



**REPUBLIC OF KENYA**

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

**ELC PETITION NO. E001 OF 2026**

**LAW SOCIETY OF KENYA & 105 OTHERS.....  
PETITIONER**

**VERSUS**

**CABINET SECRETARY MINISTRY OF LANDS, PUBLIC WORKS,  
HOUSING AND URBAN DEVELOPMENT & 21  
OTHERS.....RESPONDENT**

**RULING**

1. The matter comes up for determination of the 7<sup>th</sup> - 12<sup>th</sup> Respondents Preliminary Objection in which the Respondents raise various points of law in respect of which the parties filed submissions which the court will shortly

summarize. The parties had occasion to orally highlight their submissions in court.

2. Counsel for the 7<sup>th</sup> to 12<sup>th</sup> Respondents argue that the 1<sup>st</sup> Petitioner (Law Society of Kenya (LSK)) lacks locus standi to institute the suit as the 2<sup>nd</sup> to the 106<sup>th</sup> Petitioners have sued in their own capacity. They state that the suit property has never been classified as community land and that it was private property held in trust by Trustees of the 10<sup>th</sup> Respondent.
3. As such, the LSK whose mandate under **Section 4 of the Law Society Act** only extends to public interest matters, cannot represent private interests. They urged the Court not to accept all litigation couched as public interest litigation unless it is demonstrated that the same would protect public interest and address a genuine wrong. In support of this argument, counsel referred the court to the case of **Ashok Kumar Pandey v State of West Bengal, Communications Commission of Kenya v Royal Media Services**, and **Brian Asin & 2 others v Wafula Chebukati & 9 others [2017] eKLR**.

4. On the issue of Res Judicata, it is submitted that the issue of sub division and titling is pending determination at the Court of Appeal in *CA (Application) No. E486 of 2025- Keekonyokie Community Trust v The Chief Land Registrar & Others*, and that on 13<sup>th</sup> February 2026 the Court of Appeal (Gatembu, Mumbi N. and Odunga JJ.A.) found that there was no impropriety in the Chief Land Registrar subdividing the suit property and issuing new titles. They contend that in view of this finding the instant suit is *res judicata* and that re-litigating the matter would violate **Section 7 of the Civil Procedure Act**.

5. As such, the Petition is an abuse of the Court process and that the court should await the outcome of the Court of Appeal case. Counsel for the 1<sup>st</sup> to the 3<sup>rd</sup> Respondent and the 13<sup>th</sup> to the 22<sup>nd</sup> Respondent supported the submissions of counsel for the 7<sup>th</sup> - 12<sup>th</sup> Respondent.

6. The Petitioners oppose the Preliminary Objection which they argue is against the principles set out in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**. It is the Petitioners case that all the issues

raised in support of the Preliminary Objection are contested and would require evidentiary interrogation. They denied any similarities between this Petition and CA No. E486 of 2025 pointing out that the Court of Appeal matter was instituted by Keekonyokie Community Trust (the 12<sup>th</sup> Respondent herein) and not by the current Petitioners and that it concerned trusteeship and interlocutory injunctive issues, not the constitutional questions raised herein.

7. They further submit that the Petition is not *res judicata* as it raises distinct constitutional issues under **Article 10**, failure to register under the Community Land Act 2016, lack of county planning approval and police intimidation, none of which were before the Court of Appeal. They argue that the substratum of the Petition was constitutional governance of Community land under **Article 63**, which is not a private civil dispute and that completion of subdivision does not defeat the Petition as the sub division was illegally undertaken.

8. On *locus standi* they argue that **Article 22(2)** allows associations to act in the interest of their members and in

public interest. Given the governance concerns including capture of community land, abuse of public office and historical land injustices, which are matters of genuine public interest, the 1<sup>st</sup> Petitioner had locus to institute the proceedings and the Preliminary Objection should be dismissed.

9. The 6<sup>th</sup> Respondent while aligning to the Petitioner's submissions on the threshold of a Preliminary Objection, further submitted that the fact that the County Government did not grant approval for the subdivision is central to the constitutional challenge.

10. Having considered the Preliminary Objection, the Submissions by all counsels the court distills the following issues for determination;

- Whether this Petition is Res Judicata
- Whether the Law Society of Kenya has locus
- Whether the fact that the original suit property has ceased to exist renders the Petition incompetent
- Whether failure to sue individual proprietors of resultant sub divisions is fatal

**11.** On the first issue, **Section 7 of the Civil Procedure Act** 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... and has been heard and finally determined by such court."***

i. The elements for a successful plea of res judicata were set out in **Uhuru Highway Development Ltd v Central Bank of Kenya & Others [1996] eKLR** and **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR**, namely:

- 1. The matter must have been directly and substantially in issue in the former suit ;**
- 2. The former suit must have been between the same parties or their privies;**
- 3. The matter must have been heard and finally determined; and**
- 4. The court determining the former suit must have**

**been competent to do so.**

12. From the outset I note that the 7<sup>th</sup> -12<sup>th</sup> Respondents have not filed a Replying Affidavit to oppose the Petition. They did not therefore have an opportunity to plead any of the facts which have been alluded to in the course of submissions.

It has severally been the expressed view of this court as captured in previous determinations that courts should be very cautious in determining Res Judicata on the basis of a Preliminary Objection. I have cited with approval the case of **Henry Wanyama Khaemba vs Standard Chartered Bank Ltd & Another (2014) eKLR**, and **George Kamau Kimani & 4 Others vs County Government of Trans Nzoia & Another (2014) eKLR**, in which the court stated’  
*“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1<sup>st</sup> Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will*

*require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”*

13. The standard is even higher in respect of Constitutional Petitions. The Supreme Court in the case of John Maritme provides useful instruction on the doctrine of Res Judicata in Constitutional Petitions. The Supreme Court restated holdings of various superior courts on the issue of Res Judicata as captured below;

14. In **Okiya Omtatah Okoiti & Another v. The Attorney General and Another Petition No. 593 of 2013 [2014] eKLR** Lenaola J. (as he then was) stated inter alia...*I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court*

*and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.”*

15. In **Wycliffe Gisebe Nyakina v. Attorney General & another [2014] eKLR**, Gikonyo, J. held as follows: *“I reiterate the sentiments above and I must also state that while the Courts in constitutional litigation must apply the principle of res judicata sparingly, they must also be vigilant to guard against litigants who are clearly evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the same Court. That being my finding and looking at the Petition before me, I do not think that it is res judicata and I will say why shortly.”*

16. “In **William Kabogo Gitau v. Ferdinand Ndung’u Waititu [2016] eKLR** Onguto, J. held as follows:

*59. In the cases of Aggrey Chiteri v. Republic [2016] eKLR and Edward Okongo Oyugi & 2 Others v. The Attorney General [2016] eKLR, this Court held that the doctrine of res*

*judicata applied with even force to constitutional litigation though it was important that caution is exercised lest a person whose rights were being violated a fresh was unjustly locked out from the wheels and seat of justice. So said the court in Edward Okongo Oyugi & 2 Others v. The Attorney General [supra]: “[11] The application of the principle of res judicata has the potential of locking out a person from the doors of justice or even reaching the out-stretched arms of justice if the claim is disposed off without venturing into the merits. Consequently, the factors and circumstances ought always be nit-picked and caution exercised. The court ought to be in no doubt that the principle is applicable to the facts and circumstances of each case.”*

17. After citing several authorities from within and outside Kenya the Supreme Court in the end had this to say [83] *However, though the doctrine of res judicata lends itself to promote the orderly administration of justice, it should not be at the cost of real injustice. In the Danyluk Case from Canada the court cited the dissenting opinion of Jackson J.A., in Iron v. Saskatchewan (Minister of the Environment &*

*Public Safety*), 1993 CanLII 6744 (SK CA), [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21 where he stated: “The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.” [84] Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power. [85] In the alternative a litigant must demonstrate special circumstances warranting the Court to make an exception”

18. The Supreme Court pronounced that a court may exempt application of the doctrine of Res Judicata where substantial injustice is likely to occur or where there are special circumstances. In the instant case it would be premature to consider whether these circumstances exist as the court does not have all the facts before it given that the issue of Res Judicata was raised a Preliminary Objection without any supporting facts denying the court the opportunity of carrying out an evaluation of the facts herein to verify whether this Petition is Res Judicata.

19. The Kenyan Constitution was hard fought for by Kenyans who wanted a different form of governance. The Courts must be vigilant in upholding Constitutional supremacy, enforcing fundamental rights, safeguarding public interest and protecting the purposes and principles of the Constitution. Carry the aspirations of millions of Kenyans who rely on the Courts to protect the rights the Constitution. The Court must balance this vigilance against the principles of finality in litigation.

20. The issue of public participation which is a constitutional obligation in our Constitution is an issue in this Petition. It is not evident at this stage that this issue has been addressed in any other matter. However, considering the limited scope of a preliminary objection in terms of enabling the court to interrogate the facts I will not make a definitive finding on the issue of Res Judicata at this time. The Respondent will be at liberty to raise the issue at the hearing of the main petition

21. The second issue I will address is whether the Law Society of Kenya has locus in this matter. It is argued by the Respondents that there is no public interest in this matter; that Kibiku Block 1 is a matter of private rights as it was registered in the names of private citizens and that the Law Society is non suited in the interests of private citizens.

**22.** There is no doubt that the Constitution of Kenya has broadened access to courts by dismantling strict interpretation of the concept of locus standi which denies a party the right to be heard. Courts in numerous decisions

have liberally interpreted **Article 22(2) and Article 258 of the Constitution.**

23. In **Civil Appeal No. 290 of 2012, Mumo Matemo v. Trusted Society of Human Rights Alliance and another**, in which the Court of Appeal stated;

24. *“27 Moreover we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broad context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1<sup>st</sup> respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution ...*

25.      28. *It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, ....”*

26.      The instant Petition raises issues of public participation, land governance and Constitutional process which are issues of public interest in respect of which the Law Society of Kenya can institute proceedings especially considering that land injustice is a matter that this country has grappled with for a long time. To the extent that the issue of public participation and constitutional governance are raised I find that the interest of Law Society is within the ambit of Article 22 and 258.

27. It was also argued that the Petition is incompetent as the original suit property has allegedly ceased to exist after subdivision. The Respondent argues that the original title no longer exists as the title has been sub divided into smaller parcels. In a related issue the Respondents argue that the court cannot determine the Petition as all the title holders are not before the court.

28. Transfer of land does not extinguish the right to challenge Constitutional violations. Regarding the failure to enjoin all affected parties Order 1 Rule 9 Civil Procedure Rules provides ;

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties...”

In any event the pleadings can be amended to include all necessary parties. However, this issue too is improperly raised as a Preliminary Objection as the question of whether parties affected are represented requires factual interrogation of who the registered owners are, whether they are parties and whether the orders sought will impeach their titles.

29. The upshot of the foregoing is that the **Preliminary Objection** has no merit and is dismissed with no orders as to costs. The Respondents shall be at liberty to raise the issue of *Res Judicata* at the hearing of the main Petition.

**Dated, Signed and Delivered virtually at Kajiado this 7<sup>th</sup> day of May 2026.**

**JUDY OMANGE**

**JUDGE**

**In the presence of**

Mr Sankipa for Mr Topua Lesinko h/b Mr Elisha Ongoya for Petitioner

M/S Misiati h/b Professor Ojienda SC

Mr Akama for Mr Nyaosi for 6<sup>th</sup> Respondent