



**Gathithi (Legal Representative of the Estate of the Late Fredrick Gathithi Kabue) v Cannon Assurance Kenya Limited (Environmental and Land Originating Summons E065 of 2024) [2025] KEELC 4519 (KLR) (17 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4519 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E065 OF 2024  
CA OCHIENG, J  
JUNE 17, 2025**

**BETWEEN**

**EUNICE WANJIRU GATHITHI (THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE FREDRICK GATHITHI KABUE) ..... PLAINTIFF**

**AND**

**CANNON ASSURANCE KENYA LIMITED ..... DEFENDANT**

**RULING**

1. The Plaintiff commenced this suit vide Originating Summons dated the 16<sup>th</sup> October 2024. She contends that she entered into Settlement and Sale Agreements dated the 9<sup>th</sup> October 2015 with the Defendant to settle her late husband's (Francis Gathithi Kabue) guaranteed debt on the terms that three (3) acres of land, would be excised and transferred to the Defendant from the Charged property, being LR No. 12XX2/6 in settlement of all claims due to the Defendant. She confirms that she entered into a sale agreement in which, she sold one (1) acre hived from the suit parcel to the Defendant on the understanding that proceeds thereof would offset sub-division costs. Further, that the remainder portion was to remain in her late husband's estate. On its part, the Defendant undertook to release all title and security documents in its possession including any new titles that would be issued for the remainder of the land.
2. She contends that subsequently, the Defendant's director allegedly directed their surveyor to sub-divide the four (4) acres given to the Defendant into eight (8) plots while the Plaintiff entered into sale agreements with third parties, who purchased some of the sub-divided plots from the land that was lawfully vested in the estate of her late husband. She claims that she is now facing imminent threats of litigation over delay in completing the aforementioned sale agreements as the Defendant is frustrating the process by failing to release the title to the suit parcel. She sought orders compelling the Defendant to deliver titles among other completion documents. Contemporaneously with the



Originating summons, she also filed a Notice of Motion application dated the 16<sup>th</sup> October 2024 seeking release of completion documents at the interlocutory stage.

3. In opposition, the Defendant filed a Notice of Preliminary Objection dated the 4<sup>th</sup> November 2024 which is for determination. It contends that this court has no jurisdiction to hear the suit as all matters concerning/relating to subdivision of LR No. 12XX2/6 and transfer of four (4) acres out of the said parcel to the Defendant are res-judicata having been finally and conclusively resolved in a consent judgment/order recorded in HCCC No. 151 of 2008.
4. Further, that the court lacks jurisdiction to hear and determine the Plaintiff's Notice of Motion application dated the 16<sup>th</sup> October, 2024, which effectively seeks summary judgement of the reliefs sought in the Originating Summons.
5. The Defendant also filed a Notice of further grounds in support of the preliminary objection. It contends that matters of variation of enforcement of the consent order recorded by the parties litigating in HCCC No. 151 of 2005 was raised in an application in the said matter and was dismissed.
6. In opposition to the preliminary objection, the Plaintiff filed a response contending that the court in Milimani HCCC No. 151 of 2008 Eunice Kabue (as the legal representative of the estate of the late Fredrick Kabue] v Cannon Assurance (K) Ltd only marked the suit as settled but was never privy to the terms of the Settlement or Sale Agreements since they were never filed in court prior to the filing of the consent.

#### **Submissions.**

7. In its submissions, the Defendant submits that the mortgage of LR 12XX2/6 to the Defendant, its validity, the Plaintiff's liability under the said mortgage, and the discharge of Charge have been subject of previous litigation, being HCCC No. 3434 of 1993, 1998 of 1994, 532 of 1996 and 151 of 2008 thus the suit is res-judicata.
8. Further, that the matter of validity and finality of the consent judgment or order as recorded by the parties herein was determined in HCCC No. 151 of 2008. To support its averments, it relied on the case of Pop-In (Kenya) Ltd & 3 Others v Habib Bank AG Zurich [1990] KECA 62 (KLR).
9. On her part, the Plaintiff submits that she is actualizing the compromise reached in sub-dividing the suit property to settle the Defendant's debt in accordance with Order 37 Rule 1 of the Civil Procedure Rules, thus the suit is not res-judicata. Further, that the Originating Summons is in respect of enforcing the sale agreement which is distinct and separate from the settlement agreement. She reiterates that she is exposed to suffer the greatest if the suit is delayed further, as she is an octogenarian.
10. To support her averments, she has relied on the following decisions: John Florence Maritime Services Limited & Another v Cabinet Secretary Transport & Infrastructure & 3 Others [2021] KESC 39 (KLR); Suzanne Achieng Butler, Martin Njema Mutura, Margaret C. Muringa Ireri, Wilson Kimutai Mugungei & Constance Anjiri Anyika v Redhill Heights Investments Limited & Imperial Concepts Limited [2016] KEHC 1313 (KLR) and Mulongo & Another v Njuguna (Environment & Land Case E126 of 2023) [2023] KEELC 21662 (KLR) (14 November 2023) (Ruling).
11. On 15<sup>th</sup> May 2025, Counsels for the parties herein orally highlighted their respective submissions in court. They sought to rely on their pleadings and submissions filed, which the court has considered.



## **Analysis and Determination.**

12. Upon consideration of the instant Notice of Preliminary Objection, the Originating Summons and rivaling submissions, the only issue for determination is whether the said Originating Summons is res judicata.
13. The Defendant claims that this suit is res judicata since issues raised herein were settled by way of a consent judgment entered in HCCC No. 151 of 2008. On res judicata Section 7 of the *Civil Procedure Act* provides 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.”
14. The Supreme Court stated as follows in *John Florence Maritime Services Limited & Another vs Cabinet Secretary Transport & Infrastructure & 3 Others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment):

“...whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction..”
15. The Plaintiff insists that this suit is not res judicata as she sought to implement the terms of a Sale Agreement with third parties in respect to the suit property. The Plaintiff argues that the impugned Consent in HCCC No.151 of 2008 was in respect of three acres of the suit property while the instant suit regards enforcement of an agreement in respect to one acre of the said land as well as release of the various documents to facilitate issuance of title. The Plaintiff has not denied that on 20<sup>th</sup> January, 2025, she filed an Appeal No. E035 of 2025 in the Court of Appeal where she is challenging the impugned Consent Order that she seeks to enforce herein.
16. On perusal of the Court records, it is evident that the fulcrum of the dispute in HCCC No. 151 of 2008 revolved around LR No.12XX2/6, which case was determined through a consent judgement. Further, the Plaintiff now seeks to enforce a portion of the consent judgment in the instant suit, whose fulcrum also revolves around LR No. 12XX2/6.
17. From the foregoing while, relying on the legal provisions cited and associating myself with decision quoted, I find that the fulcrum of the dispute in HCCC No. 151 of 2008, and instant case revolved around the same parcel of land, with same parties in each of the cases litigating under the same title, which the court of competent jurisdiction, heard and determined. The Plaintiff has once more raised the same issues in the instant Originating Summons. It is my considered view since the Respondent had delayed in the implementation of the Consent Judgment, the Plaintiff should have sought to enforce the terms of the impugned Consent in the aforementioned High Court suit and not herein. Further, since the Plaintiff has further filed an Appeal to challenge the impugned consent, then I find that this suit will amount to an abuse of court process. In the circumstances, I find the instant Originating Summons res judicata.



18. It is against the foregoing that I find the Defendant's Notice of Preliminary Objection dated the 4<sup>th</sup> November, 2024 merited, will allow it and proceed to strike out the Originating Summons dated the 16<sup>th</sup> October 2024.

19. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17<sup>TH</sup> DAY OF JUNE 2025**

**CHRISTINE OCHIENG**

**JUDGE**

**In the presence of:**

Allen Gichuhi SC for Plaintiff/Applicant

Moses Kurgat for Interested Party

Otieno holding brief for Oyatsi for Cannon Assurance

Court Assistant: Joan

