



Kiungua v Kimilu & 4 others (Environment and Land Petition E005 of 2024) [2025] KEELC 5465 (KLR) (23 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5465 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND PETITION E005 OF 2024**

**EO OBAGA, J
JULY 23, 2025**

BETWEEN

DAVID MUKEKU KIUNGUA PETITIONER

AND

ISAAC MUTHAMA KIMILU 1ST RESPONDENT

**THE CABINET SECRETARY MINISTRY OF LANDS, PUBLIC WORKS,
HOUSING AND URBAN DEVELOPMENT 2ND RESPONDENT**

THE CHIEF LAND REGISTRAR OF TITLES 3RD RESPONDENT

**THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT 4TH
RESPONDENT**

THE HON ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. This is a ruling in respect of a preliminary objection dated 3rd March, 2025 in which the 1st Respondent raises the following grounds:

1. This court lacks proper jurisdiction to hear and determine the Petitioner’s petition dated the 1st October, 2024 for it offends the doctrine of non-justiciability under Article 159 of *the Constitution* of Kenya 2010.
2. That the Petitioner’s petition dated the 1st October, 2024 is res judicata having been dealt with by this honourable court in Makueni ELC Judicial Review Application No. E001 of 2023.
3. That the proceedings herein offends the provisions of Section (29) and (30) of the *Land Adjudication Act* Cap 284 Laws of Kenya as it amounts to an abuse of the process of the court.

2. The Petitioner filed a constitutional Petition in which he sought the following reliefs:



- a. A declaration that the Petitioner’s rights to Fair Administrative Action under Article 47 of *the Constitution* as read together with the *Fair Administrative Action Act*, 2015 as well as its right to a fair hearing under Article 50 (1) of *the Constitution* has been violated.
 - b. A declaration that the Petitioner’s right to own property under Article 40 of *the Constitution* has been violated.
 - c. An order of certiorari be issued to remove to this court for the purpose of being quashed the decision of the Cabinet Secretary Ministry of Lands, Public Works, Housing and Urban Development through the Deputy County Commissioner, Mbooni East Subcounty dated 9th November, 2018 in appeal case number 55 of 2001 in respect of title number Kisau/Nduluku/6X5 between the Petitioner and the 1st Respondent.
 - d. An order of revocation and cancellation of the registration of the 1st Respondent as the proprietor of title number Kisau/Nduluku/6X5 be issued.
 - e. An order be made that title number Kisau/Nduluku/6X5 belongs to the Petitioner.
 - f. An order compelling the 3rd Respondent to register the Petitioner’s property interest of ownership of title number Kisau/Nduluku/6X5 in the register of titles and issue him with a new title deed within 30 days of this order.
 - g. Any other order that this court may deem just and fit.
 - h. The Petitioner be awarded the costs of this petition.
3. The 1st Respondent argued that the land in issue is under adjudication and that the Petitioner should have exhausted the mechanism under the Act before moving to court. He also argued that the Petitioners should have filed an application for judicial review if he was not satisfied with the decision made.
 4. The 1st Respondent further argued that the judicial review application which had been filed by the Petitioner and the issues being raised herein were the same ones settled in ELC Judicial Review No. 23 of 2021 and that if the Petitioner was aggrieved with the decision, he should have appealed to the Court of Appeal. The 1st Respondent therefore argued that the petition is res judicata.
 5. In response to the submissions by the 1st Respondent, the Petitioner submitted that he is at liberty to move to court alleging that his constitutional rights were violated. He submitted that this court has jurisdiction to entertain this petition and can issue a remedy of judicial review.
 6. The Petitioner further submitted that the petition is not res judicata as what happened in ELC Judicial Review No. E001 of 2021 is that the Petitioner’s application for leave to bring judicial review out of time was dismissed. There was no determination on merits in judicial review No. E001 of 2021. He relied on Petition No. 17 of 2015 John Florence Maritime Services Limited & Another –vs- Cabinet Secretary Transport and Infrastructure (2021) eKLR.
 7. I have carefully considered the oral submissions which were made on behalf of the 1st Respondent and the Petitioner. This matter was raised as a preliminary issue. A preliminary issue was defined in the



case of Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696 at 700 paragraph D-F where Law JA held as follows:

“.....a preliminary objection 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”.

8. In the instant case, the 1st Respondent is submitting that the petition herein offends the doctrine of non-justiciability. From the submissions by counsel for the 1st Respondent, it is clear that he is confusing this principle with the principle of exhaustion. He submitted that the Petitioner should have exhausted the mechanism provided under the Land Adjudication Act before coming to court.
9. The principle of non-justiciability refers to issues or disputes that are considered unsuitable for determination by court. These are matters which are deemed to be beyond the purview of the judiciary and are better left to be determined by other branches of government. In the instance case, the Petitioner is alleging violation of his constitutional rights. This is a matter which squarely falls within the jurisdiction of the court and there is no way the doctrine of non-justiciability can be invoked here.
10. On the issue of res judicata, it is clear that there was no determination of issues on merit in Judicial Review No. E001 of 2021. The Petitioner had filed an application seeking extension of time to bring Judicial Review proceedings against the Minister’s decision. This application was dismissed. The Petitioner’s issues were therefore not addressed in that application.
11. The 1st Respondent submitted that the petition offends the provisions of Section 29 and 30 of the Land Adjudication Act. He did not state in which manner the petition herein has offended these sections. Section 29 deals with appeals which are provided for under the Act. It also deals with alteration of register by the Chief Land Registrar. All these processes were done and that is why the Petitioner is aggrieved and wants his grievances heard in the Petition. Section 30 of the Act deals with stay of suits when the adjudication process is ongoing. In the instant case, the adjudication process had been completed that is why the Chief Land Registrar issued titles touching on this matter after the process under the Act was completed. I therefore find that the preliminary objection by the 1st Respondent is devoid of merit. The same is dismissed with costs to the Petitioner.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 23RD DAY OF JULY, 2025.

IN THE PRESENCE OF:

Mr. Mukungi for Petitioner

Ms. Nyawira for 2nd to 5th Respondents

Court assistant – Steve Musyoki

