



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANI, NAIROBI

ELCEP PETITION NO. E048 OF 2025

BETWEEN

LINA NYOKABI GITHUKA 1ST

PETITIONER

DAVID KINYUA NJOGU 2ND

PETITIONER

-VERSUS-

NAIROBI CITY COUNTY GOVERNMENT 1ST

RESPONDENT

THE GOVERNOR,

NAIROBI CITY COUNTY GOVERNMENT 2ND

RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER,

BUILT ENVIRONMENT & URBAN PLANNING 3RD

RESPONDENT

MULTI AUTO PARKHAUS LTD 4TH

RESPONDENT/APPLICANT

AND

THE SPEAKER,

NAIROBI CITY COUNTY ASSEMBLY 1ST

INTERESTED PARTY

JACARANDA AVENUE

RESIDENTS ASSOCIATION 2ND

INTERESTED PARTY

RULING

The Application

1. The Application before Court is the Notice of Motion dated 15th December 2025 by the 4th Respondent/Applicant, Multi Auto Parkhaus Ltd, brought under Articles 23, 24, 50 and 159(2) of the Constitution, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. The Applicant principally seeks orders for the stay, setting aside and discharge of the ex parte conservatory orders issued on 9th December 2025, in so far as they affect property known as L.R. No. 3734/1459, Lavington, together with an order that the Petition and the Application dated 5th December 2025 be struck out for being res judicata, sub judice and an abuse of the court process, and for costs.
2. The Application is premised on the grounds set out on its face, namely that the conservatory orders issued on 9th December 2025 were obtained through material non-disclosure, particularly the failure by the Petitioners to disclose the existence of prior proceedings in ELC EPCC No. E013 of 2025, in which a ruling delivered on 6th November 2025 declined to grant similar injunctive reliefs in respect of the same property, development, parties and issues. The Applicant contends that the present proceedings amount to a re-litigation of matters already determined, contrary to the doctrine of res judicata, and that the Petitioners are effectively pursuing an appeal in disguise against that ruling.
3. The Application is supported by the affidavit sworn on 15th December 2025 by the Applicant's General Manager, who depones that the impugned orders have halted ongoing construction on the suit property and were procured through deliberate non-disclosure of

material facts, including the prior ruling and pending proceedings. The deponent reiterates that the issues relating to environmental harm, public participation and the right to a clean and healthy environment were previously considered and determined, and that unless the orders are set aside, the Applicant stands to suffer substantial financial loss, disruption of lawful construction and exposure to contractual liabilities, thereby necessitating the intervention of this Court in the interests of justice.

Replying Affidavits

a) 1st Petitioner's Replying Affidavit

4. The 1st Petitioner opposes the Application and depones that the 4th Respondent's reliance on the doctrine of res judicata under Section 7 of the Civil Procedure Act is misplaced. She states that the ruling delivered on 6th November 2025 in ELC EPCC No. E013 of 2025 by Hon. Lady Justice A. Omollo was purely interlocutory, arising from an application for injunction, and did not constitute a final judgment on the merits of the suit. She avers that the said ruling cannot bar subsequent proceedings, particularly as the substantive issues in that suit remain pending and capable of further adjudication.
5. She further depones that the earlier suit was instituted by Jacaranda Avenue Residents' Association through a plaint, challenging issues such as expired change of user approval, lack of proper public participation in obtaining approvals, and alleged irregularities in obtaining a NEMA licence. In contrast, the present proceedings are a constitutional petition brought by individual Petitioners invoking **Articles 2, 3, 20, 21, 22, 23, 24, 28, 42, 47, 50 and 70 of the**

Constitution, as well as statutory provisions including **Section 115 of the County Governments Act, Section 55 of the Physical and Land Use Planning Act, and Section 4 of the Nairobi City County Public Participation Act**. She states that the Petition challenges, inter alia, the reclassification of zoning along James Gichuru Road to Sub Zone 5E allowing high-rise mixed-use developments, and the direct impact of the 4th Respondent's construction including deep excavation, noise and air pollution on the Petitioners' adjacent residential properties, matters which were not determined in the earlier suit.

b) 2nd Petitioner's Replying Affidavit

6. The 2nd Petitioner likewise opposes the Application and reiterates that the plea of res judicata does not arise, as there has been no final determination in ELC EPCC No. E013 of 2025. He depones that the ruling of 6th November 2025 was limited to an interlocutory application and cannot extinguish the Petitioners' constitutional claims. He further emphasizes that the earlier proceedings involved different parties, namely the Jacaranda Avenue Residents' Association as plaintiff, whereas the present Petition is brought by two individual property owners, and that there is no demonstrated privity between them for purposes of claim or issue preclusion.
7. He also sets out that the present Petition raises distinct causes of action and reliefs, including declarations of violation of constitutional rights and orders of certiorari against the County Government, which were not sought in the earlier plaint. He reiterates that the Petition is grounded on specific and ongoing harm to the Petitioners' properties

arising from the 4th Respondent's development, including threats to structural integrity and environmental degradation, supported by an independent environmental and planning assessment report annexed to the Petition. He maintains that the Petition is therefore neither res judicata nor sub judice, and urges the Court to dismiss the Application.

c) 2nd Interested Party's Replying Affidavit

8. The 2nd Interested Party, through its Chairman Antony Mzee, also opposes the Application and terms the plea of res judicata under **Section 7 of the Civil Procedure Act** as frivolous and misconceived. He depones that in **ELC EPCC No. E013 of 2025**, the ruling delivered on 6th November 2025 by Hon. Lady Justice A. Omollo did not determine the dispute on its merits but was confined to an interlocutory issue of jurisdiction, where the Court held that it had jurisdiction in light of the non-operational liaison committee. He emphasizes that the suit was subsequently set down for pre-trial on 12th March 2026, and therefore there exists no final judgment capable of triggering the doctrine of res judicata.
9. He further distinguishes the two proceedings by setting out that the earlier suit was instituted by Jacaranda Avenue Residents' Association against Multi Auto Parkhaus Ltd. and Africa Waste and Environment Management Centre, primarily challenging the change of user process in 2018 and lack of public participation, whereas the present Petition is a constitutional petition brought by individual Petitioners challenging broader issues of, urging that the Application be dismissed with costs.

Submissions

The Application was canvassed by way of written submissions.

a) Applicants Submission

10. The Applicant submits that the Petition and the Application dated 5th December 2025 are barred by the doctrines of **res judicata and sub judice**, and further that the Petitioners are undeserving of equitable relief due to **material non-disclosure**. The Applicant identifies three issues for determination, namely:
- (i) whether the Petition and Application are res judicata;
 - (ii) whether the Petition is sub judice; and
 - (iii) whether the Petitioners are entitled to equitable relief in light of non-disclosure.
11. On res judicata, reliance is placed on **Section 7 of the Civil Procedure Act** and authorities including ***Satya Bhama Gandhi -Vs- Director of Public Prosecutions & 3 others [2018] KEHC 6100 (KLR)***, where the Court held that a final and conclusive ruling may found res judicata, and *John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3, others [2021] KESC 39 (KLR)* where the Supreme Court emphasized finality of litigation as a matter of public policy.
12. On the issue of sub judice, the Applicant relies on **Section 6 of the Civil Procedure Act**, submitting that the present Petition concerns the same subject matter **L.R. No. 3734/1459** and the impugned development as in **ELC EPCC No. E013 of 2025**, which is pending determination, and therefore the subsequent proceedings are barred.

13. The Applicant further submits that the Petition is an abuse of the court process, citing authorities including **Telkom Kenya Limited -Vs- John Ochanda 2014 ekr** on the doctrine of functus officio and **Raila Odinga & 2 Others -Vs- Independent Electoral & Boundaries Commission & 3 Others 2013 ekr** on finality of decisions. On material non-disclosure and equitable relief, reliance is placed on **Mbiti -Vs- Mwilu & another; Attorney General & 4 others (Interested Parties) 2021 KEHC 4871(KLR)** and **Brinks MAT Ltd. -Vs- Elcombe {1988} 3 ALL ER CA 188**. for the duty of full and frank disclosure in ex parte applications.

b) **Petitioners' Submissions**

14. The Petitioners oppose the Application and similarly identify the issues for determination as;

(i) whether the Application and Petition are res judicata, and

(ii) whether the Petition is sub judice. On res judicata, they rely on Section 7 of the Civil Procedure Act and the Supreme Court decision in **John Florence Maritime Services Ltd. & another -Vs- Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)** , submitting that for the doctrine to apply there must be a final judgment on the merits, identity of parties, subject matter and cause of action.

15. They argue that the ruling delivered on 6th November 2025 in ELC EPCC No. E013 of 2025 was interlocutory, arising from an injunction application, and did not finally determine the issues in dispute. They further distinguish the earlier suit as one grounded on statutory

compliance issues, including expired change of user approval, lack of NCA approval, irregular approvals and flawed public participation, whereas the present Petition raises constitutional violations, including threats to the Petitioners' rights to a clean and healthy environment arising from ongoing excavation, noise, air pollution, structural risk and loss of privacy, supported by an expert report.

16. On sub judice, the Petitioners rely on **Section 6 of the Civil Procedure Act** and submit that the earlier suit and the present Petition are distinct in parties, causes of action and reliefs, and therefore the doctrine is inapplicable. They emphasize that the present proceedings invoke the Court's constitutional jurisdiction under **Articles 2, 3, 20, 21, 22, 23, 24, 28, 42, 47, 50 and 70 of the Constitution**, as well as statutory provisions including the **County Governments Act, Environmental Management and Co-ordination Act and Physical and Land Use Planning Act**, and seek remedies such as declaratory orders and certiorari which are unavailable in an ordinary plaint.

c. 2nd Interested Party's Submissions

17. The 2nd Interested Party opposes the Application and aligns itself with the Petitioners, submitting that the Application is devoid of merit and improperly invokes the doctrine of res judicata under Section 7 of the Civil Procedure Act. It reiterates that the ruling delivered on 6th November 2025 in ELC EPCC No. E013 of 2025 by Hon. Lady Justice A. Omollo was limited to a preliminary issue of jurisdiction, and did not

constitute a final determination on the merits of the dispute. It is submitted that the earlier suit remains pending and was set down for pre-trial directions on 12th March 2026, and therefore none of the essential elements of res judicata particularly a final judgment on merit have been satisfied.

18. The 2nd Interested Party further submits that the earlier suit was instituted by Jacaranda Avenue Residents' Association through a plaint challenging the change of user process and lack of public participation in 2018, whereas the present proceedings are a constitutional petition brought by individual Petitioners challenging zoning decisions (Zones 5C, 5D and 5E along James Gichuru Corridor) and alleging violations of constitutional rights under Articles **2, 3, 20, 21, 22, 23, 24, 28, 42, 47, 50 and 70 of the Constitution**, together with statutory provisions including the **County Governments Act, Environmental Management and Co-ordination Act and Physical and Land Use Planning Act**. It is contended that the parties, subject matter, causes of action and reliefs are distinct, and that the present Petition cannot be said to be either res judicata or sub judice, thus the Application ought to be dismissed with costs.

d) **4th Respondent's Supplementary Submissions**

19. In supplementary submissions, the 4th Respondent reiterates its earlier position and contends that the present Petition does not raise any new issues distinct from those in ELC EPCC No. E013 of 2025, but merely re-packages the same dispute under a constitutional framework. It

submits that courts must look at the substance rather than form, and that parties cannot evade the doctrine of res judicata by introducing additional constitutional provisions or reframing claims.

20. Reliance is placed on authorities such as ***Henderson -Vs- Henderson (1843)***, ***E.T -Vs- Attorney General & Another (2012) eKLR*** and ***Omondi -Vs- National Bank of Kenya Ltd. (2001) EA 177***, for the proposition that res judicata applies not only to issues actually determined but also to those which ought to have been raised in earlier proceedings. It is argued that all complaints relating to the development on L.R. No. 3734/1459, including alleged lack of public participation, zoning concerns, environmental impact and constitutional violations, were matters directly in issue or capable of being raised in the earlier suit, and that the present Petition amounts to an abuse of the court process.
21. The 4th Respondent further submits that the Petitioners, though suing in their individual capacities, are members of the Jacaranda Avenue Residents' Association, which instituted the earlier suit, and are therefore bound by it under Explanation 6 to Section 7 of the Civil Procedure Act, which deems persons litigating in respect of a common right to represent all interested parties. It relies on ***John Florence Maritime Services Ltd. & another -Vs- Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)*** to argue that parties sharing a commonality of interest are deemed to litigate under the same title. Accordingly, it is submitted that the Petitioners cannot re-litigate the same subject matter under the guise of individual claims, and that the Petition is both res judicata and sub

judice, warranting the setting aside of the conservatory orders and the allowing of the Application with costs.

Issues for Determination

22. Having considered the Application, the affidavits on record and the rival submissions by the parties, the Court is of the view that the issues falling for determination are the following:

- a) whether the Petition and the Application dated 5th December 2025 are barred by the doctrine of res judicata;
- b) whether the Petition offends the doctrine of sub judice in light of ELC EPCC No. E013 of 2025; and
- c) whether the conservatory orders issued on 9th December 2025 ought to be set aside on account of material non-disclosure and abuse of the court process.

Analysis and Determination

Issue No. 1: Whether the Petition and the Application dated 5th December 2025 are barred by the doctrines of res judicata and sub judice

23. **Section 7 of the Civil Procedure Act** codifies the doctrine of res judicata in Kenya as follows: *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.

24. Our case law has distilled the essential ingredients of the doctrine as can be noted in the following decided cases: ***Nancy Mwangi T/A Worthlin Marketers -Vs- Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others*** [2014] eKLR; ***Kamunye & others -Vs- Pioneer General Assurance Society Ltd*** [1971] E.A. 263 and ***John Florence Maritime Services Limited & another -Vs- Cabinet Secretary for Transport and Infrastructure & 3 others*** [2015] eKLR. The four ingredients of res judicata that can be discerned from the cited cases are:

- a) Was there previous litigation in which identical claims were raised or in which identical claims could have been raised?
- b) Are the parties in the present suit the same as those who litigated the original claim?
- c) Did the Court which determined the original claim have jurisdiction to determine the claim?
- d) Did the original action receive a final judgment on the merits?

25. The four ingredients make the instant task quite straightforward. Turning to the facts of this case, it is not in dispute that there exists previous litigation, namely ELC EPCC No. E013 of 2025, concerning the same development on L.R. No. 3734/1459, and involving parties litigating under a common interest, the Petitioners herein being

members of the Jacaranda Avenue Residents' Association which instituted the earlier suit.

26. It is also not disputed that the Court seized of that matter was competent. However, the critical question is whether there was a final judgment on the merits. From the material placed before Court, the ruling delivered on 6th November 2025 arose from an interlocutory application and the suit itself remains pending for hearing. In the absence of a final determination on the merits, the fourth ingredient is not satisfied. Consequently, the plea of *res judicata* does not succeed.
27. Turning to the doctrine of sub judice, **Section 6 of the Civil Procedure Act** provides as follows: *“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.”*
28. In **Republic -Vs- Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR**, the Court held that: *“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to*

grant the relief claimed...”

29. The rationale for this principle was restated in Kampala High Court Civil Suit No. 450 Of 1993 ***Nyanza Garage -Vs- Attorney General*** where the Court observed: *“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided...”*

30. Guided by the principles espoused in the above cited cases, I find that the present Petition and Application arise from the same subject matter as the earlier suit, namely the development on L.R. No. 3734/1459, and raise substantially similar issues relating to approvals, public participation and environmental impact. The parties, though not identical in form, are litigating under the same title and interest. The earlier suit remains pending before a court of competent jurisdiction. In the circumstances, the present proceedings offend the doctrine of sub judice and amount to a multiplicity of suits over the same subject matter. Accordingly, while the plea of res judicata fails, the objection grounded on sub judice succeeds.

Issue No. 2: Whether the conservatory orders issued on 9th December 2025 ought to be set aside

31. The 4th Respondent/Applicant seeks the setting aside of the ex parte conservatory orders issued on 9th December 2025 on the ground that the same were obtained through material non-disclosure, particularly the failure to disclose the existence of ELC EPCC No. E013 of 2025 and the ruling delivered on 6th November 2025. The Petitioners, on the other hand, maintain that the present Petition raises distinct

constitutional issues and that the orders were properly issued.

32. It is trite that a party who approaches the Court ex parte bears a duty of full and frank disclosure of all material facts, whether favourable or adverse. Failure to do so disentitles such a party to equitable relief and entitles the Court to discharge the orders so obtained. From the record, it is not disputed that there existed prior proceedings involving the same subject matter and substantially similar issues, and that a ruling had been delivered therein prior to the issuance of the impugned conservatory orders. That prior litigation was clearly material to the Court's exercise of discretion in granting ex parte relief. In the absence of disclosure of such material facts, the Court finds that the conservatory orders were obtained in circumstances that warrant interference.

33. Further, having found that the present proceedings offend the doctrine of sub judice, it follows that the continuation of the conservatory orders would serve to sustain parallel proceedings over the same subject matter, contrary to the principles of orderly administration of justice. In the premises, the Court is satisfied that sufficient grounds have been established to warrant the setting aside of the conservatory orders issued on 9th December 2025.

Issue No. 3: Who should bear the costs of the Application

34. Costs follow the event unless the Court, for good reason, orders otherwise. In the present case, the Application has substantially succeeded on the ground of sub judice and in the setting aside of the conservatory orders. The Court finds no exceptional circumstances to

depart from the general rule. Accordingly, the costs of the Application are awarded to the 4th Respondent/Applicant.

Final Orders

In the result, the Court makes the following orders:

- a) The Notice of Motion dated 19th December 2025 is hereby allowed.
- b) The conservatory orders issued on 9th December 2025 are hereby set aside and discharged.
- c) The Petition dated 5th December 2025 is hereby stayed pending the hearing and determination of ELC EPCC No. E013 of 2025.
- d) The costs of the Application are awarded to the 4th Respondent/Applicant.

It is so ordered!

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **4th** day of **May, 2026.**

MOHAMMED N. KULLOW
JUDGE

Ruling delivered in the presence of: -

Mr. Kitinya with Ojallo..... for the Petitioners

Mr. Chege..... for the 4th Respondent/Applicant

Ms. Wacuka..... for the 2nd Interested Parties

Philomena W Court Assistant

Original Copy