

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELCLPET NO. E023 OF 2025

SILVESTER CHIBO MWAROME
PETITIONER

VERSUS

AMRI KHAMIS & 3 OTHERS
RESPONDENTS

RULING

1. The motion application dated 11th September 2025 is seeking the following principal orders:
 - a. *That pending the hearing and final determination of the Constitutional petition herein a temporary order of injunction do issue restraining the first respondent, his agents, servants or representatives from in any manner interfering with the suit property known as Kilifi/Roka/750;*
 - b. *That pending the hearing and final determination of the Constitution of petition here in a temporary order of injunction to issue restraining the first respondent, his agents, servants or representatives from evicting the petitioner’s family from the suit property known as Kilifi/Roka/750; status quo be maintained;*
 - c. *That the Directorate of Criminal Investigations be enjoined in these proceedings and directed to probe the entire conveyancing process relating to land parcel no Kilifi/Roka/750 including but not limited to the drafting and execution of the sale agreement, preparation and exchange of completion documents, payment of the purchase price, valuation for stamp duty purposes, and the transfer and registration of the suit property.*
 - d. *The costs of the application be provided for.*

2. The grounds relied on are that whilst the petitioner was the beneficial owner of the suit property, the first respondent unlawfully procured a decree in *Malindi ELCOS Number 041 Of 2015* despite not being a party to a 1983 sale agreement, and without any Power of Attorney or authority from the alleged purchasers, and was registered as the sole owner of the land even though the petitioner's title was never lawfully cancelled. It is alleged that the facts were discovered by the petitioner in 2025, long after the impugned decree was issued and an appeal filed; that the transfer was tainted by fraud, misrepresentation and irregularities. It is alleged that the respondent relied on an alleged Authority to Act from one of three purchasers with no valid Power of Attorney; that the property was undervalued to Kenya Shillings 4,500,000/= against the true value of Kenya Shillings 70,000,000/=, leading to stamp duty evasion; also, that suspicious encumbrances existed including a charge of 1980, purportedly discharged in 2024, long after the suit land was transferred to the first respondent; that there was non-disclosure of material facts, particularly spousal interest that would have vitiated the impugned sale and transfer, in that the initial owner of the suit property had a spouse. It is also alleged that the Land Registrar irregularly issued title to the first respondent without cancelling the petitioner's valid title and without affording the petitioner a hearing as required by **Article 47** of the Constitution. That the doctrines of *res judicata* and *res sub judice* cannot be sustained in the circumstances, the fraudulent activities by the first respondent having only been discovered in August 2025, long after the impugned decree was issued in 2021 and the subsequent appeal filed; that the present application is therefore premised on fresh and material evidence of fraud which was never placed before, or adjudicated upon by, the previous courts, and that it is trite law that fraud vitiates all transactions, and decrees and court orders cannot be used as instruments to shield fraudulent schemes; that this court should not uphold procedural objections in

this matter but should focus on substantive justice by interrogating the newly unearthed conduct of the first respondent; that if the orders are not issued, the first respondent may alienate, transfer or otherwise dispose of the suit property, thereby causing the petitioner irreparable harm and rendering this petition nugatory. The application is supported by the sworn affidavit of the petitioner, also dated 11th September 2025 and the further affidavit dated 17th November 2025.

The Response

3. The first respondent filed a replying affidavit dated 24th October 2025. He pointed out that judgment was entered in the former case (*Malindi ELCOS Number 041 Of 2015*) by Olola J.; that the petitioner's attempt to set it aside failed; that the court is thus *functus officio*; that the petitioner filed another litigation *ELCLCLOS E036 of 2025* before this court, raising identical questions of ownership and fraud in respect of the same land parcel, and the present petition and notice of motion are *sub judice* that latter case; that these proceedings offend the doctrine of finality, issue estoppel, and are an attempt to reopen matters conclusively determined by a competent Court; that surprisingly in *ELCLCLOS E036 of 2025*, the petitioner claims ownership by way of adverse possession, thus acknowledging that he was not the registered owner, while in the present petition, he now claims to be a lawful and registered owner of the same parcel of land, which two positions cannot be reconciled.

Submissions

4. The applicant filed submissions dated 4th December 2025. The respondent filed submissions dated 16th January 2026. I have taken those submissions into consideration in the preparation of this ruling.

Analysis And Determination

5. It is the case that there has been previous litigation by way of ordinary suits between the petitioner and the 1st respondent herein. Those suits concerned the suit land herein. The first suit ended in favour of the 1st respondent. When the petitioner herein attempted to set aside the judgment vide an application dated 23/1/25, this court ruled as follows in a ruling dated 17th June 2025:

“The application is premised on the following grounds:

- a) The plaintiffs filed a civil application as an originating summons and went ahead to prosecute their case and judgment was given in their favor on 16th of July 2021;***
- b) The judgment so entered was irregular and was obtained in breach of the rules of procedure of service of summons and hearing notices;***
- c) No personal service was effected upon the defendant as he was away in Germany;***
- d) The only document which was served on him or sent to Germany and the applicants counsel in Germany wrote to the court explaining that the defendant was not in Kenya as at that time, and that he was unable to attend court;***
- e) That defendant was not served with any invitation or notice to fix the matter or hearing or to attend a hearing;***
- f) The plaintiffs continued prosecute their case without involving the defendant;***
- g) The plaintiffs relied on affidavits of service which do not even have their alleged hearing notices attached to the affidavits of service;***
- h) That the plaintiff claims to have bought the suit premises from the deceased owner but this is not true and the truth can only be established if the defendant is allowed to defend himself;***
- i) The deceased owner had a spouse who was not involved in or made aware of the arranged sale or purchase and she stayed on the suit premises believing that this is family property left by her late husband and therefore they alleged sale is false;***
- j) The plaintiff has never lived on the premises;***
- k) The plaintiff took advantage of the defendant’s absence to obtain favorable orders from the court;***

- l) The defendant has a good defense to the originating summons and should be granted a chance to defend himself;**
- m) The plaintiff shall suffer no loss if the order sought are granted since the defendant is in actual position of the suit premises to date.**

The application is supported by the affidavit of Sylvester Chibo Mwarome, the defendant. In that affidavit he states as follows: that he has resided in Germany since 2001 and he visits Kenya randomly. He is the administrator of the estate of Masha Dena Kideshwe. He became the registered proprietor of the suit land vide succession proceedings conducted at the Malindi High Court. He has always taken care of the property. He also took care of the wife of the deceased known as Kache Masha Dena. However, the plaintiff filed an originating summons, prosecuted the same and finally obtained judgment in his favor on 16th July 2021. In the defendant's opinion upon advice by his advocates, the judgment so entered was irregular and in breach of procedural rules regarding service of summons and hearing notices. He depones that no personal service was effected on him as he was in Germany; that when a document served on 20th April 2016 was sent to Germany his counsel one Dr Michael Grophich wrote to this Court explaining that he was not in Kenya at the time; that he could not therefore attend court; that in the meantime the plaintiff continued to prosecute his case without involving him; that contrary to the plaintiff's version, the correct position is that the plaintiff's elder brother is the one who came to ask for permission to build on the suit land and was allowed to do so; that however, after a few years the structure built collapsed and the plaintiff's brother disappeared; that there was no sale of the suit land to the plaintiff; that the plaintiffs obtained the fingerprints of the deceased fraudulently when the deceased was still alive and suffering from sickness, during which period the plaintiff took the deceased from the suit premises ostensibly to take him to hospital. Attached to the affidavit is what the defendant refers to as the draft reply/ defense to the Originating Summons.

To place the two applications before me in proper context, it is good to set out a history of the matter. This suit was commenced by way of an Originating Summons filed on 17th March 2015. That pleading was seeking a temporary injunction restraining the

defendant from interfering with the suit land and a declaration that the suit property belonged to the plaintiffs. The grounds on which they said orders were sought were that by a sale agreement made on 27th June 1983, whose copy is attached to the Summons, the plaintiffs purchased the suit land from Masha Dena Kideshwe. It is stated that immediately thereafter, the vendor was taken ill and he asked them to pay the outstanding payments for him to get medical treatment and so the plaintiffs completed the payment of consideration; that before the vendor executed the transfer in their favor, he passed on. The vendor was survived by his wife and the couple were childless. Although the terms of the agreement were that possession would be taken immediately, upon the demise of the vendor the plaintiffs did not take possession as the vendor's wife was elderly and childless, and was living on the suit land. At that time the suit land had not been registered and it was later registered under the Title Number Kilifi Roka 750. The defendant petitioned the High Court at Malindi in Succession Cause Number 21 Of 2003 for a grant of letters of administration describing himself as an adopted son of the late Masha Dena Kideshwe and was issued with such a grant on 25th May 2007. The plaintiffs were not aware of the succession cause that the respondent had filed and they came to discover it on 19th September 2007; that a title document had been issued to the respondent in his name on the strength of the grant issued in that succession cause. The plaintiffs also aver that another Succession Cause Number 21 Of 2013 was filed at the Kilifi Magistrate's Court by one Sulubu together with others who claimed to be sons of the deceased. The said Sulubu Charo Dena also filed another Succession Cause Number 40 Of 2012 at the High Court in Malindi, seeking a grant over the same estate. In both succession causes the name Kideshwe has been omitted and the suit land has been listed as an asset of the estate. It is averred that through the land is situate in Chumani the Petition Number 21 Of 2013 was commenced on the strength of a letter from their Assistant Chief of Tezo Location, of which the deceased was not a resident. It is also claimed that the plaintiffs have lodged a complaint with a Criminal Investigations Department regarding the foregoing matters.

On 26th April 2016 the court (Angote J,) was satisfied that the defendant had been served with a Notice of Motion dated 13th April 2016 and granted against him

an order of injunction as sought in that application, pending the hearing thereof which order was confirmed on 25th April 2016.

A letter addressed to the court by the defendant through his advocate abroad, which is dated 16th May 2016 and is in the court record demonstrates that summons were served on the defendant and on 20th April 2016; it is an acknowledgment of receipt of process.

On 19th April 2018, the matter came up in court when Olola J. granted an order that the defendant in the OS be served through the German Embassy. It was also ordered that the defendant be served through his last known address being registered post, which was Post Office Box Number 95350 Mombasa. One Victor Otieno Morris, process server swore an affidavit of non-service dated 17th August 2018 showing that service upon the respondent at the German Embassy had proved not possible on the basis that the officer in charge of that office had declined service and recommended that other suitable avenue be employed to serve the defendant since the embassy was not a party to the matter. An affidavit of service by the same Victor Otieno Morris dated November 2018 and filed on 14th December 2018 is in the court record, in which he confirms service by way of registered post as ordered by Court. An original receipt from the Postal Corporation of Kenya dated 1st October 2018 is attached to that affidavit of service. A request for interlocutory judgment against the defendant was filed on 14th December 2018. A hearing notice dated 28th February 2019 for hearing scheduled for 14th March 2019 was, according to the record, vide the affidavit of service of Alois Kitsango Mwandeka dated 4th March 2019 and filed on 11th March 2019 served upon the respondent by way of registered post. A Postal Corporation of Kenya receipt, number dated 1st March 2019 is attached thereto.

The Plaintiffs' request for service upon the defendant abroad, dated 3rd June 2020 is in the court file.

Judgment delivered on 16th July 2021 is in the court file. Frederick Obach Adeny has sworn an affidavit of service dated 6th October 2021 regarding service of the draft decree and judgment on the defendant vide registered post.

Gazette Notice number 6761 of 10th June 2022 is in the court file showing that the intention to have the land registered in the names of the plaintiffs as ordered by this Court was gazette on that date. From the

following: a copy of the application for Land Control Board Consent, copy of the consent dated 9th February 2023 and a copy of the transfer of interest in land to Amri Hamis the first plaintiff, and a copy of the title deed in his name, which are all retained in the court file, it is apparent that the Deputy Registrar of this court pursued registration of the suit land in the plaintiff's name to conclusion.

Having considered all the documentation inside the court file I find that the plaintiffs served the defendant in the proper manner and the defendant acknowledged receipt of summons in this suit through an advocate while abroad, and no step was skipped in the prosecution of this case. Service upon the defendant abroad is allowed by the rules. In this court view all that matters in this case is that summons reached the defendant and that he acknowledged them. That was proper service. This court thus finds that the defendant received the summons and plaint. It was for the defendant to file appearance and defense through that advocate and not to indicate to the court that he would attend to suit at his own pleasure. If business of the court was conducted in that manner it is doubtful that any reasonable amount of litigation would ever be concluded in any year.

The upshot of the foregoing is that the application dated 23rd January 2025 lacks merit and it is hereby dismissed with costs."

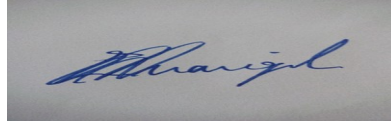
6. It is clear from the above excerpt that the dispute between the petitioner and the 1st respondent was in respect of title to the suit land herein and it has been finalized and there is a judgment in favour of the 1st respondent herein that has not been set aside. Though it is clear that the petitioner thinks that some of his grievances arising from that case can be considered as of constitutional nature, judgments in ordinary suits tried under processes prescribed under statute should, in this court's view, only attract setting aside applications, review applications or appeals and second appeals where applicable. That is where the merits of the decisions made by lower courts can be addressed. It is trite that a constitutional petition can not address the merits of the judgment of a court, more so when it was made by the same court trying the

petition, otherwise the court may be seen as sitting on appeal in its own decision.

7. In this case, the only issue that this court seems to identify that would come close to a constitutional issue is whether the second respondent was involved in any action with respect to the suit property, which may be deemed to raise a triable constitutional issue as to whether he could have violated petitioner's right to property as enshrined in **Article 40** of the Constitution of Kenya 2010; however, it is expressly conceded by the petitioner that on 8th October 2021, a decree was issued in favor of the first respondent which the first respondent used to cause transfer and registration of the suit property in his name in 2023. The actions of the Land Registrar having been executed pursuant to a decree of the court issued in an ordinary civil case, cannot form the ground for a constitutional petition for violation of rights under **Article 40** of the Constitution.
8. Lastly, with regard to **prayer number 6** of the Notice Of Motion, this court notes that a report to the Director of Criminal Investigations of any wrongdoing by the first respondent should be made at the earliest point for investigation without even an order of this court because it is presumed that the said office knows how to execute its mandate without a supervision of the court, and in any event, the present application has not demonstrated that it have refused to act in accordance with the law.
9. Having considered the application, the responses and the parties' submissions in detail, this court is of the view that the matters in the dispute herein have been extensively litigated in ordinary courts of law, and that any other residual matters can still be ventilated in that same forum, and that there is no constitutional issue that arises there from. Consequently, both the application and the petition dated 11th September 2025 are hereby struck out with no orders as to costs. This file shall be marked as closed.

**Dated, signed and delivered at Malindi on this 23rd Day of
April, 2026.**

MWANGI



JUDGE, ELC, MALINDI.

NJOROGE,