



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**ELC JUDICIAL REVIEW LAND CAUSE NO. E001 OF 2025**

**(J.R)**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL**

**REVIEW FOR AN ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012, THE**

**LAND REGISTRATION ACT NO. 3 OF 2012 & THE**

**NATIONAL LAND COMMISSION ACT**

**AND**

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

**BETWEEN**

**REPUBLIC.....**

**.....APPLICANT**

**AND**

**ELC JR NO. E001 OF 2025**

**Page 1 of 26**

- 1. MALINDI MUSKETEERS LIMITED**
  - 2. THE NATIONAL LAND COMMISSION**
  - 3. THE COUNTY REGISTRAR KILIFI COUNTY**
  - 4. THE HONOURABLE ATTORNEY**
- GENERAL.....RESPONDENTS**

**AND**

- 1. LEONARD KARISA KENGA**
  - 2. NZINGO MTORO**
  - 3. KAMBI NGALA**
  - 4. CHOME NGALA HINZANO**
  - 5. CHARO NGALA HINZNAO**
  - 6. CONSTANCE K. NGALA**
  - 7. FLORENCE DAMA NGALA**
  - 8. KADZO NGALA**
  - 9. ROMAN CHOME NGALA.....EX PARTE**
- APPLICANTS**

**RULING**

**1.** In the Chamber Summons dated July 31, 2025, the *ex parte* applicants seek the following orders from this court:

**a) Leave be granted to the *ex parte* applicants to initiate judicial review proceedings for an order of mandamus, compelling the 3rd respondent to cancel the 1st respondent's Title Deed for L.R. No. Chembe/Kibabamshe and to enforce the directive issued by the 2nd respondent on June 21, 2024, by registering the parcel of land Chembe/Kibabamshe/373 in favor of the *ex parte* applicants.**

**b) Costs be in the cause.**

**2.** The said chamber summons is supported by a verifying affidavit of Leonard Karisa Kenga, sworn on July 31, 2025, verifying the facts in the statement dated July 31, 2025.

**3.** The Chamber Summons was opposed by the 1st respondent, who has filed a notice of Preliminary Objection (PO) dated September 29, 2025, and Grounds of Opposition dated October 14, 2025, as well as a replying affidavit sworn by Daniel Ricci on October 14, 2025.

**4.** In the PO dated September 29, 2025, the 1st respondent preliminarily opposes the *ex parte* applicant's Chamber Summons dated July 31, 2025, on the following legal grounds:

- a) **The *ex parte* applicant, without a grant of letters of administration, lacks the standing to initiate these legal proceedings.**
- b) **The entire judicial review process is currently *sub judice* in Malindi ELC Case No. E114 of 2025 - Malindi Musketeers Ltd v Roman Chome Ngala & 3 Others, which was filed before these judicial review proceedings.**
- c) **The *ex parte* applicant has not received permission from the court to initiate judicial review proceedings on his own behalf or on behalf of the 2nd to 9th *ex parte* applicants.**

**5.** In the Grounds of Opposition dated October 14, 2025, the 1st respondent objects to the *ex parte* applicant's Chamber Summons dated July 31, 2025, on the following ground:

- a) **That the *ex parte* applicant has no grant of letters of administration and therefore lacks the standing to initiate these judicial proceedings.**
- b) **The entire judicial review proceedings are currently *sub judice* in the case of Malindi ELC Case No. E114 of 2025 - Malindi Musketeers Ltd v. Roman Chome Ngala & three Others, which was initiated before these judicial review proceedings.**
- c) **The *ex parte* applicant has not obtained leave from the court to initiate the judicial review proceedings on his**

**own behalf or on behalf of the 2nd to the 9th *ex parte* applicants.**

- d) The judicial review forum is not the most effective and efficient remedy for resolving the facts in this case due to the highly contested nature of the facts and law involved.**
- e) The orders sought by *mandamus* are not available to the *ex parte* applicant in this case due to highly disputed facts and legal issues involved.**
- f) The *ex parte* applicant has not exhausted other effective remedies, and therefore, the application for judicial review violates the doctrine of exhaustion.**

**6. The 3rd and 4th respondents filed Grounds of Opposition dated October 14, 2025, which are as follows:**

- a) That the prayers sought in the application are not available to the *ex parte* applicant because the court lacks jurisdiction to hear this case under section 6 of the Civil Procedure Act, as there is already a suit between the same parties—namely **ELCLC/E114/2025, Malindi Musketeers Limited v Roman Chome Ngala & others**—on the same subject matter pending in the same court.**
- b) The application is misconceived and lacks merit because all issues regarding the ownership of the suit property are yet to be decided in **ELCLC/E114/2025**, which is still pending before the court.**

**c) The application is incompetent and without merit since it appears to attempt to embarrass the court by seeking conflicting orders on the same subject matter that is currently before the court.**

**7.** The Court directed the parties to submit written submissions in this case. I acknowledge receipt of submissions from the parties' learned counsel: Mr. Mwadilo for the ex parte applicants, Mr. Kilonzo for the 1st respondent, and Mr. Munga, State Counsel, for the 3rd and 4th respondents. I appreciate their submissions, including the relevant cited legal precedents that helped this court reach a verdict on the issues raised herein.

**8.** Based on the materials and submissions before me, the issues I frame for the Court's decision are whether the PO is sustainable regarding *locus standi*, the *sub judice* rule, and the doctrine of exhaustion, and who should bear the costs.

**9.** A PO 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 (**Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors [1969] EA 69**).

**10.** The PO challenges the competence of the JR and therefore that the court should summarily strike out the Chamber summons application dated July 31, 2025.

**11.** The 1st respondent argues that, regarding *locus standi*, Leonard Karisa Kenga, who swore an affidavit on July 31, 2025, does not qualify as the personal representative of the estate of the late Kenga Hinzano alias Ngala Hinzano Kadungo (deceased). According to the annexures attached by **the ex parte** applicants, marked LKK-1, the administrator of the estate of the deceased Kenga Hinzano is Roman Chome Ngala, for whom the Succession Court issued a rectified Certificate of Confirmation of Grant on June 27, 2023.

**12.** Therefore, the *Ex parte* Chamber Summons dated July 31, 2025, is deemed incompetent for lack of *locus standi* by Leonard Kenga Karisa to initiate the judicial review proceedings before the court, and the entire application should be struck out *in limine* and preliminarily, with costs to the 1st respondent.

**13.** The 1st respondent argues that, regardless of whether the chamber summons conflicts with the doctrine of *sub judice*,

it has been demonstrated in paragraphs 9 and 11 of their replying affidavits dated October 14, 2025, that two other ongoing legal proceedings exist: **Malindi ELC Case No. E114 of 2025 - Malindi Musketeers Ltd v Roman Chome Ngala & 3 Others**, and **Malindi HCC No. 54 of 2006 - Kenga Hinzano v The Hon. Attorney General & 3 Others**.

**14.** The 1st respondent states that a careful review of the plaint attached in paragraphs 9 and 11 of the earlier replying affidavits clearly shows that the issues in the *ex parte* applicant's Chamber Summons dated July 31, 2025, are either similar or substantially similar to those raised in previous proceedings between the same parties or parties under whom the *ex parte* Applicants seek to initiate the Judicial Review proceedings. Under these circumstances, the 1st respondent submits that the *ex parte* Chamber Summons dated July 31, 2025, is incompetent, constitutes an abuse of the court's process, and is *sub-judice*, and therefore should be struck out with costs to the 1st respondent.

**15.** The 1st respondent also believes that the *ex parte* applicants have not exhausted other available channels

before approaching this court, as there are other pending matters mentioned earlier, and that the *ex parte* applicants could have approached the registrar to correct the title according to section 79 of the Land Registration Act.

**16.** On timelines within which to approach the court, the respondent argues that the *ex parte* applicant seeks leave to commence judicial review proceedings to compel the 3rd respondent to implement the decision of the 2nd respondent, stating that title no. Chembe/Kibabamshe/373 be regularized in favor of the late Kenga Hinzano, as contained in Gazette Notice No. 138 Vol.CXX dated 9th November 2018. That is over seven (7) years since the 2nd respondent's decision was made, and not within the six (6)- month period within which the applicant should have sought the court's leave. The said gazette notice is annexed as LKK-3 to the verifying affidavit of Leonard Karisa Kenga dated 31st July 2025; therefore, the application for leave to commence judicial review proceedings is time-barred.

**17.** The 1st respondent further argues that mandamus generally will not issue in cases with highly contentious facts requiring a factual inquiry, and that this is one of those

contested matters where JR proceedings will not provide an effective remedy.

**18.** In summary, the 1st respondent opines that leave should not be granted to the *ex parte* applicant to initiate judicial review proceedings as requested in the chamber summons dated 31st July 2025, since the threshold established in the case of **Republic v National Social Security Fund & 2 Others - Misc. Civil Application No. 446 of 2015 [KLR]** has not been met.

**19.** The 3rd and 4th respondents, in their submissions, support the PO by the 1st respondent, highlighting that the current JR application conflicts with the doctrine of *sub judice* because there exists the **Malindi ELC Case No. E114 of 2025**, which seeks to resolve ownership of the suit property and involves the same parties herein, and that the Court has no jurisdiction to hear the present application. They argue that the only recourse is to stay the hearing of the application pending the hearing and determination of **ELC Case No. E114 of 2025**.

**20.** The *ex parte* applicants contend that all the grounds presented in the Preliminary Objection (PO) are

predominantly factual in nature: Ground 1 (*locus standi*) – requires evidence of who is holding the grant and whether Roman Chome Ngala consents; Ground 2 (*sub-judice*) – necessitates proof concerning the nature, parties involved, and filing dates of two distinct suits; Ground 3 (*lack of leave*) – calls for an examination of the chamber summons itself. As articulated by Roman Chome Ngala in paragraphs 4 to 7 of his replying affidavit, none of these grounds qualify as purely points of law. Consequently, the PO is incompetent and warrants dismissal with costs.

**21.** The *ex parte* applicants argue that Roman Chome Ngala, the 9th *ex parte* applicant, is the confirmed administrator of the estate of the late Kenga Hinzano alias Ngala Hinzano Kadungo, as evidenced by the Rectified Certificate of Confirmation of Grant dated June 27, 2023 (annexure RCN-1). He has fully authorized and consented to these proceedings. In any event, the applicants sue in their own right as persons harmed by the 3rd respondent's continued failure to implement the NLC determination dated June 21, 2024. They have a sufficient interest under Section 14 of the National Land Commission Act and Article 22 of the

Constitution—the 1st respondent’s entire argument about intermeddling collapses.

**22.** On the issue of *sub judice*, the *ex parte* applicants contend that Roman Chome Ngala has demonstrated (annexure RCN-2) that the current judicial review case was filed on August 12, 2025, while **Malindi ELC No. E114 of 2025** was filed later on August 16, 2025. The latter case cannot make the earlier one *sub judice*. Even if the dates were reversed, the two cases are entirely different: **ELC No. E114 of 2025** is a private possessory suit; The present application is a public law case seeking to enforce a clear statutory duty. There is no overlap in parties, subject matter, or reliefs. The doctrine of *sub judice* does not apply.

**23.** On the issue of leave, the *ex parte* applicants argue that the Chamber Summons dated July 31, 2025, seeks permission to initiate judicial review proceedings. The 1st respondent’s third ground is therefore premature and misconceived.

**24.** The *ex parte* applicants assert that the duty to be enforced is clear, ministerial, and non-discretionary: The County Registrar is legally required to implement the NLC’s

binding decision of June 21, 2024, by cancelling the 1st respondent's fraudulently obtained title and regularizing the parcel in favor of the rightful beneficiaries. The 1st respondent has never challenged the NLC's finding and remains final and binding until it is set aside. When a public body refuses or fails to perform a clear public duty, *mandamus* is the proper and most efficient remedy to award.

**25.** On the doctrine of exhaustion, the *ex parte* applicant asserts that Section 9(4) of the Fair Administrative Action Act, 2015, authorizes this Court to exempt an applicant from the exhaustion requirement when exceptional circumstances exist and it is in the interest of justice. Continued dispossession of land based on a title obtained through proven fraud constitutes exceptional circumstances warranting an exemption. It is in the interest of justice for this Honourable Court to grant leave to the *ex parte* applicants to file the substantive Notice of Motion application and allow the matter to be decided on its merits.

**26.** Having considered the conflicting submissions by the parties in this matter, along with the materials and judicial precedents cited regarding the issue of *locus standi* to

institute this case, I agree with Mr. Mwadilo that, looking at the parties involved, the *ex parte* applicants, one of them has a grant of letters of administration. In contrast, the others have brought the suit as a matter of right. Therefore, this is not an issue that can be dealt with summarily.

**27.** Regarding whether leave has been granted to originate this JR, it is the very application we are discussing that the *ex parte* applicants are seeking leave to bring a substantive judicial review application.

**28.** To me, the issues that stand out as worthy of discussion are whether the JR proceeding will be time-barred, whether the application for leave runs afoul of the doctrine of *sub judice* in view of **Malindi ELC No. E114 of 2025**, and **Malindi HCC No. 54 of 2006**, whether the application runs afoul of the doctrine of exhaustion, and not the most efficacious remedy.

**29.** The determination to be enforced is said to have been made on June 21, 2024. This application was filed on July 31, 2025, meaning the application seeking leave was filed nearly a year after the NLC's determination. The *ex parte* applicants have not shown that they approached the Land Register (3rd

respondent) to enforce the decision, and there was inaction for this Court to start counting the time within which a decision was made declining enforcement. I need not discuss this issue further, as no specific time is indicated for the purposes of reckoning time when the 3rd respondent declined to act.

**30.** On the doctrine of *sub judice*, there is a dispute over which matter was filed first, whether this one or **Malindi ELC No. E114 of 2025**. From the CTS, this matter was filed on August 12, 2025, while the former was filed on August 16, 2025. This means the two were filed almost simultaneously. However, it appears that the current suit was the one filed earlier—I will address that issue shortly.

**31. Malindi ELC No. E114 of 2025** was initiated by the plaint dated 25th July 2025, in which the 1st respondent seeks the following reliefs concerning the suit property herein:

- a) A declaration against the Defendants jointly and severally that the parcel of land known as Chembe/Kibabamshe/373 belongs to the Plaintiff.**
- b) Against the 1st defendant, (9<sup>th</sup> ex parte applicant here), a permanent Injunction restraining the defendant, his**

**family members, his agents, or any other person acting under his authority from trespassing, remaining on, or carrying out any activities on the property known as Chembe/Kibabamshe/373.**

**c) Against the 2nd defendant (2<sup>nd</sup> respondent here), an order declaring that Gazette Notice No. 778c issued on 13th June 2024, which deletes Gazette Notice No. 5182 of 2023, and Gazette Notice No. 11714 of 2918, as null and void for lack of due process.**

**d) Against all defendants jointly and severally, an order directing that the status quo be maintained in the land records, specifically that the land remains registered in the plaintiff's name.**

**e) Costs of this suit.**

**f) Any other relief that this honorable Court may deem fit and just to grant.**

**32.** I did not see representations regarding **Malindi HCC No. 54 of 2006** for consideration.

**33.** The doctrine of *sub judice*, as argued by the respondents, is hinged on Section 6 of the Civil Procedure Act, which states:

***“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.”*

34. The same principle has been confirmed in various judicial precedents, such as in **Nguruman Ltd v. Jan Bonde Nielsen & another (2017) eKLR**. The Court stated:

*“Accordingly, I have no hesitation in finding that the issues in this suit are directly and substantially in issue in Nakuru HCC 103/2009 previously instituted between parties under whom they or any of them claim.” ... Accordingly, I find that this matter is res sub judice Nakuru HCC/ELC 103/2009, and the appropriate order that comments itself for granting at this stage is to order, and I hereby order that this suit shall forthwith be stayed pending hearing and determination of HCC/ELC Nakuru 103/2009.”*

35. In **Ali v Cysewski & 3 others [2025] KEELC 4202 (KLR)**, this court commented on the doctrine of *sub judice* as follows:

*“The sub judice doctrine, which translates to “under judgment” in Latin, delineates the principle that when*

***a matter is currently before a court of law, no other court should preside over the same issue until the resolution of the initial suit is achieved. In Kenya, this doctrine is codified within Section 6 of the Civil Procedure Act. It serves to avert the proliferation of lawsuits and guarantees that identical matters are not adjudicated in different courts concurrently. The primary objective of the doctrine is to obstruct overlapping litigation and to ensure that multiple courts do not make determinations on the same legal issue. The doctrine is applicable when a matter is pending in a court of law and the identical matter is also in dispute in another lawsuit involving the same parties.***

***The Supreme Court of Kenya, in the case of National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 Others (Interested Parties) [2020] eKLR, articulated: “The term sub judice is defined in Black’s Law Dictionary, 9<sup>th</sup> Edition as: “Before the Court or Judge for determination.” The purpose of the sub judice rule is to stop the filing of 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. This means that 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."***

**36.** Based on the cited authorities, it appears that the doctrine of *sub judice* applies when a later case is filed involving the same subject matter and similar parties, without regard to a previous case concerning the same subject and parties. Here, the current case is the one filed earlier; in fact, it is the *ex parte* applicants who should argue that the current case violates the doctrine of *sub judice*, not the other way around.

**37.** Therefore, the current suit cannot be considered to violate the doctrine of *sub judice* based on the timelines when each of the matters was filed. I have indicated when the two

lawsuits were filed. The *ex parte* applicants argue that they are unaware of the alleged (sic) prior suit. It is this matter that was filed earlier, not the other way around.

As already stated, I did not receive any submissions concerning **Malindi HCC No. 54 of 2006**, including details of its current status and the issues, to determine whether the present matter is *sub judice* to it. Therefore, the current suit cannot be said to run contrary to the doctrine of *sub judice*.

**38.** Having determined that the current suit does not violate the doctrine of *sub judice*, I now address whether leave should be granted to commence JR proceedings alongside the doctrine of exhaustion and whether JR proceedings will be the most effective route to take.

**39.** The *ex parte* applicants believe that leave should be granted and that JR proceedings are the most effective process, with the most effective remedy in the form of *mandamus* being the best order to issue thereafter.

**40.** The respondents disagree. They argue that the determination by the NLC and the simmering ownership issue between the parties should be resolved through the plaint, as already filed in **Malindi ELC No. E114 of 2025**

specifically addresses the twin issues. I agree with the respondents.

41. The purpose for leave was enunciated in **Republic v County Council of Kwale & another; Kondo & 57 others (Ex parte) [1998] KEHC 2 (KLR)**, with which I concur that espousing the position them:

*“The purpose of the application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. As was pointed out by Lord Diplock in Republic -vs- Inland Revenue Commissioners ex p National Federation of Self Employed and Small Businesses Ltd [1982] AC 617, the requirement that leave must be obtained before making an application for judicial review is designed to:*

*“Prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative*

*action while proceedings for judicial review of it were actually pending even though misconceived.”*

*13. Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the courts discretion but as always is has to be exercised judicially. Has the applicant satisfied these principles.”*

42. But then again, the position obtaining now is as elaborated in the case of **Republic v. Kenya Revenue Authority, Commissioner Ex parte Keycorp Real Advisory Limited ([2019] KEHC 11050 (KLR))**, with which I also agree, the Court dissected on whether leave is required; these days, to originate JR proceedings in view of Article 47 of the Constitution, the Court stated as follows:

*“The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. First, parties, who were once denied Judicial Review on the basis of the public-*

***private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Second, the right to access the Court is now constitutionally guaranteed. This makes the requirement for leave unnecessary. Third, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3)(f). Fourth, section 7 of the Fair Administrative Action Act provides that:***

***"any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. Section 7 (2) of the act provides for grounds for applying for Judicial Review."***

**43.** While leave might not be necessary under Article 47 of the Constitution, the question is whether JR proceedings are the most appropriate route in this matter, considering the facts at hand, given that there are other remedies available to the *ex parte* applicants. I believe that JR proceedings are not the best option. I say this because the *ex parte* applicants seek to enforce a determination issued by the 2nd respondent, ostensibly on June 21, 2024, which directed the 3rd

respondent to register the *ex parte* applicants as the registered owners of the suit property and to rectify the title held by the 1st respondent under Section 79 of the Land Registration Act.

**44.** Following that decision, the 1st respondent filed **Malindi ELC No. E114 of 2025**, challenging that decision and seeking that decision to be declared null and void, and declaring the 1<sup>st</sup> respondent as the owner of the suit property as against the *ex parte* applicants.

**45.** Under the doctrine of exhaustion, which the *ex parte* applicants argue they should be exempted from, they have not shown that they engaged the 3rd respondent to have the title cancelled or rectified. Additionally, even if the 3rd respondent were to be moved for cancellation or rectification, the existence of **Malindi ELC No. E114 of 2025**—even if filed later—would prevent the title from being cancelled or rectified, as the determination of the 2nd defendant is under challenge and the issue of ownership remains to be addressed between the parties. JR proceedings, then, in my view, would be premature.

**46.** In my view, the best solution would be to address the issues raised here in **Malindi ELC No. E114 of 2025**, as it will determine whether the decision made by the 2nd respondent for the 3rd respondent to cancel or rectify the register in favor of the *ex parte* applicants will hold, and clarify the ownership dispute between the parties.

**47.** That will mean the most efficient way to proceed is to have Malindi **ELC No. E114 of 2025** take precedence.

**48.** Given the situation, I am inclined to decline leave to initiate JR proceedings as it would not be the most effective approach. Therefore, the PO partially succeeded under the grounds of exhaustion of remedies and the most effective way to proceed. Consequently, the chamber summons dated July 31, 2025, is hereby struck out.

**49.** On costs, the PO raised having partially succeeded, I will direct that each party bears its own costs.

**Dated, signed, and delivered electronically in Nyeri on this 9th day of April, 2026.**

**E. K. MAKORI**

**JUDGE**

**In the presence of:**

**Mr. Mwadilo for the Applicant**

**Mr. Kilonzo for the 1<sup>st</sup> Respondent**

**Kendi: Court Assistant**

**In the absence of:**

**Mr. Munga for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents**