



Ngaur (Suing as a Father and Legal Guardian of the Estate of Elijah Sunte Koipumet) v Kipaa & another; Benson & 2 others (Third party) (Civil Suit 32 of 2015) [2025] KEHC 13770 (KLR) (30 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13770 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 32 OF 2015
EN MAINA, J
SEPTEMBER 30, 2025**

BETWEEN

**JOSEPH KOITUMET NGAUR PLAINTIFF
SUING AS A FATHER AND LEGAL GUARDIAN OF THE ESTATE OF ELIJAH
SUNTE KOIPUMET**

AND

**JACOB LEMASIKA KIPAA 1ST DEFENDANT
ODHIAMBO COLLINS 2ND DEFENDANT**

AND

**MULAI BENSON THIRD PARTY
POWER SOURCE ENTERPRISES LIMITED THIRD PARTY
MULTIPLE HAULIERS (EA) LIMITED THIRD PARTY**

RULING

1. Before this court is a Notice of Motion dated 24th April 2025, which seeks to set aside a consent order dated 11th May 2017; and also that the court be pleased to order that this suit be transferred to the Chief's Magistrate's Court for want of pecuniary jurisdiction.
2. The application is supported by the Affidavit of the 1st Defendant/Applicant sworn on 24th April, 2025 wherein he deposes that the advocates (Mulwa and Mulwa Advocates) who were appointed by M/s Jubilee Allianz General Insurance Ltd to represent his interest are properly defended failed to do so and proceeded on their own volition to record a consent on liability thereby negating his interest and those of his insurer paving way for a judgment that was unfair.



3. It was averred that if the consent of 11th May 2017 is not set aside and this suit is set for hearing de novo the enjoining of the third parties to the suit would become an academic exercise and that the applicant was likely to suffer great prejudice and financial loss as the decretal sum is likely to surpass/exceed the ceiling introduced by insurance Motor Vehicle Third Party Risk (Amendment) Act 2013 which introduced structured compensation to a maximum of Kshs 3,000,000/-.
4. The application was opposed through a Replying Affidavit sworn by the Respondent on 7th May, 2025. The Respondent deposes that the application is frivolous, abuse of court and ought to be struck out and dismissed as it offends the principle of resjudicata as the applicant has previously filed a similar application. That it also offends the principles of res judicata and this court is devoid of jurisdiction as it is functus officio. That this application thus lacks merit and should be dismissed.

Submissions

5. The application was canvassed by way of written submissions with Counsel for the Applicant submitting that the Applicant's interests were not considered when the impugned consent was recorded as it clearly negates his interests and allowing the same to stand would unconscionably prejudice the Applicant as it would bind him to pay a high quantum on damages. Counsel reiterated that if the prayer sought is granted it will accord the parties an opportunity to ventilate their respective cases for a just and proper adjudication of the dispute. That the Applicant should not be punished for the actions of its advocate. Counsel also emphasized the Applicant's constitutional right to be heard and right to access to justice and urged this court to find the application meritorious and allow the same.

Determination and Analysis

6. This court has considered the application, the responses thereto, the cases submissions of the parties, the cases cited and the law.
7. The background of this application is that the Respondent brought a claim for compensation for fatal injuries sustained by his son arising from a road traffic accident involving a motor vehicle belonging to the Appellant. In the course of the proceedings, Counsel for the Applicant entered into a consent on liability with Counsel for the Respondent allegedly without his knowledge. Upon entry of the judgment, the matter then proceeded for assessment of damages and a judgment was rendered by the court on 31st October 2017. He applied to set that judgment aside and the application was allowed but the court rejected his application to restart the case. The record shows that subsequent to that ruling, proceedings to enjoin a third party were conducted.
8. In the current application, the Applicant contends that without setting aside of the consent order of 11th May 2017 and permitting a de novo hearing, the enjoining of a third party would be rendered an academic exercise. On the other hand, the Respondent argues that the application is frivolous and an abuse of the court process as it offends the doctrine or resjudicata, as the same issue was litigated between the parties and determined.
9. In the case of *John Florence Maritime Services Limited & another –v- Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR) the court considered the issue of res judicata and stated.

“For res judicata to be invoked in a civil matter the following elements had to be demonstrated:

- a. there was a former judgment or order which was final;



- b. the judgment or order was on merit;
- c. the judgment or order was rendered by a court having Jurisdiction over the subject matter and the parties; and
- d. there had to be between the first and the second action Identical parties, subject matter and cause of action.”

10. I have carefully considered this application, the rival submissions and the law. It is clear from the record that the consent order of 11th May 2017 was set aside. That was done way back on 24th September 2019 when Kemei J delivered a ruling wherein he set aside his judgment delivered on 31st October 2017. That judgment was premised on the impugned consent and once set aside then it follows that the consent was also expunged as it formed the gist of that application.
11. The issue concerning the consent is therefore not just misleading but is vexatious and an abuse of the court process. So also is the issue of starting the case denovo. There is nothing to warrant this court to review the orders of Kemei J in regard to the issue. The issue of starting the hearing de novo was raised in the application dated 29th March, 2019 but was abandoned as the Applicant did not submit on it. Nevertheless, Kemei J determined it and declined it. I see no reason to revisit it and it is rejected.
12. The issue of third parties is also a non-issue given that the application to take out 3rd Party proceedings was withdrawn by a consent of Counsel for the parties dated 10th May 2021. The case can therefore continue from where it had stopped.
13. The Applicant has also applied that this case be transferred to the lower court for lack of pecuniary jurisdiction by this court. Again, I say that the application on that ground is an abuse of the court process as this court is seized of unlimited jurisdiction in civil cases and can hear the case and hence the issue of pecuniary jurisdiction does not arise.
14. Further the Respondent stands to suffer prejudice as this case is very old and to transfer it would only aggravate the situation. The Respondent has a constitutional right to expeditious disposal of his case – see Article 159(2)(b) of the *Constitution*. It is also often said that litigation must come to an end. It is time that the Applicant allows this case to continue so that justice can be done to the parties. He cannot keep taking the Plaintiff/Respondent and this court round in circles merely because he is apprehensive that the quantum of damages awarded will be high. It is an affront of justice and an abuse of the court process to stall a case as he has done. It does not augur well for the administration of justice. The application is dismissed with costs to the Respondent and it is ordered that the case shall continue from where it had reached.

It is so ordered.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 30TH DAY OF SEPTEMBER 2025.

E. N. MAINA

JUDGE

In The Presence Of:

Mr. Otieno for the Plaintiff

Mr. Ndungu for Ochieng for Defendant

Geoffrey- Court Assistant/Interpreter

