

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT KENYA**  
**AT NAKURU**  
**ELC PETITION NO. E011 OF 2025**  
**IN THE MATTER OF THE CONSITUTION OF KENYA, 2010 ARTICLES**  
**1,2,3,10,19,21,22,40,42,60,62 AND 258**  
**AND**  
**IN THE MATTER OF BREACH OF FUNDAMENTAL RIGHTS AND**  
**FREEDOMS CONTRARY TO CHAPTER FOUR OF THE COSNTITUTION OF**  
**KENYA**  
**AND**  
**IN THE MATTER OF RULES 4, 10,11, 13 & 20 OF THE CONSITUTION OF**  
**KENYA SUPERVISORY AND PROTECTION OF FUNDAMENTAL RIGHTS**  
**AND FREEDOMS OF INDIVIDUALS (HIGH COURT PRACTICE &**  
**PROCEDURE RULES, 2013**  
**AND**  
**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND**  
**FREEDOMS UNDER ARTICLES 19, 20, 21,22,23,28,40,42,48 AND 159 OF THE**  
**CONSTITUTION OF KENYA, 2010**  
**AND**  
**IN THE MATTER OF PUBLIC ROADS AND ROADS OF ACCESS ACT**  
**(CHAPTER 399) LAWS OF KENYA**  
**BETWEEN**  
**JOSEPH LANGAT KARIANGEI.....1<sup>ST</sup> PETITIONER**  
**PATRICK CHERES KARIANGEI.....2<sup>ND</sup> PETITIONER**  
**JOHN SEMBUI LESHWARI.....3<sup>RD</sup> PETTTIONER**  
**DANIEL CHERIRO AGUYA.....4<sup>TH</sup> PETITIONER**  
**VERSUS**  
**KONIN NANDEMUA.....1<sup>ST</sup> RESPONDENT**  
**RIFT VALLEY REGIONAL SURVEYOR.....2<sup>ND</sup> RESPONDENT**  
**HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the Notice of Preliminary Objection dated 19<sup>th</sup> January, 2026, by the 1<sup>st</sup> Respondent that the Petition be struck out and/or dismissed on the following grounds:

1. ***THAT*** the Petition, as pleaded, discloses a dispute relating to boundaries, access, and alleged encroachment involving registered land parcels within Nessuit area, Nakuru County.

2. ***THAT*** the substantive issues raised in the Petition concern:

i) *The fixing and interpretation of boundaries;*

ii) *The position and existence of an alleged access road as shown on the Registry Index Map (RIM);*

iii) *The alleged overlap between private land and alleged public land.*

3. ***THAT*** under the law, disputes relating to boundaries and access to registered land fall within the exclusive initial jurisdiction of the Land Registrar, and not this Honourable Court.

4. ***THAT*** Section 18(2) of the Land Registration Act No. 3 of 2012 expressly provides;

*“The court, shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered, land unless the boundaries have been determined in accordance with this section.”*

5. ***THAT*** Section 19 of the Act vests the mandate to hear parties, visit the land, fix boundaries and issue a formal determination exclusively in the Land Registrar, with the assistance of the Government Surveyor.

6. ***THAT*** the Petition does not disclose the existence of any formal boundary determination made in accordance with Sections 18 and 19 of the Land Registration Act.
7. ***THAT*** even on the Petitioners' own pleadings, what is disclosed amounts, at best, to informal site visits and administrative engagement, which do not constitute a statutory boundary determination capable of conferring jurisdiction upon this Honourable Court.
8. ***THAT*** consequently, this Honourable Court is expressly barred by statute from entertaining the Petition at this stage.
9. ***THAT*** consequently, this Honourable Court is expressly barred by statute from entertaining the Petition at this stage.
10. ***THAT*** the Petition offends the doctrine of exhaustion of statutory remedies, there being a clear and mandatory dispute resolution mechanism provided under the Land Registration Act.
11. ***THAT*** the Petitioners have failed to:
  - i) Invoke the jurisdiction of the Land Registrar as required by law;
  - ii) Obtain a final boundary determination capable of being appealed or subjected to judicial review.

12. ***THAT the Land Registrar, being the statutory authority mandated to determine boundary disputes, has not been enjoined as a party, rendering the Petition fatally defective.***

13. ***THAT the Petition is therefore premature, incompetent and incurably defective.***

14. ***ABUSE OF CONSTITUTIONAL JURISDICTION.***

15. ***THAT the Petitioners have improperly invoked constitutional provisions to litigate an ordinary land and boundary dispute.***

16. ***THAT constitutional jurisdiction cannot be invoked to circumvent or bypass clear statutory dispute resolution mechanisms.***

17. ***THAT the Petition amounts to forum shopping and an abuse of the court process.***

18. ***THAT in the absence of jurisdiction, this Honourable Court must down its tools immediately.***

19. ***THAT consequently, the Petition is:***

***i) Incompetent***

***ii) Premature***

***iii) Statutorily barred***

***iv) An abuse of the court process.***

2. The Preliminary Objection was canvassed by way of written submissions.

## 1<sup>ST</sup> RESPONDENT'S SUBMISSIONS

3. Counsel for the 1<sup>st</sup> Respondent filed submissions dated 29<sup>th</sup> January 2026, in respect of the Preliminary Objection and identified the following issues for determination:
  - a) *Whether this Honourable Court has jurisdiction to entertain the Petition*
  - b) *Whether the Petition is statutorily barred under Sections 18 and 19 of the Land Registration Act.*
  - c) *Whether the Petition offends the Doctrine of Exhaustion of Statutory Remedies*
  - d) *Whether the Petition constitutes an abuse of constitutional jurisdiction*
  
4. On the first issue, counsel relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (1969) EA 696**, and submitted that the issues raised in the Petition go directly to jurisdiction, which is a threshold issue and a proper subject of preliminary objection. Counsel further submitted that from the pleadings, affidavits and prayers sought in the petition are in respect of the alleged encroachment, the position and existence of an access road, interpretation of the Registry Index Map (RIM), and alleged overlap between private land and alleged public land. Counsel submitted that the Land Registrar and not the Honourable court must determine boundary disputes in the first instance.
  
5. On the second issue, counsel relied on **Section 18(2) and 19 of the Land Registration Act** and the Court of Appeal case in **Azzuri Ltd V Pink**

**Properties [2018] eKLR** and **Republic V Land Registrar ex parte Kibunja [2017] eKLR**, and submitted that the Petition does not disclose any formal boundary dispute determination undertaken pursuant to Sections 18 and 19 of the Land Registration Act.

6. Mr. Miruka further submitted that informal site visits, correspondence or administrative engagement even if admitted, do not amount to a statutory boundary determination capable of conferring jurisdiction upon the court. It was counsel's submission that the statutory language is mandatory and this court is barred from entertaining the dispute at this stage, and relied on the case of **Owners of Motor Vessel "Lilian S" V Caltex Oil (Kenya) Ltd [1989] KLR 1**.
7. On the third issue, as to whether the Petition offends the doctrine of exhaustion, counsel submitted in the affirmative and stated that the Petitioners failed to invoke the jurisdiction of the Land Registrar and obtain a final determination capable of appeal or judicial review. Counsel relied on the case of Geoffrey **Muthinja & Another V Samuel Muguna Henry & 1756 Others [2105] eKLR**, where the court held that courts ought to be fora of last resort. According to Mr. Miruka, the petitioner has not pleaded or demonstrated any exceptional circumstances to justify bypassing the statutory mechanism.
8. On the final issue, counsel submitted that the Petitioners have improperly clothed an ordinary land and boundary dispute with constitutional language hence an abuse of the constitutional jurisdiction, and relied on

the case of **Harrikisson V Attorney General of Trinidad and Tobago [1980] AC 265** which cited with approval the case of **Ernest C.O. Muga v Attorney General [2018] KECA 254 (KLR)**. Further, it is trite law that constitutional jurisdiction should not be invoked where adequate statutory remedies exist.

9. In conclusion, counsel submitted that the Petition is incompetent, premature and an abuse of constitutional jurisdiction and should be struck out or dismissed for want of jurisdiction with costs.

#### **PETITIONER'S SUBMISSIONS**

10. Counsel for the Petitioners filed submissions dated 13<sup>th</sup> March 2026, and identified the following issues for determination:
  - a) *Whether the Preliminary Objection raises pure points of law capable of determination at a preliminary stage.*
  - b) *Whether this Honourable Court lacks jurisdiction to entertain the Petition.*
  - c) *Whether Sections 18 and 19 of the Land Registration Act statutorily bar the Petition.*
  - d) *Whether the doctrine of exhaustion applies to the circumstances of this case.*
  - e) *Whether the Petition constitutes an abuse of the constitutional jurisdiction.*
11. On the first issue, counsel submitted that a preliminary objection must raise a pure point of law argued on the assumption that all facts pleaded by

the opposing party are correct and if successful it would dispose of the matter without the need for evidence. Counsel relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (1969) EA 696.**

12. Mr. Wambeyi submitted that the 1<sup>st</sup> respondent's preliminary objection has failed to meet the above threshold as it is premised on contested factual assertions including whether the dispute is purely a boundary dispute as opposed to a constitutional and public law dispute. He relied on the case of **Oraro -Vs- Mbaja (2005) 1KLR 141** and **Avtar Singh Bhamra & Another -Vs- Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, and urged the court to decline the invitation to determine contested factual issues under the guise of a preliminary point of law.
13. On the second issue, on the jurisdiction of the court to entertain the Petition, counsel relied on the case of **Owners of Motor Vessel "Lilian S" V Caltex Oil (Kenya) Ltd [1989] KLR 1** and submitted that the Petition raises serious constitutional and public law questions.
14. Mr. Wambeyi further relied on **Article 162(2)(b) of the Constitution** and **Section 13 of the Environment and Land Court Act** and submitted that the court is vested with the jurisdiction to hear and determine the Petition. Further that jurisdiction cannot be defeated by isolating one aspect of a dispute while ignoring its constitutional and public law dimension. He added that **Sections 18 and 19 of the Land Registration Act** do not

expressly oust the jurisdiction of this court from hearing disputes that raise constitutional and public law issues alongside land related questions.

15. On the third issue, counsel submitted that the Petition does not merely seek fixing of boundaries but also raises allegations of unlawful obstruction of an access road, deprivation of land rights and unconstitutional conduct and omissions of public officers. It was counsel's submission that the above matters transcend the narrow technical mandate of the Land Registrar and cited the case of **Republic V Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya [2017] eKLR**, where the court held that while administrative bodies have specific statutory mandates, they cannot usurp the interpretive and enforcement powers reserved for the courts under the constitution. Further that Sections 18 and 19 of the Land Registration Act cannot be invoked as a bar to judicial intervention and relied on the case of **Mumo Matemu V Trusted Society of Human Rights Alliance**.
16. Counsel submitted that the rigid application of the exhaustion doctrine in the present case would undermine **Articles 22 and 23 of the Constitution** by denying the Petitioners effective judicial protection.
17. On the final issue, it was counsel's submission that a Petition does not amount to abuse of the constitutional process merely because the dispute also has a statutory or private law dimension. Counsel further submitted that where violations of constitutional rights are pleaded with sufficient

particularity, a constitutional Petition is properly before the court, and urged the court to dismiss the preliminary objection with costs.

### **ANALYSIS AND DETERMINATION**

18. The main issue for determination is whether the Preliminary Objection has merit. Counsel for the 1<sup>st</sup> Respondent listed many grounds in the Notice of Preliminary objection namely, want of jurisdiction, statutory bar under the land Registration Act, doctrine of exhaustion of remedies and abuse of constitutional jurisdiction.
  
19. For a preliminary objection to succeed, the objection must consist of pure points of law as was held in the case of Mukisa **Biscuits Manufacturing Co. Ltd V West End Distributors Ltd (1969) EA 696**, where the court held as follows:

*“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 had to be ascertained or if what is sought is the exercise of judicial discretion.”*

20. In the case of **Oraro Vs Mbaja (2005) 1KLR 141**, the court 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”.*
21. The 1<sup>st</sup> Respondent contends that this court lacks the jurisdiction to hear and determine the present matter as it is a dispute relating to boundaries, access road and alleged encroachment involving the suit parcels. He contends that such disputes fall within the exclusive initial jurisdiction of the Land Registrar, and not this Honourable Court.
22. The Petitioners on the other hand argue that the preliminary objection did not raise a point of law and that it was based on contested factual assertions including whether the dispute is a boundary dispute as opposed to a constitutional and public law dispute.
23. The grounds raised in the preliminary objection, on the face of it, look like pure points of law, but the court has to interrogate them further to see if they involve facts that would need factual evidential proof where the facts are contested.
24. The Petitioners aver that they are bona fide proprietors and beneficial owners of the suit parcels of land and claim that the 1<sup>st</sup> Respondent has encroached on a 10-meter road and unallocated rocky public land.
25. The orders that the Petitioners are seeking are a declaration that the Respondents failure to open the access road to the parcels of land breach

the Petitioners’ constitutional rights, that the rocky part on the area RIM is public land pursuant to Article 62 (1) of the Constitution.

26. In addition, the Petitioner stated under paragraph 27 and 28 that despite their complaint to the Regional Administration who sent surveyors to the ground, they failed to act thus depriving them of the use of the public land being the road.
27. The Respondents submitted that the Petitioners’ claim emanates from encroachment by the 1<sup>st</sup> Respondent and the alleged inaction by the 2<sup>nd</sup> Respondent which is couched as a constitutional Petition. Counsel submitted that this is a pure case of trespass, encroachment and a boundary dispute between the Petitioners and the 1<sup>st</sup> Respondent which can be handled as a civil matter following the right procedures set out under Sections 18 and 19 of the Land Registration Act.
28. In the case of **Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015] eKLR** the Supreme Court explained as follows regarding preliminary objections:

*“[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort*

*to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”*

29. The grounds on the Notice of Preliminary Objection, as stated are not pure points of law but issues that would require a full hearing so that evidence is tendered on whether the allegations about the non-compliance with section 18 and 19 of the Land Registration Act. These are factual issues which the court must look outside the preliminary objection which means that it no longer fits the bill as regards preliminary objections
30. The Notice of Preliminary objection also had many issues raised, including the petition being incompetent, premature, statutorily time barred and abuse of court process. The preliminary objection was a mouthful of which some of the issues are factual therefore cannot be handled at this preliminary stage. These issues can be properly handled during the full hearing of the Petition and the court will determine whether the Petition meets the constitutional threshold, whether it is an abuse of court process, and whether the Petitioners has complied with the doctrine of exhaustion. At the hearing, if the court finds that the Petitioners are guilty of the above issues then, it can give the orders accordingly.
31. I find that the preliminary objection lacks merit and is therefore dismissed with each party bearing their own costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 23<sup>RD</sup>  
DAY OF APRIL 2026.**

**M. A. ODENY**

# JUDGE