

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ELC PET NO. E002 OF 2024

JUMA SEVA & 441 OTHERS

PETITIONERS

VERSUS

HON. BASIL CRITICOS1ST

RESPONDENT

H. E. MAMA NGINA KENYATTA 2ND

RESPONDENT

NATIONAL LAND COMMISSION 3RD

RESPONDENT

**THE DIRECTOR LAND
ADJUDICATION & SETTLEMENT.....**

4THRESPONDENT

THE CHIEF LAND REGISTRAR5TH

RESPONDENT

THE HON. ATTORNEY GENERAL6TH

RESPONDENT

RULING

**(On the preliminary issue of res sub judice and res
judicata)**

1. On its own motion, this Court invited the parties to address it on whether the present **Petition ELC Petition No. E002 of 2024** is sub judice and/or res judicata vis-à-vis;
 - i. **Milimani Judicial Review Misc. Application No. E011 of 2023 Republic v Chief Land Registrar & Another, Ex parte Hon. Basil Criticos & H.E. Mama Ngina Kenyatta; and**
 - ii. **Voi ELC Petition No. E006 of 2025 Jeremiah Kinanguka Kibanga Nixon Richard Otano Gabriel Kaze Nicholas Munuve Muna & 69 Others v Land Adjudication and Settlement Officer-Taveta & 2 Others.**
2. In compliance with the Court's invitation, the 1st Respondent filed his List of Documents dated 11th April 2026 on the issue of res sub judice. The Court has carefully considered the said documents, namely the **Notice of Motion dated 5th March 2026, Ruling dated 11th December 2025, Decree dated 4th March 2024 in JR**

E011 of 2023, and the Petition in ELC E006 of 2025, together with the oral submissions of both Counsel.

3. **Learned Counsel Mr. Kilumo**, appearing for the Petitioners, submitted that the parties in the present Petition are not the same as those in the Judicial Review proceedings. He argued that the pleadings, causes of action and reliefs sought are entirely different.
4. It was submitted that in the JR matter, the ex parte applicants who are the 1st and 2nd Respondents herein merely seek issuance of a provisional certificate of title over LR No. 10287/7 (IR 252528/1). The Petitioners do not contest the 1st Respondent's title; they only seek recognition of their legitimate expectation to be settled on that portion of the land which the 1st Respondent had earlier donated or promised to the Kachero residents. Counsel cited the Supreme Court decision in **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (Advisory Opinion Reference 1 of 2017) [2020] KESC 54 (KLR) (7 February 2020)** in support of the argument

that the strict triple identity test for sub judice and res judicata is not satisfied, and that a judgment in the JR matter will not operate as res judicata against the Petitioners.

5. He concluded his submissions by reiterating that sub judice does not arise.

6. **Learned Counsel Mr. Obok**, appearing for the 1st Respondent submitted that the JR was filed in 2023 before the present Petition. The Court in the JR matter has already delivered a Ruling dated 11th December 2025 directing the Chief Land Registrar to issue a provisional certificate of title to the 1st Respondent, cancel all illegal titles and file a compliance report. The suit property is the same. The Chief Land Registrar is a party in all the matters. The 1st Respondent has not admitted to ever donating any land. Counsel also relied on the Supreme Court decision **in Kenya National Commission on Human Rights (Supra)**.

7. The sole issue for determination is whether the present Petition is sub judice and/or res judicata to the Judicial

Review proceedings in **Milimani JR No. E011 of 2023 and/or Voi ELC Petition No. E006 of 2025.**

8. **Section 6 of the Civil Procedure Act Cap 21** prohibits a court from proceeding with a suit where the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or their privies litigating under the same title.
9. **Section 7 of the Civil Procedure Act** bars re-litigation where the matter has been finally decided in a former suit between the same parties or privies litigating under the same title in a competent court.
10. Both doctrines protect the sanctity of court decisions and prevent multiplicity of suits. They are, however, strictly applied only where the triple identity test parties, subject-matter and cause of action is satisfied as was stated in the case of **Independent Electoral and Boundaries Commission v Maina Kiai & 3 Others (2017) eKLR.**
11. The Supreme Court of Kenya has authoritatively restated the strict application of the sub judice doctrine in **Kenya National Commission on Human Rights v**

Attorney General (Supra) emphasising that superior courts must not usurp the jurisdiction of lower courts in pending matters, thereby underscoring the need to avoid parallel proceedings and respect the hierarchy of courts.

12. On the identity of the parties, it is noteworthy that In JR E011 of 2023, the ex parte applicants were Hon. Basil Criticos and H.E. Mama Ngina Kenyatta, with the Chief Land Registrar and Attorney General as respondents.
13. In the present Petition E002 of 2024, the Petitioners are Juma Seva & 441 Others (Kachero residents/settlers), while the respondents include the 1st and 2nd Respondents who were ex parte applicants in the JR together with the National Land Commission, Director of Land Adjudication and Settlement, Chief Land Registrar and Attorney General. E006 of 2025 involves yet another distinct group of Kachero residents.
14. The Petitioners in E002 of 2024 were never parties to the JR proceedings. They are third parties asserting independent constitutional rights. The mere fact that the Chief Land Registrar and Attorney General appear in all

matters does not satisfy the identity of parties requirement under **Sections 6 and 7 of the Civil Procedure Act.**

15. The present Petition is a constitutional petition under **Articles 10, 19(2), 27, 40, 43, 47 and 60** of the Constitution. The Petitioners plead long occupation and generational use of the land, prior donation/promise of settlement by the 1st Respondent, a flawed adjudication/settlement process lacking public participation, legitimate expectation of plot allocation, and threatened infringement of property and socio-economic rights. They do not seek to set aside the 1st Respondent's title; they seek settlement rights on the land allegedly donated to them.
16. Petition No. E006 of 2025 does not involve the 1st or 2nd Respondents as parties.
17. From the perusal of the pleadings and documents availed herein, the core issues in this Petition being legitimate expectation, public participation in the settlement scheme, and protection of occupation rights under **Article 40 of the Constitution** were neither pleaded nor determined in the JR. The JR Court expressly

declined to re-open ownership or allow new evidence on “surrender/donation” because that issue had already been decided inter partes in the 2024 decree. The present Petitioners were not before that Court and are therefore not bound by it.

18. This distinction is reinforced by the Supreme Court in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021)**, where the Court held that a determination in judicial review proceedings does not constitute a final determination of issues in a constitutional petition. The jurisdiction exercised, the considerations taken into account, the procedures followed, the reliefs available, and the role of the Court are materially different. A judicial review application exercises only a fraction of the jurisdiction vested in the Court when determining a constitutional petition.

19. Consequently, the doctrines of res sub judice and res judicata cannot operate to bar the present constitutional Petition.

20. Although the JR was instituted earlier in 2023, its main cause was concluded by decree in March 2024. The December 2025 Ruling and March 2026 Notice of Motion are enforcement proceedings against the Chief Land Registrar only. They do not constitute a “pending suit” capable of rendering this constitutional Petition sub judice. Petition No. E006 of 2025 was filed later in 2025 and cannot operate backwards as res sub judice against this 2024 Petition.

21. Furthermore, the Court finds that the remedies available under Judicial Review primarily the prerogative orders of Certiorari, Mandamus, and Prohibition are inherently distinct from the compensatory and restorative reliefs available under **Article 23 of the Constitution**. As the 1st Respondent's title is not the primary target of this Petition, but rather the fulfilment of a constitutional obligation toward landless settlers and hence therefore the reliefs sought identity fails.

22. To bar the Petitioners now would be to deny them their right to be heard under **Article 50(1)**, on matters that no other court has yet substantively determined.

23. Applying the triple identity test, guided by the Supreme Court decisions in **Kenya National Commission on Human Rights v Attorney General & 17 Others (supra)** and **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport & Infrastructure & 3 others (supra)**, the Court finds that neither *res sub judice* nor *res judicata* applies. The parties are different, the causes of action are distinct, and the reliefs sought are not the same.

24. The Petition shall therefore proceed to full hearing on its merits. Directions on filing of responses, if any, and fixing of the hearing date shall be given *instanter* after delivery of this ruling.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS
22ND DAY OF APRIL 2026.**

**E. K. WABWOTO
JUDGE**

In the presence of:

Mr. Kilumo h/b for Mr. Bwire for the Petitioners.

Mr. Obok for the 1st Respondent.

Mr. Kemei for the 4th to 6th Respondents.

N/A for the 2nd and 3rd Respondents.

Court Assistants; Mary Ngoira and David Ngoosa.

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