLER OF BUDGET, THE AUDITOR GENERAL, THE COUNTY COMMISSIONER BUSIA, and THE ATTORNEY GENERAL, (the 1st to 6th Interested Parties).

He seeks the following orders:

1) A declaration that the judgment and decree issued in BUSIA MAGISTRATES COURT ELC CASE NO. 17 of 2019 by Hon. P. E. OLENGO, Senior Principal Magistrate, are null and void ab initio, for having been rendered by a Court lacking pecuniary jurisdiction under Section 7(1)(b) of the Magistrate Courts Act as the value of the suit property exceeded Kshs.15 million.

2) A declaration that the actions and omission of 1st, 2nd, and 7th Respondents violate Articles 1, 2, 10, 40, 47, 48, 50(1), 159, and 232 of the Constitution of Kenya 2010; including denial of fair hearing and access to justice; unlawful deprivation of public property, collusion to squander

public funds and breach of national values (integrity, accountability, and sustainable development).

- 3) A declaration that the judgment and decree issued in BUSIA MAGISTRATES COURT ELC CASE NO. 17 of 2019 (Hon. P. A. OLENGO. SPM) are null and void ab initio for having been determined without involving the National Land Commission.**
- 4) An Order of Certiorari to:**
 - a) Squash the judgment, decree, and all consequential orders in BUSIA MAGISTRATES COURT ELC CASE NO.17 of 2019 (HON. P. E. OLENGO, SPM);**
 - b) Nullify the purported 're-purchase' agreement between the 1st and 2nd Respondents and the 7th Respondent;**
- 5) An Order of Mandamus compelling the 8th Respondent (Registrar of Lands, Busia County) to:**

- a) **Cancel any entries or subdivisions (parcels 4397 - 4405) made in disregard of the 1990 sale agreement;**
- b) **Register Title No. SOUTH TESO/OSURETTETE/964 in the name of the County Government of Busia (the 7th Respondent);**
- 6) **An Order of Inhibition restraining the 1st to 6th Respondents, their agents or assigns from:**
- a) **Interfering with the suit property;**
- b) **Evicting traders or demolishing structures on the land;**
- c) **Further alienating, transferring or dealing with the land in any manner.**
- 7) **A permanent injunction barring the 7th Respondent from:**
- a) **Disbursing public funds for the purported 're-purchase' of suit property;**

- b) Entering into any transaction inconsistent with the 1990 sale agreement.
- 8) An Order compelling the 7th Respondent to:
- a) Publicly account for all funds allocated to the development of the suit property;
- b) Restore the land to its original status as a public market under the County Integrated Development Plans (CIDPS).
- 9) An Order that each party shall bear its own costs of this Petition given the public interest nature of the litigation.
- 10) This Honorable Court gives any other orders required to advance the cause of justice and the rule of law in this case.

The basis of the Petitioner's case is that there was injustice by **HON. P.A. OLENGO, SPM** in **BUSIA-MAGISTRATES COURT ELC CASE NO. 17** of **2019** when the trial Court granted judgment in favor of the 1st and 2nd

Respondents as Administrators of the Estate of the late **OGALU ORIMA OGALO** against the 7th Respondent in a dispute over land lawfully acquired by the 7th Respondent's predecessor (Busia County Council) for public use as a market to which it was committed. That the suit property originally registered as **SOUTH TESO/OSURETTE/964** was sold by the Estate of the late **OGALU ORIMA OGALO** to the then Busia County Council (now succeeded by the 7th Respondent) through a valid and documented agreement dated 20th July 1990 for a consideration of Kshs.130,000 and the said land was earmarked and developed for use as a public market. A caution was registered on 8th June 1993 in favor of the County Council to protect its interest and no objection was raised by the vendors' Estate or Administrators for nearly three decades.

3. Despite having full knowledge of the original sale and the 7th Respondent's possession and development of the land, the 1st and 2nd Respondents filed a suit claiming ownership of the land, falsely alleging that it had never been sold. The suit was filed in a Court without jurisdiction as the

plaintiffs claimed it was valued at Kshs.35 million. At the time of filing the suit, being **BUSIA CHIEF MAGISTRATE COURT ELC CASE NO. 17** of 2019, the market value of the land was in excess of the pecuniary jurisdiction of the trial Magistrate which was Kshs.15 million. Therefore, the trial Magistrate lacked jurisdiction and the judgment rendered was a nullity.

4. Further, the suit was filed on 1st February 2019 some 29 years after the County Council took possession after purchasing the suit property on 20th July 1990, so the judgment was also a nullity as the suit was statute barred. The suit was also determined without involving the National Land Commission, which is constitutionally mandated to manage public land on behalf of the National and County Governments.
5. That when the matter came up for hearing, the 7th Respondent's key witness being its Chief Officer Lands was on maternity leave and the trial Magistrate declined a request for adjournment thus denying the 7th Respondent an opportunity to present its case.

6. Judgment was then entered for the 1st and 2nd Respondents granting them an order of eviction and mesne profits against the 7th Respondent despite overwhelming historical and documentary evidence in its favor.
7. Upon discovery of critical documents including the original sale agreement, the 7th Respondent filed a review application under **Section 80** of the **Civil Procedure Act** which has not been heard to-date and there is no attention to the serious allegations of fraud, misrepresentation and procedural unfairness. As part of re-purchasing the suit property, the 7th Respondent vide a letter **REF: 040/08/LA/1/17** dated 10th April 2024 requested for searches and status of land parcel **NO SOUTH TESO/OSURETTE/964** and in response the Registrar of Land Busia County supplied such certificates revealing that the 2.2 Hectares of land had since been subdivided and new title deed numbers 4397-4405 issued to several individuals. That instead of pursuing an appeal or determination of the review application, the 7th Respondent wants to re-purchase from the 1st and 2nd

Respondents the land which it already owns and has already developed for public use. This conduct is not only irrational and economically irresponsible but is also indicative of collusion, abuse of office and misappropriation of public resources and warrants the intervention of this Honorable Court pursuant to its supervisory jurisdiction under **Article 163(6) and (7)** to avert a miscarriage of justice and to protect the public interest. The 7th Respondent's failure to defend public land, its apparent abandonment of available legal remedies and its involvement in an illegal purchase of the same land amount to a gross abdication of its Constitutional and statutory responsibility particularly in light of **Articles 10, 40, 47, 48, 165 and 232** of the **Constitution**. The Petitioner therefore brings this matter before this Court in public interest seeking Constitutional redress, enforcement of public accountability and the protection of public land from fraudulent conversion and judicial abuse. The supervisory jurisdiction of this Court is specifically invoked to correct the irregularities and the unlawful judgment and restore the rule of law.

8. The unlawful alienation of public land at the centre of this Petition raises critical issues under **Articles 62(1) (a) and (2)** of the **Constitution** which define land previously vested in local authorities for public use and land now held by the County Governments in trust for the people. Further, **Article 66(1)** affirms the state's power to regulate the use of land in the public interest while **Article 60(1)(b) (c) and (e)** requires that land be held and managed equitably, sustainably and in a manner that ensures secure land rights. The attempt to alienate this land through collusion and without regard to these Constitutional safeguards constitutes a grave breach of public trust and a violation of the sovereign will of the people under **Article 1(1) and (2)** of the **Constitution**.
9. With regard to locus, the Petitioner has pleaded that he has moved to this Court in public interest under **Article 22 (1) and (2)** of the **Constitution** which empowers every person to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or threatened and as an elected representative in the senate of the people of Busia

County, the Petitioner has both legal mandate and a moral obligation to protect public property, to uphold the Constitution and demand public accountability in the management of public resources by the County and National Governments alike. The issues raised in this Petition concern fraudulent dealings involving public land management and dereliction of duty by the 7th Respondent and collusion between public officials and private individuals to deprive the people of Busia and Kenya in general of land that was lawfully purchased and developed for public benefit.

10. The Petitioner is therefore aggrieved by the failure of public institutions to safeguard public land the abuse of judicial process in the Magistrate Court Busia and the continued exposure of Busia County Residents to economic and administrative harm through loss of land and public funds.
11. This Court has the jurisdiction under **Articles 162 (2) (b), 22, 23, 40, 47, 50, 159, 165 (3) (b) and (d) and 258** of the **Constitution** to determine a violation of fundamental rights interpretation of the Constitution and enforcement

of public interest rights as well as exercising of supervisory authority over subordinate Courts and any person, body or authority exercising judicial or quasi-judicial functions.

12. Further under **Section 13(1)** of the **Environment and Land Court Act 2011**, this Court has powers to determine disputes relating to inter alia:

1. Land administration and management,
2. Public, private and community land,
3. Contracts, tenancies and land transactions,
4. Actions to recover land,
5. Any other disputes relating to land including Constitutional issues arising from such disputes.

It is in that regard that the Petitioner challenges the legality and Constitutionality of the proceedings, judgment and decree rendered by **HON PA OLENGO (SPM)** in Busia Chief Magistrate Court **ELC CASE NO 17** of **2019** but also the conduct of the 7th Respondent in failing to prosecute the matter diligently, declining to appeal and instead colluding with the 1st and 2nd Respondents to repurchase land in its possession already lawfully acquired

for and put to public use. The matters which fall for determination in this Petition and which are within the scope of this Court's jurisdictions involve:

1. Alleged abuse of judicial process
 2. Threats to public ownership and use of land
 3. Violation of national values and Constitutional principles
 4. Collusion and maladministration by a county government
 5. Urgent need to enforce transparency accountability and protection of public land.
13. The Petitioner has set out the facts upon which this Petition is founded and the Constitutional provisions and other laws which the Respondents violated.

FACTS RELIED UPON

14. These have elaborately been addressed in the preceding paragraphs of this judgment but just as a recap it is the Petitioner's case that the land parcel number **SOUTH TESO/OSURETTE/964** later fraudulently subdivided to create parcels **NO SOUTH TESO/OSURETTE/4397** to **4405** was lawfully purchased by the then Busia County

Council the predecessor of the 7th Respondent from one **JOHN OUMA OGALLO** representing the Estate of the late **OGALU ORIMA OGALO** vide a sale agreement on 20th July 1990. The said sale agreement was executed by one **FREDRICK OCHIENG** the clerk to the said Busia County Council in the presence of **MR J. O. MANWARI** of **J O MANWARI & COMPANY ADVOCATES** at a consideration of Kshs.130,000. A caution was placed on the land by the Busia County Council on 15th June 1993 to protect its interest because the seller had not disclosed his interest in the Succession Cause which caution was not objected by the seller.

15. Subsequently the Busia County Council now represented by the 7th Respondent embarked on developing the land as a public market which was even included in the County Integrated Development Plans (**CIDPS**). However, in a surprising and dishonest turn the 1st and 2nd Respondents as Administrators to the Estate of the said **OGALU ORIMA OGALO** filed Busia Magistrate Court **ELC CASE NO 17** of **2019**, denied the sale and alleged trespass by the 7th

Respondent which had actual possession of the suit property.

16. The 7th Respondent faced challenges in prosecuting its defense including availing witnesses one of whom was on maternity leave and an application to adjourn the case was declined by the trial Magistrate **HON PA OLENGO SPM** who proceeded to deliver a judgment in favor of the 1st and 2nd Respondents ordering the 7th Respondent to vacate the property. The 7th Respondent subsequently filed an application under **Section 80** of the **Civil Procedure Act** to review the judgment as it had discovered new evidence which was not previously made available including the original sale agreement dated 20th July 1990, the letter dated 20th September 2022 confirming the transaction and evidence that the 1st and 2nd Respondent's predecessors had never objected to the caution placed on the suit property in 1993. All this evidence was un-available due to alleged collusion from within the 7th Respondent's Department of Lands Housing and Urban Development. That application for review is yet to be determined and has been treated

contemptuously by the trial Magistrate who has not even scheduled a date for hearing and neither is the 7th Respondent pursuing it. The original parcel **NO SOUTH TESO/OSURETTE/964** has since been sub-divided to create parcels **NO SOUTH TESO/OSURETTE/ 4399, 4402, 4398, 4397, 4401, 4400, 4405** and **4403** all registered in the names of the 1st to 6th Respondents.

17. That instead of appealing the judgment by the trial Magistrate the 7th Respondent entered into a new sale agreement with the 1st to 6th Respondents despite the fact that the 7th Respondent (through its predecessor) had already acquired the suit property and developed it at great public cost. The 7th Respondent despite asserting a purchaser's interest through its amended defense and counter-claim did not raise the issue of limitation of action.
18. On 23rd April 2025 the Petitioner wrote to the Governor, the County Government and the Chief Officer Lands, Housing and Urban Development demanding the immediate cancellation of all and lawfully initiated transactions concerning the suit property and specifically to nullify the re-purchase agreement. In response, the 7th

Respondent issued a press statement dated 29th April 2025 defending its position and asserting that the judgment of the trial Magistrate remained valid and attributing the 7th Respondent's failure to appeal as due to **“administrative gaps”** under the previous administration.

19. The Petitioner asserts that the judgment of the trial Court was issued without jurisdiction as the suit property had been earmarked for the construction of a modern multi-storeyed public market valued in excess of Kshs.20 million yet the trial Magistrate jurisdiction is Kshs.15 million. Further, the suit was filed some 29 years after the 7th Respondent had taken possession of the suit property and was therefore barred by **Section 7** of the **Limitation of Actions Act**. It was also determined without involving the National Land Commission.

LEGAL FOUNDATION OF THE PETITION:

20. The Petitioner has cited the following provisions of the Constitution in support of this Petition **Articles 1, 2, 3(1), 10(1), 10(2), 19, 20, 21, 22, 23, 24, 25 (a) & (c), 27, 40, 47(1), 48, 50(1), 73, 159, 162, 165, 201, 232** and

259. Also cited are the provisions of **Section 7** of the **Magistrate Court Act** and **Section 3** of the **Public Finance Management Authority Act.**

21. I need not to rehash the particulars of the violation alleged. All I may say at this point is that I have no doubt that the Petition has been crafted in accordance with the principles set out in the case of **ANARITA KARIMI NJERU -V- R 1976 - 1980 KLR 1272** which I shall refer to later in this judgment.
22. Annexed to the Petitioners supporting affidavit are the documents in support of the Petition which include among others the register showing that the suit property **SOUTH TESO/OSURETTE/964** was first registered in the name of **OGARU ORIMA** aka **OGALU ORIMA OGALO** on 9th August 1973. However, on 10th June 1993, a caution was placed thereon by the then Busia County Council claiming a purchaser's interest. In total, the Petitioner has filed a list of 34 documents which I need not delve into.
23. In response to the Petition, the 2nd Respondent **ELIZABETH MULANDA OMONDI** (she is not the 1st Respondent as stated in her replying affidavit) filed a

replying affidavit dated 1st July 2025 with the authority of the 1st Respondent **JOSPEH OUMA OGALLO**. She has averred therein that the Petition and the Notice of Motion which came with it but which was abandoned so that the Court could concentrate on the Petition is fundamentally defective and an abuse of the due process of the law. That there are no Constitutional issues raised in the Petition and the Petitioner is overstepping his mandate as a senator and intermeddling in a private person's property in the guise of defending public interest which is itself unconstitutional. There is nothing public about the suit property **SOUTH TESO/OSURETTE/964** which has now been sub-divided to create the land parcels **NO SOUTH TESO/OSURETTE/4397-4405** and owned by the 3rd to 6th Respondents. That the 3rd to 6th obtained their titles from the 1st and 2nd Respondents having followed due process. That the 7th Respondent has never legally possessed or owned the suit property or the sub-divisions. That the Petitioner has filed this suit with a view of obfuscating the real issues and appear to be fighting for the public in

private citizens' affairs which is politicking with peoples' lives and properties outside his mandate.

24. That a Court of competent jurisdiction has already ruled with finality that the 7th Respondent never owned the suit property and a decree was drawn and the matter rested.
25. That the 7th Respondent acting on the advice of its agents, employees and professional experts have not appealed against that judgment nor has it been reviewed and the Petitioner has no locus standi to litigate over land owned by private individuals.
26. That the Petitioner is a busybody trying to fault a judgment of a Court through un-prescribed procedure and the doctrine of Constitutional avoidance which is a cardinal principle of law should have come to the mind of the Petitioner as not every grievance, real or imagined is cured by a Constitutional Petition. The Petitioner did not seek the view or clarify the issues with the Respondents regarding the correct position over the suit property.
27. The Petitioner is being sensational in putting the price of the suit property at Kshs.200,000,000 yet the value was assessed by valuers commissioned by the 7th Respondent

and the 2nd Interested Party. The Respondents are currently occupying and using their respective parcels of land without any complaint from any members of the public who the Petitioner purports to agitate for in this Petition. No funds were set aside by the 7th Respondent to the tune of Kshs.200,000,000 for the purchase of the suit property and the suit filed by the 1st and 2nd Respondents in the subordinate Court was specifically for the eviction of the 7th Respondent from the suit property whose value was not disclosed. That if there had been any sale agreement over the suit property between the predecessor of the 7th Respondent and the son of the deceased owner of the suit property, then the same was illegal, irregular and fraudulent for the reasons that:

- 1) The purported seller had no legal capacity to sell property of a deceased person without Grant of Letters of Administration
- 2) No consent was obtained from the Land Control Board.
- 3) A competent Court has already rendered itself on these issues which are res judicata.

- 4) The Petitioner cannot appeal against the judgment through a Constitutional Petition

The 2nd Respondent annexed to her replying affidavit the following documents:

- 1) Copy of the register for the land parcel number **SOUTH TESO/OSURETTE/964.**
- 2) Copy of the decree in Busia Chief Magistrate Court **ELC CASE NO 17** of **2019.**
- 3) Copy of the Grant of Letters of Administration issued in Busia Chief Magistrate Court Succession Cause **NO 1400** of **2018** to the 1st and 2nd Respondents in respect to the Estate of **OGALU ORIMA OGALO**
- 4) Copy of order issued on 15th March 2019 in Busia Chief Magistrate Court **ELC CASE NO 17** of **2019**
- 5) Copy of Notice of Motion dated 21st May 2024 filed in Busia chief Magistrate Court **ELC CASE NO 17** of **2019** seeking to cite the 7th Respondent Executive Member for Housing and

Land and County Executive Member for Trade for contempt.

- 6) Copy of order issued on 29th August 2024 in Busia Chief Magistrate Court **ELC CASE NO 17 of 2019** directing the Land Registrar to remove all restrictions placed on the land parcels **NO SOUTH TESO OSURETTE/4397, 4398, 4399, 4400, 4401, 4402, 4403, 4404, and 4405** by the 1st, 2nd and 3rd Respondents therein i.e. County Government of Busia, County Executive Committee Member for Lands and County Committee Member for Trade.
- 7) Copy of letter dated 22nd April 2025 addressed to the County Government by **OUMA OKUTTA & ASSOCIATES ADVOCATE.**
- 8) Copy of the plaint filed in Busia Chief Magistrate Court **ELC CASE NO 17 of 2019 JOSEPH OHUMA OGALO and ELIZABETH MULANDA OMONDI** suing as the Administrator of the Estate of **OGALU ORIMA OGALO -V- COUNTY GOVERNMENT OF BUSIA.**

The 1st, 2nd, 3rd, 4th and 6th Respondents filed a joint response dated 20th July 2025. They described the Petition as grossly incompetent, un-merited and an abuse of the process of this Court.

28. They stated that the suit property is freehold land owned and possessed by individual citizens and is not public land. That the Petitioner lacks the requisite locus standi to file it and the decision of the Magistrate can only be challenged on appeal or Judicial Review and therefore this Court's jurisdiction has not been properly invoked.
29. The 7th Respondents County Executive Committee Member for Lands **PAMELA AWORI** filed a replying affidavit dated 3rd July 2025 in which she has described the Petition as being a foul of the doctrines of ripens and separation of powers and therefore incompetent and an abuse of the process of this Court.
30. That the Petitioner was not a party in the proceedings in the Busia Magistrate's Court and a party aggrieved by the judgment in that Court has the right of appeal or to file an application for review. That the 7th Respondent has already filed an application to review the judgment

delivered by **HON P. A. OLENGO SPM** on 22nd August 2022 in Busia Magistrate's Court **ELC CASE NO 17 of 2019** since the time for filing an appeal has already elapsed. This Petition is therefore sub-judice. There is therefore the danger of this Court and Busia Magistrate's Court arriving at conflicting decisions over the same subject matter. The Petitioner should have filed an application to be enjoined in the existing suit as an interested party instead of filing a parallel suit.

31. The Petition does not meet the threshold for the grant of the orders sought and it is unfounded, baseless and mere allegations for political capital. That there has been no misappropriation of either public funds or property.
32. The 5th Respondent **FRANCIS OMONDI ATCHOLA** filed a replying affidavit dated 4th July 2025 in response to the Petition.
33. He averred that he is the registered proprietor of the land parcel **NO SOUTH TESO/OSURETTE/4398** which he purchased from the 4th Respondent for valuable consideration after which he obtained the title deed. He added that no Constitutional issues are raised herein, that

this Court has no jurisdiction to issue the orders sought since the decision of the Busia Magistrates Court in **ELC CASE NO 17** of **2019** can only be the subject of an appeal but not a Constitutional Petition. That the Petitioner seeks to condemn the trial Magistrate un-heard to the extent that he is challenging the legality, Constitutionality and validity of the proceedings in the subordinate Court and this Petition is res subjudice Busia Magistrates Court **ELC CASE NO 17** of **2019**.

34. The 5th Respondent pleaded further that there is no valuation report placed before this Court to demonstrate that the suit land was valued at Kshs.20,000,000 nor minutes from the defunct County Council of Busia in which a resolution was made to purchase the suit property from **OGALU ORIMA OGALO** (deceased).

35. It is admitted that the purported seller **JOHN JOSEPH OUMA OGALO** was not the Administrator of the Estate of the deceased **OGALU ORIMA OGALO** and so the alleged sale was null and void. No budget statement from the 7th Respondent has been availed to support the allegation that the 7th Respondent has allocated Kshs.200,000,000 to

're-purchase' the suit land. The allegation that the 7th Respondent was denied an opportunity to be heard as it's key witness was on maternity leave is unfounded as there is evidence showing that the 7th Respondents witness was **MR MAURICE ODUNDO.**

36. The Petition does not impute any wrong doing on the part of the 5th Respondent who is a bona fide purchaser. The same should therefore be dismissed.
37. Annexed to the replying affidavit is a copy of an agreement of sale made by the 5th Respondent and 4th Respondent for the purchase of the land parcel **NO SOUTH TESO/OSURETTE/4398** and a copy of the title deed.
38. The Petitioner filed a supplementary affidavit dated 4th August 2025 in response to all the Respondent's replying affidavits. He averred inter alia, that the Petition is merited and anchored on the Court's supervisory jurisdiction under **Article 165(b)** and **(7)** of the **Constitution**. He reiterates that he filed this Petition in Public Interest and being a Senator does not strip him of any rights, duties or obligations under the law and in any

event, he is mandated to oversight the resources of Busia County which include the suit property.

39. That the suit property is public land which the Respondents have fraudulently acquired and taken possession of. He denied that this Petition was filed with the intention of obfuscating or politicizing private disputes but rather, it raises serious Constitutional issues which have not been determined by any other competent Court.
40. The assertion that he lacks the locus standi is misguided since **Articles 22(2) (c)** and **258 2(c)** of the Constitution expressly grants every citizen the right to institute such proceedings. He denied that he is using his position as senator to seek publicity. He averred further that the trial Magistrate has no jurisdiction over the dispute and this Court has the supervisory jurisdiction to question the legality of the process which led to the dispossession of the public interest in the suit property. That **Article 40(6)** of the **Constitution** does not protect which was acquired unlawfully.
41. The Petitioner added that the 5th Respondent's claim of bona fide purchaser cannot override Constitutional

Limitations and there was a miscarriage of justice in Busia Magistrate's Court **ELC CASE NO 17** of **2019** which can only be addressed using this Petition. Further, that a Petition cannot be defeated by reason of misjoinder or non-joinder and these proceedings are not res subjudice Busia Magistrate Court **ELC CASE NO 17** of **2019** and the supervisory jurisdiction of this Court was invoked because the pending application was not being prosecuted yet the ownership of the suit property was changing hands.

42. That the 5th Respondent is estopped from claiming that the value of the suit property was not beyond the pecuniary jurisdiction of the trial Magistrate since at paragraph 33 of the 5th Respondent's ground supporting the Petitioner's application for conservatory orders it is categorically stated that the value of the suit property is Kshs.35,000,000. Further, there was a report by the firm of Odongo Kabita & Company Valuers placing the market value of the suit property at Kshs.79,200,000.

43. In reply to the 7th Respondent's replying affidavit, the Petitioner reiterates that he has the capacity to file this Petition and that this Court has the jurisdiction to

supervise the subordinate Courts. That whereas the 7th Respondent filed a review application on 19th December 2022, that application remains un-prosecuted in the trial Court which underscores a miscarriage of justice.

44. He adds that a judgment and decree of a Court without jurisdiction is a nullity and cannot be res subjudice. Besides, the plea of res-subjudice cannot bar proceedings which invoke this Court's exercise of its supervisory jurisdiction under **Article 162** and **165** of the **Constitution**. The facts taken cumulatively reveal a grave threat to the rule of law to warrant the nullification of the proceedings and judgment of **HON P.A. OLENGO (SPM)**. The Respondents do not dispute that the National Land Commission was never involved in any assessment, review or regularization of the disposition of the suit property contrary to its mandate. Therefore, this Petition raises serious Constitutional issues concerning abuse of office, violation of public procurement safeguards, lack of transparency and irregular dealings in public land which questions are properly before this Court.

45. The Petition has been canvassed by way of written submissions.
46. Those submissions have been filed by the Petitioner acting in person, by **MR OKUTTA** instructed by the firm of **OUMA-OKUTTA & ASSOCIATES ADVOCATES** for the 1st, 2nd, 3rd, 4th and 6th Respondents, by **MR OMONDI** instructed by the firm of **OMONDI & COMPANY ADVOCATES** for the 5th Respondent and by **MR OLIECH** instructed by the firm of **OKWIRI & COMPANY ADVOCATES** for the 7th Respondent.
47. I have considered the Petition, the responses thereto, the documents filed, the rival affidavits and the submissions by counsel.
48. This being a Constitutional Petition alleging a violation of the Constitution and statute, I must now re-visit the case of **ANARITA KARIMI NJERU** (supra). Therein it was stated thus;

“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 get 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.”

I have no doubt in my find that this Petition, as crafted, meets the threshold of how a Constitutional Petition ought to be framed. The Petitioner has very clearly set out the provisions of the Constitution and other laws which the Respondents and the trial Magistrate **HON P.A. OLENGO** who heard and determined Busia Magistrate’s Court **ELC CASE NO 17** of **2019** are alleged to have violated.

49. There is also no doubt that the Petitioner has the locus standi to enable him prosecute this Petition. I am not, in the least, persuaded as the Respondents would like this Court to believe, that the Petitioner is a busy body, overstepping his mandate or playing politics as the Respondents allege. Far from it. As the senator of Busia County and part of whose duties include oversight, I cannot think of any better person that can approach this

Court alleging the violation of the Constitution in any other laws than the Petitioner.

50. What I need to consider is whether the Petitioner is infact entitled to the orders which he seeks. I shall do so under the following:

1. RES JUDICATA

The doctrine of res judicata is set out in Section 7 of the Civil Procedure Act as follows:

7: “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.”

The essence of the doctrine of res judicata is to bring litigation to an end so that parties are not vexed twice

over the same subject. For the doctrine to apply, the following must be proved:

- 1) The matter in issue has been directly and substantially in issue in the former suit.
- 2) The matter in issue involves the same parties or those acting under them litigating under the same title.
- 3) The Court which determined the former suit was competent to do so.
- 4) The former suit was heard and finally determined by the Court.

It is common ground that the suit property was also the subject in a previous suit being Busia Magistrate's Court **ELC CASE NO 17** of **2019** in which the 1st and 2nd Respondents were the plaintiffs and the 7th Respondent the Defendant that suit was heard and determined by **HON P.A. OLENGO SPM**. The Respondents' case is that this Petition is therefore res judicata Busia Magistrate's Court **ELC CASE NO 17** of **2019**. The Petitioner's case is that the doctrine does not apply because the Busia Magistrate's Court presided over by **HON P. A. OLENGO**

(SPM) had no jurisdiction to determine the dispute since the value of the suit property exceeded Kshs.15,000,000 which is the limit of pecuniary jurisdiction of a Court presided over by a Senior Principal Magistrate. The Petitioner has annexed a copy of the valuation report by the firm of **ODONGO KABITA & COMPANY VALUERS** showing the market value of the suit property as Kshs.79,200,000 as at 23rd April 2025. Even if that report was not available to the trial Magistrate during the hearing of the suit in the subordinate Court, the Petitioner has in paragraphs 34 and 35 of his supplementary affidavit drawn to this Court's attention the pleading by the 1st and 2nd Respondents where in their grounds opposing the 7th Respondent's application to review the trial Magistrate's judgment they pleaded that the value of the suit land was Kshs.35,000,000. Given those circumstances, it follows that the judgment delivered by **HON P.A. OLENGO (SPM)** in Busia Magistrate's Court **ELC CASE NO 17 of 2019** cannot sustain the plea of res judicata since it was delivered by a Court without jurisdiction. As is stated in

MULLA, THE CODE OF CIVIL PROCEDURE 18TH EDITION 2012 at page 285:

“A judgment delivered by a Court not competent to deliver it cannot operate as res-judicata since such a judgment is not of any effect. It is a well settled position in law that if a decision has been rendered between the same parties by a Court which had no jurisdiction to entertain and decide the suit, it does not operate as res-judicata between the same parties in subsequent proceedings.”

Guided by the above, it must be clear that although the doctrine of res judicata applies also to Constitutional Petitions - see **JOHN FLORENCE MARITIME SERVICES LTD & ANOTHER -V- CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE & OTHERS 2021 eKLR** - it is inapplicable in this case.

51. It follows from the above, therefore, that this Petition is not res-judicata.

2. SUB JUDICE

52. This doctrine is provided for under **Section 6** of the **Civil Procedure Act** as follows:

6: “No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

Again, for the same reasons, given above under the doctrine of res judicata, it follows that although there is an application for review of the judgment in the subordinate Court and which has not been canvassed to-date, this Petition cannot be sub judice for the same reasons that since the value of the suit property is well beyond the pecuniary jurisdiction of the Busia Magistrates Court

prescribed over by **HON P.A. OLENGO (SPM)**, the doctrine of sub judice cannot also apply.

3. CONSTITUTIONAL AVOIDANCE

53. The 2nd Respondent has in paragraph 23 of her replying affidavit invoked the doctrine of Constitutional avoidance. She has averred thus:

23: “That the doctrine of Constitutional avoidance, a cardinal principle in law practice in our Courts should have come to the mind of the Petitioner/Applicant if only to know that not every grievance about a right, real or imagined, is cured by a Constitutional Petition irrespective of it’s actual relevant if other avenues provided in law are available such as filing an appeal and/or review of the judgment.

In paragraph 10 of her replying affidavit **PAMELA AWORI** the 7th Respondent’s Executive Committee Member for lands has averred thus:

10: “That there (sic) danger of this Honourable Court and the Court in Busia Chief Magistrates Court ELC CASE NO 17 of 2019 before which an application for review is still pending arriving at conflicting decisions on the same subject matter.”

On his part, the Petitioner has averred in paragraphs 53 to 57 of his Petition as follows:

53: “That the 7th Respondent subsequently filed a review application under application Section 80 of the Civil Procedure Act citing newly discovered documentary evidence including:

- 1. The original sale agreement dated 20th July 1990 which was previously unavailable due to alleged collusion from within the County Government’s department**

of Lands, Housing and Urban Development.

2. A letter from the Chief Land Registrar dated 20th September 2022 confirming the transaction and that the land was sold to the 7th Respondent's predecessor.

3. Evidence that the 1st and 2nd Respondents' predecessor had never objected to the caution placed in 1993.

4. Evidence that the land had been developed and utilized for public benefit.”

54: “That it is material that the application states clearly that the evidence could not be availed in Court earlier ‘owing to fraudulent and clandestine’ activities perpetrated by the Respondents herein, working in cahoots with some of the Applicant’s

employees and agents stationed at the Applicant's Department of Lands Housing and urban Development."

55: "That the County Attorney's application dated (sic) sought the following main orders:

1) That this Honourable Court be pleased to grant a Temporary Stay of Execution of the judgment delivered on 24th August 2022, Decree and Order issued thereon pending hearing and determination of the application herein interparties.

2) That this Honourable Court be pleased to set aside and/or review the judgment delivered on 24th August 2022, Decree, Order and all other consequential orders attendant thereto issued against the Applicant herein."

56: “That the Court record clearly shows that the county’s application for review received contemptuous treatment by the Court as then constituted. The yet to be determined application was by passed as many other subsequent applications by the plaintiff were expeditiously handled and allowed.”

57: “That shockingly, to-date, the county’s review application has not been determined on merit. No directions or orders exist on the record regarding its scheduled disposal and the County Government is not pursuing it.”

The import of all the above is that even as the Petitioner filed this Petition, there is still pending in Busia Magistrates Court **ELC CASE NO 17** of **2019** an application filed by the 7th Respondent seeking to review

the judgment delivered on 24th August 2022 by **HON P.A. OLENGO (SPM)**.

54. The 7th Respondent may have developed cold feet in prosecuting the application for review for whatever reasons. And even though the Petitioner was not a party in the proceedings before the subordinate Court, it is clear from the provisions of **Section 80** of the **Civil Procedure Act** that:

80: “Any person who considers himself aggrieved -

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred;

or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.” Emphasis mine.

“Any person” must therefore include the Petitioner or any other person desirous of seeking an order to review the Judgment. In the case of **NGORORO -V- NDUTHA & ANOTHER C.A. CIVIL APPEAL NO 55** of **1986**, the Court of Appeal stated that:

“However, we would observe that under section 80 of the Civil Procedure Code, as we shall point out herein later, any person though not a party to the suit, whose direct interest is being affected by the judgment therein is entitled to apply for a review. The 2nd Respondent therefore has a locus.”

The same applies to the Petitioner in this case.

55. The circumstances in this case are that not only is there a pending application before a Magistrate in Busia Magistrates Court **ELC CASE NO 17** of **2019** but further, the Petitioner in his own right as an Interested Party is entitled to file his own application for review of the judgment. Given those undisputed facts, this Court must invoke the principle of Constitutional avoidance in this matter. That principle was elaborated by the Supreme

Court in the case of **COMMUNICATIONS COMMISSION OF KENYA & 5 OTHERS -V- ROYAL MEDIA SERVICES LTD & 5 OTHERS 2014 eKLR** 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.”

The Court went on to cite the minority judgment by **KENTRIDGE AJ** in the South African case of **S.V. MHLUNGU 1995 (3) SA 867 CC** who articulated the same principle at paragraph 59 thus:

“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.”

The Supreme Court of India has also held that ordinary remedies available under common law statutes must be

pursued in the ordinary manner or as provided under statute. For instance, in **RE: APPLICATION BY BAHADURI 1986 LRC (CONSTI)** the Court expressed itself as follows at page 307:

“The Courts have said time and again that where infringement of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under the Constitution. This case highlights the un-wisdom of ignoring that advise ...

The Constitution sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of many. While an infringement of the Constitution might in certain cases give rise to the redress provided for at Section 14, yet, as has been proclaimed by the highest Court in the land, it is not a general substitute for the normal procedures for invoking judicial control of administrative action.”

Finally, in the case of **MINISTER OF HOME AFFAIRS -V- BICKLE & OTHERS 1985 LRC** (Const) it was held - per **GEORGES CJ**:

“Courts will not normally consider a Constitutional question unless the existence of a remedy depends on it; if a remedy is available to an Applicant under some other legislative provision or by some other basis whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

The above precedents have been affirmed by Superior Courts in this country. I am guided by them.

56. Finally, I also take cognizance of the guidelines issued by the Court of Appeal in the case of **SPEAKER OF NATIONAL ASSEMBLY -V- KARUME C.A. CIVIL APPLICATION NO 92 of 1992 [1992 KECA 42 KLR]** where the judges said:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular

grievance prescribed by the Constitution or an Act or Parliament, that procedure should be strictly followed.”

My view of this Petition therefore, is that it is an affront to the doctrine of Constitutional avoidance and further, it would be improper to consider its merits or otherwise when there is a pending application touching on the dispute in Busia Magistrate’s Court **ELC CASE NO 17 of 2019** and when the Petitioner has recourse in that Court to address the gist of the grievance being litigated. I must therefore strike out the Petition.

57. With regard to costs, the order that commends itself to me is that there be no orders as to costs.

58. The up-shot of all the above is that having considered the Petition, I issue the following dispositive orders:

- 1) The Petition is struck out.**
- 2) No orders as to costs.**

BOAZ N. OLAO
JUDGE
9TH APRIL 2026

**Judgment dated, signed and delivered on this 9th day of April
2026 by way of electronic mail and with notice to the
parties.**

Right of Appeal.

BOAZ N. OLAO

JUDGE

9TH APRIL 2026

ORIGINAL