



REPUBLIC OF KENYA



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**Ndonye v Africa Merchants Assurance Co. Ltd; Kariuki & 11 others (Interested Parties)
(Civil Appeal E003 of 2025) [2025] KEHC 8784 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8784 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E003 OF 2025
AN ONGERI, J
JUNE 20, 2025**

BETWEEN

BENARD MUSYOKA NDONYE PLAINTIFF

AND

AFRICA MERCHANTS ASSURANCE CO. LTD DEFENDANT

AND

SAMUEL NJENGA KARIUKI INTERESTED PARTY

MOSES GARISHA INTERESTED PARTY

AMINA MWIKALI MBITHI INTERESTED PARTY

RODGERS WAMBUA MUTHENGI INTERESTED PARTY

REGINA KAWAYA KAMUTI INTERESTED PARTY

PHYLIS KARISA INTERESTED PARTY

JACINTA NJOKI INTERESTED PARTY

KINGOO MUUALANZA INTERESTED PARTY

MUSLIMA NURU MUSYIMI INTERESTED PARTY

ERICK MUSYOKA YOHANA INTERESTED PARTY

MARY KAMBUA MUNYOLO INTERESTED PARTY

ELIZABETH MASWAI MWANZA INTERESTED PARTY

RULING

1. The 5th Interested Party (IP) filed a Notice of Preliminary Objection (NOPO) as follows:-



- i. That both the application and the plaint is res judicata similar applications/suits have been filed in (1) Constitutional Petition No. E004 and E005 Voi and ruling delivered on 17th January 2025, (2) Mombasa High Court Misc. Application No. E190 of 2023 and Mombasa, Mombasa CMCC No. E274 of 2023 which suit/application therefore offends the provisions of Section seven (7) of the Civil Procedure Act 2010.
 - ii. That the Plaintiff/Applicant failed to disclose material facts that he previously filed a similar applications/suits against the 5th Interested Party and others seeking stay of this execution.
 - iii. That the application herein is contrary to Order 2 Rule 15 in that:-
 - a. It discloses no reasonable cause of action in law;
 - b. Is scandalous, frivolous, vexatious;
 - c. Shall prejudice, embarrass or delay the fair trial of this case and
 - d. It is otherwise an abuse of the process of the court.
2. The parties filed submissions in the NOPO as follows:-
 3. The 5th Interested Party submitted that she has raised a preliminary objection against the Plaintiff's suit, arguing that it is barred by the doctrine of res judicata under Section 7 of the Civil Procedure Act.
 4. The Plaintiff previously filed similar claims in Constitutional Petition Nos. E004 and E005, which were struck out by the court, as well as Mombasa High Court Civil Application No. E190 of 2023, addressing the same issues.
 5. The court's prior rulings, particularly the dismissal of the constitutional petitions, explicitly found the matter res judicata, meaning the issues had already been conclusively determined.
 6. The 5th Interested Party contends that the current suit is merely a rehash of previously adjudicated disputes, violating the principle that litigation must come to an end to ensure judicial efficiency and finality.
 7. Additionally, the objection highlights that the Plaintiff's repeated filings constitute an abuse of court process.
 8. The underlying dispute stems from a 2014 traffic accident case (Mombasa CMCC No. 1725 of 2014), where the 5th Interested Party was awarded damages.
 9. That despite losing in earlier proceedings, the Plaintiff has persistently sought to relitigate the matter through various suits and applications, including a withdrawn declaratory suit (CMCC No. E274 of 2023) and the struck-out constitutional petitions.
 10. That the court has previously cautioned against such tactics, citing the need for precision in constitutional claims and the prohibition against evading res judicata by repackaging the same grievances.
 11. The 5th Interested Party argued that the Plaintiff's actions are vexatious, intended to delay justice, and place an undue burden on the court. They urge the court to strike out the suit, emphasizing that the dispute is fundamentally between the Plaintiff and his insurer (the Defendant), and should not involve the 5th Interested Party further.
 12. The objection rests on established legal principles barring relitigation, as affirmed in precedents like *John Florence Maritime Services Limited v Cabinet Secretary Transport & Infrastructure*, which



underscore that res judicata is a substantive doctrine meant to prevent multiplicity of suits and ensure conclusive resolution of disputes.

13. The 5th Interested Party submitted that she seeks dismissal of the suit with costs, maintaining that allowing it to proceed would undermine judicial integrity and the administration of justice.
14. The plaintiff opposed the 5th Interested Party's Preliminary Objection dated 28th April 2025, arguing that neither the suit nor the application dated 8th April 2025 is res judicata or an abuse of court process.
15. The plaintiff contends that the previous cases cited by the 5th Interested Party—Voi Constitutional Petition No. E004 & E005, Mombasa High Court Misc. Application No. E190 of 2023, and Mombasa CMCC No. E274 of 2023—were either struck out on technical grounds, withdrawn, or rendered moot before being heard on merit.
16. That none of these cases resulted in a final judgment on the substantive issues, nor did they involve identical parties or causes of action as the present suit.
17. The plaintiff further argued that the suit and application do not violate Order 2, Rule 15 of the Civil Procedure Rules, as they disclose a reasonable cause of action and were filed in good faith.
18. That the withdrawal of the earlier declaratory suit (Mombasa CMCC E274 of 2023) and the subsequent transfer application (Mombasa Misc. Application No. E190 of 2023) were necessitated by jurisdictional limitations and do not amount to frivolous litigation.
19. Citing judicial precedents, the plaintiff maintains that a case dismissed on technicalities or withdrawn cannot bar subsequent proceedings under the doctrine of res judicata.
20. In conclusion, the plaintiff urged the court to dismiss the Preliminary Objection, allowing the suit to proceed on its merits in the interest of justice and fairness.
21. Finally, that the costs should also be awarded to the plaintiff for defending against what they deem an unfounded objection.
22. The sole issue for determination is whether the application dated 8th April 2025 and this suit should be dismissed for being res judicata.
23. The doctrine of res judicata, as enshrined in Section 7 of the [Civil Procedure Act](#), requires that a matter must have been directly and substantially in issue in a former suit, between the same parties (or their privies), litigating under the same title, and finally decided by a competent court.
24. The mere filing of previous suits does not automatically trigger res judicata if those cases were not adjudicated on merit or were dismissed on technical grounds.
25. In the present case, the plaintiff correctly argued that the prior proceedings—Constitutional Petition Nos. E004 & E005 (Voi), Mombasa High Court Misc. Application No. E190 of 2023, and Mombasa CMCC No. E274 of 2023—were either struck out for procedural deficiencies, withdrawn, or not conclusively determined on substantive grounds.
26. The Supreme Court of Kenya in *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR clarified that res judicata applies only where there has been a final judicial determination on the merits, not where cases were dismissed for technical reasons or abandoned.
27. Similarly, the High Court in *Ndonye v Insurance Regulatory Authority & 2 others; Kinyili & 4 others (Interested Parties)* (Petition E004 of 2024) emphasized that a case struck out for constitutional



avoidance (as in the plaintiff's earlier petitions) does not bar subsequent litigation on the same facts under a different legal framework .

28. Moreover, the plaintiff's withdrawal of Mombasa CMCC No. E274 of 2023 and the transfer application (Mombasa Misc. Application No. E190 of 2023) were necessitated by jurisdictional issues, not an attempt to relitigate.
29. The 5th Interested Party's reliance on *Katuku v Nzolove* (Misc. Application E190 of 2023) is misplaced, as that case involved a final judgment on liability and damages, unlike the procedural dismissals here.
30. On the allegation of abuse of court process, the plaintiff's actions do not meet the threshold of vexatious litigation.
31. The current suit, seeking stay of execution, arises from a distinct cause of action—enforcement of an insurance obligation—not previously adjudicated.
32. Based on the arguments presented and the legal principles, this court finds that the application dated 8th April 2025 is not *res judicata* and should proceed to full hearing on its merits.
33. The Preliminary Objection is dismissed. The application dated 8th April 2025 and the suit shall proceed for hearing on its merits.
34. The costs shall be in the cause.
35. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JUNE, 2025 IN OPEN COURT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent

