



**Gathithi (The legal representative of the Late Fredrick Gathithi Kabue) v Cannon Assurance Kenya Limited; Tandong Electric Vehicles Limited (Intended Interested Party) (Civil Case 151 of 2008) [2025] KEHC 14838 (KLR) (Commercial and Tax) (16 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14838 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 151 OF 2008  
F GIKONYO, J  
OCTOBER 16, 2025**

**BETWEEN**

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

**AND**

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

**AND**

**TANDONG ELECTRIC VEHICLES LIMITED .... INTENDED INTERESTED  
PARTY**

**RULING**

1. Before me is the plaintiff's notice of motion dated 10th July 2025, expressed to be brought under section 34 of the *Civil Procedure Act*, seeking, inter alia: -
2. An order directing the Defendant to deliver to the Plaintiff's advocates within 7 days the following documents in satisfaction of the decree: -
  - (a) The original grant over Land Reference Number 12832/6, Nairobi and all related security documents.
  - (b) The draft professional undertaking for the release of the grant over Land Reference Number 12832/6, Nairobi and discharge of the legal charge leading to the transfer of 4 acres to the Defendant pursuant to the Settlement Agreement and Agreement for the Sale of Land both dated 9th October 2015.



3. An order directing the defendant to execute the Discharge of Charge over Nairobi Reference Number 12832/6 within 7 days of presentation by the Plaintiff's advocate and immediately pay all costs and taxes necessary to complete the process for the issuance of all titles arising from the sub-division of Land Reference Number 12832/6, Nairobi.
  4. Leave to join Tandong Electric Vehicles Limited as an Interested Party.
  5. An account be taken within 7 days of the order of the court of the lawful amounts due to the Plaintiff and the court do order that the surveyor costs and any related costs be strictly restricted to the excision of 4 acres and not the 8 plots excised by the Defendant from the 4 acres.
  6. The Surveyor be ordered to pro-rate his fees for the internal sub-divisions arising from the sub-division of the Defendant's 4-acre plots and the Defendant be ordered to personally bear those fees without deducting the same from the balance of the purchase price.
  7. The balance of the purchase price be paid within 7 days of receipt of the registered transfers and titles in the Defendant's name for the sub-divisions arising from the 4 acres and interest at court rates to accrue in default of payment until payment in full.  
  
In the Alternative, the Defendant do amalgamate the 8 plots arising from the excision from Nairobi Reference Number 12832/6 into 4 acres at its own costs.
  8. That the Honourable Court be pleased to make such further or other orders, as it may deem just and expedient in the circumstances of this case.
  9. Costs of the application be awarded to the Plaintiff.
2. The application is premised on the grounds outlined in the application and the supporting and rebuttal affidavits sworn by the plaintiff on 10th July 2025 and 17th September 2025 respectively.
  3. The applicant's case is that she and defendant entered into the Settlement dated 9<sup>th</sup> October 2015 where 3 acres would be excised and transferred to the defendant from the charged property in settlement of all claims due to the defendant.
  4. Through a sale Agreement of the same date, it was agreed that the defendant would purchase 1 acre from the charged property for Kshs. 45 Million to finance the subdivision.
  5. The defendant's director, Mr. Vishy Talwar, directed the surveyor, Mr. Gacanja to subdivide the 4 acres into 8 plots and the subdivision was subsequently approved.
  6. The applicant entered into agreements with third parties to purchase some of the subdivided plots. She now faces imminent threat of litigation by the third parties.
  7. The applicant's gravamen is that the defendant has refused to release the original title and other documents necessary for the completion of the sub-division process and sales.
  8. A similar application had been filed in ELC No. 065 of 2024 Eunice Wanjiru Gathithi (the legal representative of the estate of the late Fredrick Gathithi Kabue v Cannon Assurance Kenya Limited for specific performance of the sale agreement but was struck out on 17th June 2025.
  9. The intended interested party had been joined in the ELC matter on account of being a purchaser in one of the subdivided portions of the charged property.



## Response

10. The application is opposed by the 1st respondent through a preliminary objection (PO) dated 3rd September 2025 and a replying affidavit sworn by its head of legal and corporate, Betty Kanyagia on 3rd September 2025.
11. The PO is on the grounds that: -
  1. The application is res judicata as the applicant had filed a similar application in the Environment and Land Court (ELC) in ELC No. 065 of 2024 Eunice Wanjiru Gathithi (the legal representative of the estate of the late Fredrick Gathithi Kabue v Cannon Assurance Kenya Limited. The court found that the originating summons was res judicata and would amount to an abuse of the court process since the plaintiff had further filed an appeal to challenge the impugned consent.
  2. The argument is that the court lacks jurisdiction to hear the present application which is an abuse of the Court process as it has already decided or determined in the said Ruling and Order.
  3. Further argument was that, the plaintiff/ applicant is barred and precluded by law as contained in Order 2(6) of the Civil Procedure Rules from making the claims and/or reliefs pleaded in the present application which are inconsistent with the plaintiff/ applicant's claims and/or reliefs pleaded by the same party in a previous pleading in the same litigation, namely, ground 7 of the Memorandum of Appeal dated 20th January 2025.
12. Ms. Kanyagia asserted that the appeal is still pending. That the settlement agreement is a nullity as it was arrived at and entered between the applicant and a non-executive director of the defendant. That this is contrary to clause 6.1 of the Corporate Governance Guidelines for Insurance and Reinsurance Companies.

## Submissions

13. The application was canvassed through written submissions. The applicant filed primary and supplementary written submissions dated 7th August 2025 and 17th September 2025 respectively.
14. At the time of preparing the ruling, there were no submissions filed by the respondent.

## Applicant's submissions

15. The applicant submitted that the agreements in question were also executed by a significant shareholder of the defendant, the late Inderjit Amarnath Giachand Talwar and that both were drawn by the defendant's advocates. She relied on the indoor management rule.
16. The applicant highlighted that the consent dated 26th October 2015 was executed and the suit marked as settled with neither the settlement or sale agreements being filed in court.
17. The applicant argued that the matter is not res judicata. She also argued that the court has jurisdiction under section 34 of the *Civil Procedure Act*.
18. The applicant added that the defendant cannot approbate and reprobate by previously upholding the terms of settlement and now turning around and challenging the deed of settlement after 10 years. She asserted that it is unconscionable and inequitable for the defendant to delay the matter.
19. The applicant relied on: -



1. Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR
2. In re Estate of Anthony Johnson Musyoki Wambua (Deceased) [2019] eKLR
3. Ocean View Plaza Limited v Gor Chitranjan Bhanuprasad and Gor Shishir Sooryakant Bhanuprasad Trading as C.B Gor & Gor Advocates [2020] eKLR
4. Westlands Residential Resort Limited v Kawakanja Limited, Jane Gathoni Muraya - Kanyotu & Margaret Nyakinyua Murigu [2013] KECA 474 (KLR)
5. In Re Eunice Wanjeri Njenga [2013] KEELC 4 (KLR)
6. Kenya Breweries Limited & another v Washington O. Okeyo [2002] eKLR
7. Industrial & Commercial Development Corporation (ICDC) v Patheon Limited [2015] KECA 96 (KLR)
8. Adiel Muriithi Philip v Thomas Maingi [2017] eKLR
9. Leisure Lodges Limited v Japhet S. Asige & S.O. Anyanze t/a Asige Keverenga & Anyanzwa Advocates [2018] KEHC 2848 (KLR)

### **Analysis and Determination**

20. The preliminary issues for determination are whether the instant application is res judicata and whether the court has the jurisdiction to hear and determine the application.

### **Threshold of a PO**

21. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors* [supra], Sir Charles Newbold P., stated that a PO: - "...raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop."
22. The ground that the suit is res judicata is premised on the ruling of 25<sup>th</sup> June 2025 by the ELC in ELC No. 065 of 2024. I have read the ruling and will reproduce the relevant parts below: -

“ 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."
23. The doctrine of res judicata means that a matter has been adjudged fully and completely. One of its elements, under section 7 of the *Civil Procedure Act*, is that the issue ought to have been heard and finally determined on merit.
24. From the ruling above referred, there was no final determination of the application. Ochieng' J rightly observed that the orders sought through the application before her ought to have been filed in this suit. This is provided under section 34 of the *Civil Procedure Act*.

### **Pending appeal**

25. It is not disputed that the applicant has appealed against the ruling of 6<sup>th</sup> May 2021 by Justice Mabeya in this matter in which the judge declined the applicant's application of 19<sup>th</sup> June 2020 which sought variation of the settlement terms.
26. Grounds 7 and 8 of memorandum of appeal dated 20<sup>th</sup> January 2025 are reproduced below: -
  - “7. The Court erred in law and fact by failing to set aside the Settlement Agreement for 3 acres dated 9<sup>th</sup> October 2015 on account of being inequitable, harsh, unconscionable, oppressive, amounting to unjust enrichment and contrary to Articles 10(2)(b) and Article 40 of *the Constitution*.
  8. The judge erred in law by failing to consider the numerous legal authorities addressing the aspect of inequitable and unconscionable bargains.”
27. The applicant claimed that the appeal only relates to the interest rate applicable to the settlement agreement. However, the grounds set out above tell a different story; it relates to substantive issues in respect of the settlement agreement. The application before me also relate to the enforcement of a sale agreement that was entered into pursuant to the settlement agreement of 9<sup>th</sup> October 2015, that is under challenge in the pending appeal. If there is any other agreement outside the said settlement



agreement, pragmatic dilemma would arise on how it can be dealt with in this matter without an amendment of the plaint.

28. The reality is that the appeal is pending on inter alia, substantive issues on the settlement agreement. Thus, the feasible path is for this application to be stayed on the basis of res sub judice. See Section 6 of the *Civil Procedure Act* and The Supreme Court in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR,

### **Conclusion**

29. Accordingly, the PO fails. The application dated 10th July 2025 is stayed pending the hearing and determination of the applicant's appeal.

**DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 16<sup>TH</sup> DAY OF OCTOBER, 2025.**

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**F. GIKONYO M**

**JUDGE**

In the presence of:

Allen S.C for Plaintiff/Applicant

Otieno for Oyatsi for Respondent

CA Kinyua

