

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF AT ELDORET**  
**CONSTITUTIONAL PETITION NO. E004 OF 2025**  
**IN THE MATTER OF ARTICLES**  
**2,10,19,20,21,22,23,25,28,47,48,50,50(9),56(1) AND 258(1) OF**  
**THE CONSTITUTION OF KENYA, 2010**  
**AND**  
**IN THE MATTER OF AN APPLICATION OF THE BILL OF RIGHTS BY**  
**THE COURTS**  
**AND**  
**IN THE MATTER OF SECTION 3, 4(1)(2), 10, 23(1)(2), 24, 25 AND**  
**26 OF THE VICTIM PROTECTION ACT**  
**AND**  
**IN THE MATTER OF ELDORET CHIEF MAGISTRATE CRIMINAL CASE**  
**NO. 512 OF 2024. R VERSUS JOSEPH NDAYALA MUYESU**  
**BETWEEN**  
**JOSIAH KIMBUR KIBIAS ..... PETITIONER**  
**VERSUS**  
**JOSEPH NDAYALA MUYESU ..... 1<sup>ST</sup>**  
**RESPONDENT**  
**THE CHIEF MAGISTRATE COURT ..... 2<sup>ND</sup>**  
**RESPONDENT**  
**THE DIRECTOR OF PUBLIC PROSECUTION ..... 3<sup>RD</sup>**  
**RESPONDENT**  
**THE INSPECTOR GENERAL OF POLICE ..... 4<sup>TH</sup>**  
**RESPONDENT**  
**THE ATTORNEY GENERAL ..... 5<sup>TH</sup>**  
**RESPONDENT**  
  
**Coram: Before Justice R. Nyakundi**  
**M/s Limo R.K. & Co. Advocates.**  
**M/s Mathai Maina & Co. Advocates.**  
**Ms. Kirenge for ODPP**

## **The Hon. Attorney General**

### **RULING**

1. The judgment of this court relates to a constitutional petition filed in this court on 13<sup>th</sup> February, 2025 lodged by Josiah Kimebon Kibias brought under the provisions of Articles 2, 10, 19, 20, 21, 22, 23, 25, 28, 47, 48, 50, 50(9), 56(1) of The Constitution of Kenya 2010.
2. The petitioner sought the following orders:
  - a. *A declaration that the Petitioner's right to a fair trial as provided for under Article 25(c) of the Constitution of Kenya 2010 were violated.*
  - b. *A declaration that the Petitioner's right to a fair hearing as provided of under Article 50 of the Constitution of Kenya 2010 were violated.*
  - c. *A declaration that Eldoret CMCC No. 885 of 2007 the suit should be retried denovo by competent magistrate Court vested with pecuniary jurisdiction.*
  - d. *A declaration that the Petitioner's right to own property and to have that property protected as provided for under Article 40 of the Constitution of Kenya 2010 were violated.*
  - e. *An order of certiorari be issued quashing the Judgment of the Environment and Land Court at ELDORET E&L APPEAL NO. 8 OF 2014 JOSEPH NDAYALA MUYESU -VS-THOMAS KIMUTAI BIWOTT AND JOSIAH KIMBUR KIBIAS and ELDORET CIVIL APPEAL NO. 112 OF 2018 between the parties for contravening Articles 20(2) (3)(4),25(C) and 50(1) of the Constitution of Kenya 2010 as far as application of fundamental rights are freedoms of the Petitioner is concerned.*
  - f. *That the Petitioner be compensated by way of damages for being deprived of utilization of his property since the year 2007.*
  - g. *Cost of this appeal be provided for.*

*h. Any other order the court may deem fit and just to grant.*

3. The facts of the petition are that the petitioner entered into a written exchange agreement with the 1<sup>st</sup> Respondent on 22<sup>nd</sup> January, 1996. The petitioner avers that he was the registered owner of the whole of that parcel of land known as **UASIN GISHU ILLULA SHEME/126** Measuring 7 ½ Acres. That he also owned ¾ of an Acre on that parcel of land known as **UASIN GISHU ILLULA SHEME/176**.
4. The Petitioner averred that the 1<sup>st</sup> Respondent was the owner of that parcel of land known as **UASIN GISHU/KAHUNGURA/278**. He further submitted that as per their exchange agreement dated 22<sup>nd</sup> January, 1996, they valued the 1<sup>st</sup> Respondent land at Kshs. 50,000/= per Acre and since the land was 5 acres the entire consideration was to be Kshs. 250,000/=. That it was expressly agreed in the exchange agreement of 22<sup>nd</sup> January, 1996 that the 1<sup>st</sup> Respondent was to take 1 Acre out of Petitioner's parcel of land known as **UASIN GISHU ILLULA SCHEME/176**.
5. The Petitioner averred that the 1<sup>st</sup> Respondent upon entering the exchange agreement with the Petitioner he begun to plough the 1 Acre in parcel **number 126** and lived on **parcel number 176** since it contained a dwelling house. That in the year 1997 he decided to sell the land parcel known as **UASIN GISHU KAHUNGURA/278** to the interested party since the 1<sup>st</sup> Respondent had not transferred it to him he approached him and requested him to transfer it to the Interested party who had purchased it from him.
6. The Petitioner highlighted that the 1<sup>st</sup> Respondent and the Interested Party went to the Land board where the minutes were only captured as transfer. The Petitioner further stated that he was surprised to learn that the 1<sup>st</sup> Respondent had sued him vide a plaint dated 18<sup>th</sup> October, 2007 and amended on 22<sup>nd</sup> October, 2007 at the Chief Magistrate Court Civil Case No. 885 of 2007 claiming for an order of specific performance of the exchange of land in respect of

that parcel of land namely **UASIN GISHU ILLULA SHEME/126 measuring 5 Acres.**

7. According to the Petitioner, the 1<sup>st</sup> Respondent on his plaint alleged that on/or about the year 1997 he had entered into a mutual agreement between him, the Interested Party and I whereof it was agreed that the 1<sup>st</sup> Respondent in consideration of exchange of that parcel of land namely **UASIN GISHU KAHUNGURA/278** measuring 5 Acres was to acquire and/or have ownership with that parcel of land namely **L.R No UASIN GISHU/ILLULA/126 measuring 5 Acres** which was registered in his name.
8. Pursuant to the aforesaid exchange of Land agreement, the 1<sup>st</sup> Respondent applied to Ainabkoi Land Control Board and Obtained consent to transfer his land namely **UASIN GISHU/KAHUGURA/278** measuring 5 Acres to the Interested party and by way of exchange with **L.R No. UASIN GISHU/ILLULA SHEME/126** vid **MIN 460/97(44).**
9. The petitioner avers that the trial court heard that matter and the 1<sup>st</sup> Respondent suit was dismissed vide a Judgment that was delivered by Hon. S.M Mokuu on the 17<sup>th</sup> June, 2014. The 1<sup>st</sup> Respondent went to appeal against the said Judgment at the Environment and Land court at Eldoret Appeal No. 8 of 2014. The Honorable Court heard the Appeal and on the 11<sup>th</sup> July, 2018 rendered its judgment where the Court allowed the Appeal and set aside the lower Court Judgment and substituted by allowing the lower Court Judgment.
10. The petitioner was dissatisfied the Petitioner avers that he was dissatisfied with the Judgment of the **Environment and Land court in Appeal No. 8** of 2018 and he subsequently appealed to the Court of Appeal vide **Civil Appeal No. 112 of 2018**, where the court of Appeal held that there was a valid oral agreement between the parties and dismissed the Petitioner's Appeal.
11. The Petitioner avers that there is a new development to the extent that the 1<sup>st</sup> Respondent has been charged with the offence of purgery in connection to the suit being **CRIMINAL CASE NO. E512 OF 2024**

**REPUBLIC -VERSUS- JOSEPH INDAYALA MUYESU** at the Chief Magistrate's Court Eldoret.

- 12.** The Petitioner avers that due to the purgery that was committed by the 1<sup>st</sup> Respondent, the Superior Court and the Court of Appeal upheld and oral agreement that favored the 1<sup>st</sup> Respondent contrary to the provisions of section 3(3) of the Laws of Contract. The Act of purgery that was committed by the 1<sup>st</sup> Respondent changes the nature character and legality of the suit he instituted against me at the Chief Magistrate's Court being **ELDORET CMCC NO. 885 OF 2007** ultimately affects all the decision that were made by the Superior Court regarding the claims that were made by the 1<sup>st</sup> Respondent.
- 13.** The Petitioner avers that the decision that were made as a result of the criminal act of purgery are not unjust but also null and void for lack of legal basis to anchor them in the bedrock of justifiability of matters before the Court.
- 14.** That the Act of purgery committed by the 1<sup>st</sup> Respondent and reliance of oral agreement violated the right to fair administrative action which ought to have been lawful, reasonable and procedurally fair pursuant to **Article 47 of the Constitution 2010** which proceeding before the Land and Environment Court and the Court of appeal were all contrary to the law hence violating the Petitioners right to fair administrative action.
- 15.** As a result, the Petitioner avers that his right to a fair hearing was violated to the extent that the Courts relied to oral evidence to a case that was commenced with perjured pleading and on reliance on an oral evidence where the law of Contract under Section 3(3) strictly provide for a written agreement.
- 16.** According to the petitioner, state organs and persons are constitutionally bound by the Bill of rights under **Article 19(1) and (2) of the Constitution** and the recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and promote realization of the potential of all human beings.

**17.** He contended that it emerges that when a judicial officer including judges has violated the rights or fundamental freedoms of an individual that individual is properly entitled to approach the High Court for redress and this Court is under obligation to interrogate such allegations.

**Response to the petition.**

**18.** The 3<sup>rd</sup> Respondent in response filed grounds of opposition stating that the issues raised in the petition are res judicata given that they have been subjected through the full stages of trial and addressed therein in Eldoret CMCC No. 885/2007, Eldoret ELC Appeal No. 8 of 2014, Civil Appeal No. 112 of 2018 and finally culminating in the Supreme Court Ruling in application E004/2024 delivered on 14<sup>th</sup> March, 2025

**19.** In further response, the 2<sup>nd</sup>, 4<sup>th</sup>, & 5<sup>th</sup> Respondents through the Hon. Attorney General lodged the following grounds of opposition:

- a. That this Application and Petition is incompetent and misconceived as the Petitioner has not demonstrated before this Honorable Court how their rights have been violated. The Petitioner has failed to demonstrate with reasonable Precision the rights that were violated and in what manner thus falling short of the threshold set out in *Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 Others (2003) e KLR and Anerlta Kartini Njeru VS R* where the Court held Constitutional violations must be Pleaded with a reasonable degree of Precision.
- b. That the Petitioner has raised a number of allegations against the Respondents, but have not adduced sufficient evidence to support them. The Petitioners have both legal and evidential burden, but which has not been discharged.
- c. That the Petition is fatally defective, misconceived, and an abuse of the court process as it does not disclose any violation of constitutional rights warranting the intervention of this

Honorable Court unless and until the accused person is convicted of the charge of perjury.

- d. That the Petitioner's allegations regarding the right to a fair trial under Article 25(c) and fair hearing under Article 50 of the Constitution are misplaced and untenable, as the Petitioner was duly heard and granted an opportunity to present his case before the relevant courts.
- e. That the Petitioner's claim that Eldoret CMCC No. 885 of 2007 should be retried *de novo* is legally untenable and an abuse of court process, as the matter has been fully litigated through the appellate process, culminating in E&L Appeal No. 8 of 2014 and Eldoret Civil Appeal No. 112 of 2018 and Civil Application No. 108 of 2021.
- f. That the Petition offends the doctrine of finality of litigation, which dictates that once a matter has been conclusively determined by a competent court, it cannot be re-litigated. The courts have inherent jurisdiction to prevent vexatious and frivolous suits.
- g. That the Petitioner's request for an order of certiorari to quash the judgment of the ELC Court at Eldoret in E&L Appeal No. 8 and Eldoret Civil Appeal No. 112 of 2018 is improper, as judicial review is not an avenue for challenging decisions of courts of competent jurisdiction where an appeal process exists.
- h. That the remedy of damages for deprivation of property since 2007 is unavailable, as the Petitioner has failed to demonstrate unconstitutional expropriation or an unlawful act committed by the Respondent outside the framework of judicial proceedings.
- i. That the remedy of damages for deprivation of property since 2007 is unavailable, as the Petitioner has failed to demonstrate unconstitutional expropriation or an unlawful act committed by the Respondent outside the framework of judicial proceedings.

- j. That the Petitioner's claims are res judicata under Section 7 of the Civil Procedure Act, as the matters raised have already been heard and determined by competent courts. The Petitioner cannot use constitutional petitions as a mechanism to re-litigate matters that have been conclusively determined.
- k. That this Honorable Court lacks jurisdiction to entertain this Petition, as the issues raised are matters that have been fully adjudicated upon in previous judicial proceedings, and the Petitioner's only recourse, if dissatisfied, is through the established appellate process and not by way of a constitutional petition.
- l. That the Petition is frivolous, vexatious, and an abuse of the court process, as it seeks to undermine the sanctity of judicial determinations, contrary to the principles of judicial finality and certainty in the administration of justice.

### **Analysis and determination**

- 20.** This petition revolves around Article 50 (6) a & b which provides as follows:

*That a person who is convicted of a criminal offence may petition the High Court for a new trial if –*

- (a) The person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and*
- (b) New and compelling evidence has become available.*

- 21.** This provision of the Constitution given purposive interpretation is not limited to criminal administration but transcends even to the realm of civil law.
- 22.** Appellate review is limited, almost by definition, to consideration of the factual record as established in the trial Court. This limitation, along with deferential standards of review on findings of fact, protects the fairness of the system of the parties, and helps ensure



accuracy through the advocacy of counsel and the evaluation of impartial judges and juries. The limitation also focuses appellate courts on their area of expertise – the resolution of questions of law – while recognizing the superior experience of trial courts (or, in some cases, agencies) in resolving questions of fact. Consistent with this traditional understanding of appellate review, appellate courts typically reject efforts by parties to introduce on appeal “new evidence” that could have been, but was not. Presented below.

- 23.** There is lack of definition in the preamble of the Constitution on what exactly constitutes the type of new compelling evidence for the court to exercise its discretion to order for a new trial. It is largely unconstrained control over a procedural matter at the heart of the appellate process in which this Article is primarily interested. Through an examination of when, where and how appellate courts examine new evidence on appeal, this Article seeks to define the principles underlying appellate record review in our court structure, and to use those principles to elucidate how appellate courts and judges’ function within the broader legal system, as well as how that system interacts with those appellate courts.
- 24.** The substance of the so called new evidence are issues in my view which are the subject of trial at the ongoing criminal proceedings and Chief Magistrate’s Court at Eldoret. The trial court therefore must be left to satisfy itself on the statement set forth and the affidavits which may be attached to the prosecution case so as to make a finding whether the perjury case as against the 1<sup>st</sup> Respondent is likely to impeach the entire spectrum of the trial which commenced at the subordinate court and later litigated all the way to the Court of Appeal of Kenya. In law evidence to warrant a new trial must be convincing, probative, admissible, reliable, credible for the court to exercise judicial discretion and make appropriate orders as envisioned by the Constitution in Article 50 (6) of the Constitution. This court is vested with a wide discretion in granting or refusing a new trial on grounds of newly discovered compelling evidence. In the instant case, the Court’s jurisdiction

cannot be exercised over the proceedings before the Chief Magistrate's Court once there is a final verdict on the matter. As to the extent the final judgment of that court will actually annul or vitiate the ELC proceedings which were initiated before the levels of courts may be a matter of conjecture without additional material evidence adduced in this pending petition. Whether the Petitioner has posited a good case for a consideration of new and compelling evidence as per Article 50(6) (a) and (b) of the Constitution can only be grounded more firmly upon the conclusion of the Magistrate's case currently put on hold because of this petition.

25. I have carefully considered the pleadings filed by the parties and the evidence adduced, this Court finds it necessary to examine the fundamental question of whether this constitutional petition meets the requisite threshold for constitutional adjudication and, if so, whether the reliefs sought are justified under our constitutional framework.
26. At the heart of this petition lies a fundamental tension between two competing principles: the constitutional imperative to protect the litigant's rights to fair trial and due process on one hand, and the equally important principle of finality in judicial determinations that ensures certainty and prevents the endless re-litigation of concluded matters on the other. The petitioner seeks to invoke the former to circumvent the latter, presenting this Court with the task of determining where these principles intersect and which should prevail in the circumstances of this case.
27. The constitutional framework established under the Constitution of Kenya 2010 recognizes that the Constitution is the supreme law of the Republic, binding all persons and State organs at all levels. As provided under Article 2(1) and (4), any law or act that contravenes the Constitution is invalid to the extent of such contravention. However, this supremacy does not operate in a vacuum but must be understood within the broader constitutional scheme that includes respect for judicial authority, the rule of law, and the principles of natural justice.

28. Under Article 259(1), this Court is enjoined to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law and human rights, permits the development of the law, and contributes to good governance. This interpretive mandate requires a holistic approach that considers not merely the immediate constitutional rights claimed to be violated, but also the broader implications for the administration of justice and the maintenance of legal certainty.
29. The petitioner's case fundamentally rests on the premise that the alleged perjury committed by the first respondent in the original civil proceedings so tainted those proceedings as to render all subsequent judicial determinations null and void, thereby violating his constitutional rights to fair trial and due process.
30. Based on the principles set out in the edit of the Court of appeal case of the **"Mumo Matemu - Versus - Trusted Society of Human Rights Alliance & Another (2013) eKLR"** provided the standards of proof in the Constitutional Petitions as founded in the case of **"Anarita Karimi Njeru - Versus - Republic [1980] eKLR 154"** where the court is satisfied that the Petitioner's claim were well pleaded and articulated with absolute particularity. It held:-  
*"Constitutional violations must be pleaded with a reasonable degree of precision....."*
31. Further, in the **Thorp - Versus - Holdsworth (1886) 3 Ch. D 637** at 639, Jesse, MR said in the year 1876 and which hold true today:  
*"The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing."*
32. Article 159(2)(a) of the Constitution requires that justice be done to all, irrespective of status. This mandate encompasses both the

protection of constitutional rights and the maintenance of judicial integrity. Where allegations are made that judicial proceedings were fundamentally compromised by criminal conduct, the interests of justice demand that such allegations be properly investigated and determined.

- 33.** The petitioner's rights under Articles 25(c), 40, 47, and 50 of the Constitution are of paramount importance and deserve protection where violations are established. However, premature adjudication based on unproven allegations would neither serve the interests of justice nor provide the certainty that constitutional adjudication demands.
- 34.** In the circumstances of this case, the most prudent and legally sound approach is to stay these proceedings pending the conclusion of Criminal Case No. E512 of 2024. However, given the significant constitutional issues at stake and the need for expeditious resolution of matters affecting fundamental rights, this Court deems it necessary to direct that the criminal proceedings be concluded with utmost expedition.
- 35.** In the circumstances, the Magistrate Court seized with *Criminal Case No. E512 of 2024*, is hereby directed to expedite proceedings and render final determination within forty-five (45) days of this order, in the interests of justice and timely resolution of the constitutional issues herein.
- 36.** In the interim period, this Court hereby issue a declaration the subject matter being litigated as between the Petitioner and the 1<sup>st</sup> Respondent be fast tracked so as not to prejudice or limit any such rights of enjoyment of the fruits of the judgment arising out of Eldoret CMCC No. 885 of 2007, E&L Appeal No. 8 of 2014, and Civil Appeal No. 112 of 2018.
- 37.** This being a constitutional interrogation by the Petitioner the 45 days status quo would not be an overreach in the fair and proportionate administration of justice.
- 38.** Accordingly, let the trial court seized with the matter proceed and conclude the matter within a period of 45 days. The final status

conference be held on 25<sup>th</sup> September 2025. The costs of this petition to abide the outcome of the determination of the cause of action on the merits. Leave to apply granted.

**39.** It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 11<sup>TH</sup> DAY OF  
AUGUST, 2025**

.....  
**R. NYAKUNDI**  
**JUDGE**