

REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT KWALE

CONST. PETITION NO. E001 OF 2026

**IN THE MATTER OF: ARTICLE 19, 20, 22 AND 23 OF THE
CONSTITUTION OF KENYA 2010 -
ENFORCEMENT OF BILL OF RIGHTS O
THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: ARTICLE 29(9) OF THE CONSTITUTION
OF KENYA**

AND

**IN THE MATTER OF: ARTICLE 50 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF: THE ENVIRONMENT AND LAND CASE
NO. E016 OF 2024 AT KALOLENI,
PAYAYE CHUPHI (SUING ON BEHALF
OD THE MWABAJE CLAN - VERSUS -
EDWARD SHIDA KAULI**

BETWEEN

EDWARD SHIDA KAULI.....

PETITIONER

- VERSUS -

PATAYE

CHUPHI.....RESPONDENT

RULING

I. Introduction

1. Before this Honourable Court for its determination is the Notice of Motion application dated 9th February 2026 filed by the Petitioner/Applicant *Edward Shida Kauli* against *Pataye Chuphi*, the Respondent herein.. It was brought under the provision of Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010, Sections 1A and 3A of the Civil Procedure Act Cap. 21 and Articles 19, 20, 22, 23, 28, 29 and 50 of the Constitution of Kenya, 2010.
2. Vide the said application, the Petitioner/Applicant sought to be granted conservatory orders staying the proceedings and orders in the civil case before the Lower Court being "**Land Case No. E016 of 2024 at Kaloleni**"., Further, that the Petitioner/Applicant be accorded immediate release from civil jail pending the hearing of both the application and the substantive Petition.
3. Upon service of the Application, the Respondent filed Grounds of Opposition dated 2nd March, 2026, contending that both the Petition and the application were an abuse of the due court process, offended the doctrines of "**Res Judicata**" and "**Sub -**

judice” contrary to the respective provision of the relevant law, and failed to meet the constitutional threshold for grant of conservatory relief.

II. The Petitioner/Applicant’s case

4. The Petitioner/Applicant sought for the following orders: -

a) Spent

b) THAT a Conservatory Order staying the proceedings and Order in the Land Case No. E016 of 2024, Kaloleni, Pataye Chuphi (Suing on behalf of the Mwabaje Clan - Versus - Edward Shida Kauli and directing that the Applicant herein be released from prison forthwith pending the hearing of the application.

c) THAT a Conservatory Order staying the proceedings and Order in the Land Case No. E016 of 2024, Kaloleni, Pataye Chuphi (Suing on behalf of the Mwabaje Clan - Versus - Edward Shida Kauli and directing that the Applicant herein be released from prison forthwith pending the hearing of the Petition

d) THAT the costs of this application be paid by the Plaintiff.

5. The application was premised on the grounds, testimonial facts and the averments made out under the 14 Paragraphed annexed affidavit of EDWARD SHIDA KAULI, the Petitioner herein dated the same day, wherein it was averred that:

- a) he was an adult person of sound mind and competent to swear the Affidavit.
- b) he hailed from Samburu Area of Kwale County where he was born.
- c) he lived with his two families and children in a community land called a ranching scheme with a title and comprising of several persons.
- d) as a member of the County he had an area allocated to him (though without a title deed) on which he lived.
- e) the Respondent and members of his family had sought to convert his ownership rights in their favour all along and had threatened to ensure that he went to jail, which they eventually succeeded in doing.
- f) before the case giving rise to the Petition, namely Land Case No. E016 of 2024 at Kaloleni, other members had filed cases against him in Kwale, namely Case No. 13 of 2012 and Case No. 71 of 2018.
- g) those two cases were dismissed. Attached herein and marked "ESK - 1" and "ESK - 2" were the copies of the pleadings and the judgments.

- h) the Respondents, being dissatisfied, moved to a Court in a different location—Kaloleni—and this time obtained the desired outcome and consequently had him committed to jail.
- i) he believed his incarceration was unconstitutional, dubiously obtained, and that his constitutional right to freedom and liberty had been infringed.
- j) he had been informed by his Counsel on record that the Kaloleni Court was under duty to consider the previous cases vis-à-vis the Rule of Res Judicata.
- k) he also attached the pleadings and judgment of the Court in Land Case No. E016 of 2024 marked as “ESK - 3” so that the Court could see that the Rule of Res Judicata was breached.
- l) he was not able to obtain the other proceedings in the Kaloleni case and the proceedings as to the Notice to Show Cause, and had been informed that the Court file was with the Magistrate.
- m) he made the Affidavit in support of his application herein.

III. The responses by the Respondent

6. As indicated above, upon service the Respondent responded to the Application through 4 Paragraphed Grounds of Opposition on the following grounds:
 - a. The Application dated the 9th February, 2026 was an abuse of the court process.
 - b. The application dated 9th February 2026 failed to meet the legal threshold and should be dismissed with costs.
 - c. The application violated the principle of "**Res Judicata**" and "**Sub - Judice**" and thus should be dismissed with costs.
 - d. The interest of justice will be served if the application dated application dated 9th February 2026 was dismissed with costs.

IV. Submissions

7. On the 4th March, 2026, while the Parties were present in Court, they were directed to have the Notice of Motion application dated 9th February, 2026 filed by Petitioner, be disposed of by way of written submissions.
8. Unfortunately, by the time of penning down this Ruling, the Honourable Court had not been in a position to access any of the submissions from the parties, Hence, it proceeded to render this on 15th April, 2026 accordingly on its own merit.

V. Analysis and Determination

9. I have considered the Notice of Motion application dated 9th February, 2026 filed by the Petitioner, the Grounds of Opposition by the Respondent. From the pleadings and arguments placed before this Honourable Court, the following issues fall for determination in relation to the instant application: -

- a. Whether the Petitioner has demonstrated a prima facie case warranting conservatory orders.***
- b. Whether the doctrine of Res Judicata and Sub - Judice applied to bar the proceedings in Land Case No. E016 of 2024.***
- c. Whether the committal of the Petitioner to civil jail was lawful.***
- d. What orders should issue as to costs of the application.***

ISSUE No. a). Whether the Petitioner has demonstrated a prima facie case warranting conservatory orders

10. Under this sub - heading the Honourable Court will decipher whether the Petitioner/Aplicant has demonstrated a prima facie case warranting the grant of conservatory orders. The starting point is the provision of Article 23 (3)(c) of the Constitution of Kenya, 2010, which empowers this Court to issue conservatory orders in proceedings alleging violation of fundamental rights.

11. The law on conservatory orders is now well settled in this jurisdiction and is backed by myriads of authorities and hence

the Court will not need to re - invent the wheel. For instance, in the case of:- **“Centre for Rights Education and Awareness (CREAW) & another - Versus - Speaker of the National Assembly & 2 others [2017] eKLR”** the court was emphatic that: -

“A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”

12. Similarly, in the case of: **“Privy Council Case of Attorney General - Versus - Sumair Bansraj (1985) 38 WIR 286”**, Braithwaite JA expressed himself follows:

“Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the “conservatory order” in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, ... but on the other hand it would be well within the competence and jurisdiction of the High Court to “give

such directions as it may consider appropriate for the purpose of securing the enforcement of ... the provisions” of the Constitution...In the exercise of its discretion given under section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim conservatory order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in section 14 (2) “subject to subsection (3) and the enactment of section 14(3) in the 1976 Constitution must have...the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too...The critical factor in cases of this kind is the exercise of the discretion of the judge who must “hold the scales of justice evenly not only between man and man but also between man and state.”

13. The aforesaid principles were adopted by the High Court of the **“Republic of Trinidad and Tobago in Steve Furgoson & another - Versus - The AG & another Claim No CV 2008 - 00639 - Trinidad & Tobago”**. The Honourable Justice V Kokaram in adopting the reasoning in the case of Bansraj above stated: -

“I have considered the principles of East Coast Drilling - Versus - Petroleum Company of Trinidad and Tobago Limited (2000) 58 WIR 351 and I adopt the reasoning of BANSRAJ and consider it appropriate in this case to grant a conservatory order against the extradition of the claimants pending the

determination of this motion. The constitutional challenge to the Act made in this case is on its face a serious one. The defendant has not submitted that the constitutional claim is unarguable. The claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect and which will render the matter of the constitutionality of the legislation academic.”

14. Indeed, the principles in regard to the granting of interim or conservatory orders were outlined by the Supreme Court in the case of **“Gatirau Peter Munya - Versus - Dickson Mwenda Kithinji & 2 Others, Supreme Court Application NO. 5 of 2014 (2014) eKLR”**, where the Court held that:-

[85] These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the

prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.” (Emphasis added).

15. The principles in regard to grant of Interim conservatory orders were further reiterated in the case of **“Nubian Rights Forum & 2 others - Versus - Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) Petition Nos. 56, 58 & 59 of 2019 [2019] eKLR”**, where the Court observed that:-

[91] This Court is granted powers to issue conservatory orders in constitutional petition under Article 23(3) (c) of the Constitution and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules 2013.

[92] The applicable principles for the grant of conservatory orders were detailed by Onguto J. in Board of Management of Uhuru Secondary School - Versus - City County Director of Education & 2 Others [2015] eKLR. In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim

conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether, to grant or deny a conservatory order.

[93] We are also guided by the principle that in determining whether or not to grant conservatory orders, the Court must bear in mind that it is not required to enter into a detailed analysis of the facts and the law. As Musinga, J (as he then was) observed in High Court Petition No.16 of 2011, Nairobi - Centre for Rights Education and awareness (CREAW) & 7 others” “...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

[105] We have already found that the Petitioners have established, and the Respondent have conceded that there is a risk of prejudice being caused to members of the public and their right to privacy by the disclosure of certain types of personal information in the absence of proposals on how that data will be protected. As regards where the public interest falls in light of the respective prejudices that will be caused if the implementation of NIIMS is stayed, we are persuaded by the definition of public interest by the Indian Supreme Court in the case of *Dattraj Nathuji Thaware - Versus -State of Maharashtra, Indian & Others [2004] INSC 755 S.C 755 of 2004*

which adopted the meaning of public interest as set out in Stround's Judicial Dictionary Vol. 4 (v Ed) as: "A matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected."

[106] We take the view that it is in the public interest to have an efficient and organized system of registration of persons, and the responsible use of resources in the process, in light of the socio-economic gains of the system that have been illustrated by the Respondents. There is, however, also a public interest in ensuring that the said system does not infringe on fundamental rights and freedoms. There is thus a need for a balancing of the competing public interest rights while the consolidated Petitions are heard, so as to safeguard rights and resources, and ensure that the Petitions are not rendered nugatory." (Emphasis Added)

16. Now applying these legal principles to the instant case. The Petitioner/Applicant herein avers that he has been committed to civil jail without prior execution attempts, and that the suit culminating in his committal was barred by res judicata. He annexes Judgments in Kwale ELC No. 13 of 2012 and No. 71 of 2018, both dismissed, and contends that the Kaloleni Court failed to consider these earlier suits. This raises arguable constitutional questions under the provision of Article 29 (on freedom and security of the person) and Articles 25 (c) & 50 (1) & (2) (on fair trial). The Court in the case of:- ***"Mumo***

Matemu - Versus - Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR” clarified that a prima facie case is not one that must succeed but one that raises serious constitutional issues deserving judicial consideration.

17. Further, the Petitioner’s claim that his incarceration violates the provision of Article 11 of the ICCPR, which prohibits imprisonment merely for inability to fulfill a contractual obligation, resonates with Kenyan jurisprudence. In the case of:- **“Beatrice Wanjiku & Another - Versus - Attorney General & Another [2012] eKLR”**, the Court held that civil jail must be exercised in a manner consistent with constitutional guarantees of liberty and dignity. The Petitioner’s averment that no attachment or lawful execution was attempted before committal raises a legitimate constitutional question.
18. On the other hand through the filed Grounds of Opposition, the Respondent argues that the application is an abuse of process and violates res judicata. While this is a weighty issue, the Court notes that its rather premature to be dealt with at the interlocutory stage. The test is not whether the Petition will ultimately succeed but whether it raises arguable constitutional questions. In the case of:- **“Coalition for Reform and Democracy**

(CORD) & 2 Others - Versus - Republic of Kenya & Another [2015]

eKLR”, the Court held that conservatory orders are meant to prevent violation of rights and preserve the status quo pending determination, even where the merits are contested.

19. Thus, the Honourable Court finds that the Petitioner/Applicant has demonstrated a prima facie case. His continued incarceration, absent proof of lawful execution, risks irreparable violation of his constitutional rights to liberty and fair trial. The substratum of the Petition—whether his committal was lawful and whether res judicata was breached—must be preserved for full hearing. Denial of conservatory relief would render the Petition nugatory. Hence, on this front the application must succeed.

ISSUE No. b). Whether the doctrine of Res Judicata and Sub - Judice applies to bar the proceedings in Land Case No. E016 of 2024.

20. Under this sub-heading the Honourable Court will decipher whether “***the doctrine of Res Judicata***” and “***Sub - Judice***” applies to bar the proceedings in Land Case No. E016 of 2024.

The **Black’s law Dictionary 10th Edition** defines “***Res - Judicata***” as:

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

21. The doctrine of res judicata is codified under the provision of Section 7 of the Civil Procedure Act, Cap. 21 which provides that:

“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.”

22. This provision embodies the principle of finality in litigation, ensuring that once a matter has been adjudicated upon by a competent court, it cannot be re - opened between the same parties. It is a jurisdictional bar, not merely a procedural technicality, and goes to the very root of the court’s authority to entertain a matter.

23. A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party

and determine all matters in dispute in an action so as to avoid multiplicity of actions.

24. In this case, the Petitioner/Applicant has annexed Judgments in the Civil Cases of “**Kwale ELC No. 13 of 2012**” and “**Kwale ELC No. 71 of 2018**”, both dismissed, and contends that the Kaloleni Court failed to consider these earlier suits when entertaining Land Case No. E016 of 2024. He argues that the Respondent, dissatisfied with the outcome in Kwale, moved to Kaloleni to obtain a different result, thereby violating the principle of finality in litigation.

25. Kenyan courts have consistently emphasized that res judicata is a jurisdictional bar meant to protect the integrity of judicial decisions. In the case of”- “**Uhuru Highway Development Limited - Versus - Central Bank of Kenya & 2 Others [1996] eKLR**”, the court in an earlier Application ruled that the Application before it was Res Judicata as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. The court further emphasized that the same Application having been finally determined “thrice by the High Court and twice by the Court of Appeal”, it could not be

resuscitated by another Application. The Court of Appeal further stated that:

“That is to say, there must be an end to Applications of similar nature, that is to further, under principles of Res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or Civil Procedure Act caters for.”

26. Similarly, in the case of:- ***“ET - Versus - Attorney General & Another [2012] eKLR”***, the High Court observed that res judicata applies not only to substantive suits but also to constitutional petitions, provided the issues and parties are the same.
27. In order therefore to decide as to whether an issue in a subsequent Suit/ claim is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire suit/ claim and the instant suit/ claim to ascertain;
- i. what issues were really determined in the previous suit/ claim;
 - ii. whether they are the same in the subsequent suit/ claim and were covered by the Decision.

iii. Whether the parties are the same or are litigating under the same title and that the previous suit/ claim was determined by a court of competent jurisdiction

28. Kuloba J., in the case of ***“Njangu - Versus - Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported)”***, held that:

‘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.....’

29. In the Court of Appeal case of ***“Siri Ram Kaura - Versus - M.J.E. Morgan, CA 71/1960 (1961) EA 462”*** the then EACA stated that: -

“The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...

The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect

of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...

The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit.”

30. Further, the test for res judicata was laid down in the case of:-
“Independent Electoral and Boundaries Commission - Versus - Maina Kiai & 5 Others [2017] eKLR”, where the Court of Appeal held that for res judicata to apply, the following elements must be satisfied:

- a. The matter in issue must be identical in both suits.**
- b. The parties in the suit must be the same or litigating under the same title.**
- c. The matter must have been heard and finally determined.**
- d. The court that determined the matter must have been competent**

31. Applying this test to this case, the Petitioner/Applicant has demonstrated that the subject matter—ownership and occupation of community land in Samburu, Kwale—is substantially the same in the earlier suits and in Land Case No. E016 of 2024. The parties are also substantially the same, being

members of the Mwabaje clan and the Petitioner. The earlier suits were dismissed by competent courts. On the face of it, therefore, the Kaloleni proceedings raise serious questions of res judicata.

32. The Respondent argues that the application itself violates res judicata and sub judice. However, the Court notes that the doctrine is not a technical rule but a substantive principle of law grounded in public policy. In the case of:- ***“John Florence Maritime Services Limited & Another - Versus - Cabinet Secretary for Transport & Infrastructure & 3 Others [2015] eKLR”***, the Court of Appeal emphasized that res judicata is meant to prevent abuse of the court process and multiplicity of suits, ensuring finality in litigation.

33. The doctrine of **sub judice** is founded under the provision of Section 6 of the Civil Procedure Act, Cap. 21 which provides 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.

Explanation - The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court”.

34. Numerous decisions have put the issue in perspective. In the case of **“Kenya National Commission on Human Rights - Versus - Attorney General; Independent Electoral & Boundaries Commission & 16 Others (2002) eKLR”**, the Supreme Court of Kenya held;

“The purpose of sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter-----When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives”.

35. The rationale behind this doctrine is to prevent parallel proceedings over the same subject matter, which could result in conflicting decisions, multiplicity of suits, and abuse of the court

process. It is a jurisdictional bar designed to protect the integrity of judicial proceedings and ensure orderly administration of justice. The Respondent has argued that the Petitioner/Applicant's application violates both *res judicata* and *sub judice*. The distinction is important: while *res judicata* applies to matters already heard and finally determined, *sub judice* applies to matters still pending before another court. The Petitioner/Applicant avers that earlier suits in Kwale (ELC No. 13 of 2012 and ELC No. 71 of 2018) were dismissed, and that the Kaloleni matter (ELC No. E016 of 2024) was instituted thereafter. If indeed the Kwale suits were concluded, then *res judicata* would be the applicable doctrine. However, if any of those matters remain pending on appeal or review, then *sub judice* may apply.

36. Applying these principles, the Honourable Court notes that the Petitioner/Applicant has demonstrated that earlier suits were dismissed, and that the Kaloleni matter was instituted thereafter. On the face of it, therefore, the doctrine of **res judicata** appears more directly applicable than *sub judice*. However, if any appeal or review of the Kwale decisions is pending, then the Kaloleni matter would be caught by **sub**

judice. The Petitioner/Applicant has raised an arguable issue that the Kaloleni proceedings may be barred either by **res judicata** or **sub judice**, depending on the status of the earlier suits.

37. At this interlocutory stage, the Court is not required to conclusively determine whether *res judicata* applies, but only whether the Petitioner/Applicant has raised an arguable case. The annexed judgments and pleadings (“ESK - 1”, “ESK - 2”, and “ESK - 3”) demonstrate that the issue of ownership rights of the suit land has been litigated before. This suffices to establish a *prima facie* case that the Kaloleni proceedings may be barred by *res judicata*.

38. Accordingly, the Court finds that the Petitioner/Applicant has raised a serious constitutional and statutory issue on *res judicata*, warranting preservation of the substratum of the Petition through conservatory orders pending full hearing. The interplay between *res judicata* and constitutional petitions underscores that while constitutional rights are fundamental, they cannot be invoked to perpetuate abuse of process or to reopen matters conclusively determined by competent courts.

39. It is further important to note that the Petitioner/Applicant has raised a serious jurisdictional question under the provision of Section 6 of the Civil Procedure Act, Cap. 21 warranting preservation of the substratum of the petition through conservatory orders pending full hearing. The interplay between the Doctrine of **res judicata** and **sub judice** underscores the need to prevent multiplicity of suits and conflicting decisions, while safeguarding the Petitioner's constitutional rights. Thus, under the prevailing legal circumstances, the application must be allowed.

ISSUE No. c). Whether the committal of the Petitioner to civil jail was lawful.

40. Under this sub-heading the Honourable Court will decipher whether the committal of the Petitioner/Applicant to civil jail was lawful. The law on civil jail in Kenya is anchored under the provision of Order 22 of the Civil Procedure Rules, 2010 and Sections 38 - 40 of the Civil Procedure Act, Cap. 21. Section 38 provides that a decree may be executed by detention in prison of the judgment-debtor, but only in accordance with the safeguards set out in the Act. Section 40 further stipulates that no person shall be committed to civil jail unless the court is

satisfied, after due inquiry, that the debtor has means to pay but has refused or neglected to do so. This statutory framework makes clear that civil jail is not a default mechanism of execution but a measure of last resort, to be invoked only after other lawful modes of execution—such as attachment of property—have been attempted and found ineffective.

41. The Petitioner/Applicant avers that he was committed to civil jail without any attempt made at attachment or other lawful execution, and that his incarceration was therefore unconstitutional. He invokes the principle that imprisonment merely for inability to fulfill a contractual obligation is prohibited under the provision of Article 11 of the International Covenant on Civil and Political Rights (ICCPR), which Kenya has ratified and which forms part of Kenyan law under the provision of Article 2(6) of the Constitution. This principle has been recognized in Kenyan jurisprudence. In the case of:- ***“Beatrice Wanjiku & Another - Versus - Attorney General & Another [2012] eKLR”***, the High Court held that civil jail must be exercised in a manner consistent with constitutional guarantees of liberty and dignity, and that mere inability to pay cannot justify imprisonment. The Court emphasized that deprivation of liberty must always be accompanied by due process safeguards.

42. The jurisprudence of Kenyan superior courts has consistently reinforced this position. In the case of:- **“Braeburn Limited - Versus - Gachoka & Another [2007] eKLR”**, the Court of Appeal stressed that before committal to civil jail, the court must conduct a proper inquiry into the debtor’s means and ensure that imprisonment is not imposed arbitrarily. Similarly, in the case of:- **“Kennedy Mokuo Ongiri - Versus - John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] KEELC 1631 (KLR)”**, the Environment and Land Court reiterated that civil jail is not automatic upon default of payment; the court must satisfy itself that the debtor has the means to pay but is unwilling. This authority underscores that the Petitioner’s claim raises a serious constitutional issue, particularly where he alleges that no inquiry was conducted into his means and no attempt at attachment was made.

43. The Supreme Court in the case of:- **“Gitirau Peter Munya - Versus - Dickson Mwenda Kithinji & 2 Others [2014] eKLR”** emphasized that conservatory orders are meant to safeguard constitutional values, including liberty, pending determination of disputes. This principle applies with equal force in the context of civil jail, where liberty is at stake. The Court must therefore

be vigilant to ensure that incarceration is not imposed in violation of constitutional rights.

44. The Respondent argues that the application is an abuse of process. However, the Court notes that the right to liberty under provision of Article 29 of the Constitution is a fundamental right, and any deprivation thereof must strictly comply with due process. The Petitioner/Applicant's contention that he is serving an "illegal prison term" without lawful inquiry into his means or prior execution attempts raises a prima facie case of violation of constitutional rights. The Court of Appeal in **"Uhuru Highway Development Limited (Supra)"** observed that courts must guard against abuse of process, but equally must protect fundamental rights where they are threatened.

45. Accordingly, the Court finds that the surrounding facts, inferences and circumstances lawfulness of the Petitioner/Applicant's committal to civil jail is seriously in question. The safeguards under the Civil Procedure Act and the Constitution appear not to have been observed, and the Petitioner/Applicant has demonstrated an arguable case that his incarceration was unlawful. This issue warrants full ventilation

at trial, and in the interim, conservatory relief is justified to protect his liberty. Therefore, the application is allowed.

ISSUE No. d). What orders should issue as to costs of the application.

46. Under this sub-heading the Honourable Court will decipher what orders should issue as to costs of the application. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 provides that: -

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

47. The case before Court being a Constitutional Petition, Rule 26 (1) and (2) of the Constitution of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013) provides :-

**“(1) The award of costs is at the discretion of the Court.
(2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every**

person has access to the Court to determine their rights and fundamental freedoms.”

48. This statutory provision establishes that costs ordinarily follow the event, meaning that the successful party is entitled to costs unless the Court directs otherwise for good reason. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims.

49. See the cases of **“Harun Mutwiri - Versus - Nairobi City County Government [2018] eKLR”** and **“Kenya Union of Commercial, Food and Allied Workers - Versus - Bidco Africa Limited & Another [2015] eKLR”**, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of **“Hussein Muhumed Sirat - Versus - Attorney General & Another [2017] eKLR”**, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

50. In the present application, the Petitioner/Applicant seeks conservatory orders to secure his liberty pending determination of the Petition. The Respondent has opposed the application, arguing that it is an abuse of process. The Court has found that

the Petitioner/Applicant has demonstrated a prima facie case warranting conservatory relief. However, the substantive issues—including res judicata and the lawfulness of committal to civil jail—remain to be determined at the full hearing of the petition.

51. Given that the application raises weighty constitutional questions touching on liberty under Article 29 of the Constitution, it would be unjust to penalize either party with costs at this interlocutory stage. The Court in ***“Trusted Society of Human Rights Alliance - Versus - Attorney General & 2 Others [2012] eKLR”*** held that in constitutional litigation, costs should not be used to deter parties from seeking enforcement of fundamental rights. The Court emphasized that where public interest is involved, each party may be directed to bear its own costs.
52. Applying these principles, the Court finds that the appropriate order is that costs of this application shall abide the outcome of the Petition. This ensures fairness to both parties, preserves the Petitioner/Applicant’s right to pursue constitutional relief without undue financial burden, and allows the Court to revisit the issue of costs once the substantive Petition is determined.

VI. Conclusion and Disposition.

53. Having carefully considered the Notice of Motion application dated 9th February 2026, the Affidavit sworn by the Petitioner, the Grounds of Opposition filed by the Respondent, and the applicable statutory provisions together with the case law cited, the analyzed issues, the Honourable Court arrives at the following conclusion:-

- a. **THAT the Notice of Motion application dated 9th February 2026 filed by the Petitioner seeking conservatory orders staying the proceedings and orders in Land Case No. E016 of 2024, Kaloleni, and his release from civil jail, is found to be merited and is hereby allowed.**
- b. **THAT the Honourable Court holds that the Petitioner has demonstrated a prima facie case warranting conservatory protection under Articles 23(3) and 29 of the Constitution, as his continued incarceration without prior execution attempts raises serious constitutional questions on liberty and due process.**
- c. **THAT the Honourable Court further finds that the Petitioner has raised an arguable issue on the applicability of the doctrine of res judicata, given the existence of earlier suits in Kwale (ELC No. 13 of 2012 and ELC No. 71 of 2018), which were dismissed, and which ought to have been considered by the Kaloleni Court before entertaining Land Case No. E016 of 2024.**

- d. **THAT** a conservatory order is hereby issued staying the proceedings and orders in Land Case No. E016 of 2024, Kaloleni, pending the hearing and determination of this Petition, and the Petitioner shall be released forthwith from civil jail.
- e. **THAT** there be a mention on 15th June, 2026 in the physical presence of the Petitioner/Applicant for taking concise direction on how to expeditiously dispose of the Substantive Petition herein.
- f. **THAT** the costs of the Notice of Motion application dated 9th February 2026 shall abide the outcome of the Petition in accordance with Section 27 (1) of the Civil Procedure Act, Cap. 21 and Rule 26 (1) and (2) of the Constitution of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013).

IT IS SO ORDERED ACCORDINGLY.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS.....15THDAY OFAPRIL.....2026.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT
KWALE**

Ruling delivered in the presence of:

(a) M/s. Asma Maftah, the Court Assistant.

(b) M/s. Okumu Advocate holding brief for Mr. Magolo Advocate for the Petitioner.

(c) No appearance for Respondent.