



**Canon Automobile Limited v D Kwale International Sugar Company Limited & another
(Civil Appeal E128 of 2022) [2025] KECA 676 (KLR) (11 April 2025) (Judgment)**

Neutral citation: [2025] KECA 676 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E128 OF 2022
SG KAIRU, P NYAMWEYA & KI LAIBUTA, JJA
APRIL 11, 2025**

BETWEEN

CANON AUTOMOBILE LIMITED APPELLANT

AND

KWALE INTERNATIONAL SUGAR COMPANY LIMITED .. 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

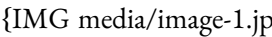
(Being an appeal from the Ruling and Order of the Environment and Land Court of Kenya at Kwale (Dena, J.) dated 3rd November 2022 in ELC Cause No. 126 of 2021)

JUDGMENT

1. This appeal arises from the ruling delivered on 3rd November 2022 in which the Environment and Land Court (ELC) at Kwale (A. E. Dena, J.) struck out the appellant's suit, being ELC Case No. 126 of 2021 (formerly Mbsa ELC Case No. 141 of 2011) for being res judicata. At the same time, the ELC allowed the 2nd respondent's counterclaim and ordered cancellation of the appellant's title over the property known as Kwale/Shiraz Bodo/754.
2. In its Amended Complaint dated 18th October 2012, the appellant Canon Automobile Limited, prayed for judgment against the respondents, Kwale International Sugar Company Limited and the Attorney General, for, among other reliefs, a declaration that it is the registered and absolute owner of the property known as Kwale/Shiraz Bodo/754 (the property); a declaration that the said property is not part of L.R. No. 27742; and a permanent injunction restraining the respondents from interfering with the property.
3. The appellant pleaded that it purchased the property from five named individuals through a sale agreement dated 15th April 2011 for a price of Kshs. 5,600,000 which it paid; that on 16th June 2011, the appellant was registered by the Land Registrar, Kwale Land Registry, as proprietor of the



property; that, on taking possession, it started erecting a perimeter fence; that, in November 2011, the 1st respondent unlawfully descended on the property with a bull dozer and demolished the perimeter fence whereupon the appellant instituted suit; that, in the course of the proceedings, the 1st respondent asserted that the property was part of LR No. 27742, which was leased to the 1st respondent by the Government.

4. In its statement of defence dated 3rd December 2012, the 1st respondent averred that the five individuals who purportedly sold the property to the appellant did not have capacity to do so or to transfer the same to the appellant; that any purported transfer of the property in favour of the appellant is null and void; that the property is part of LR No. 27742 measuring 6082.6 hectares belonging to the Government, but leased to the 1st respondent.
5. The 2nd respondent (the Attorney General or the AG) in a statement of Defence dated 30th May 2013 denied the appellant's claim. The AG subsequently filed an amended defence and counterclaim dated 9th March 2020 in which the original owners from whom the appellant purchased the property were joined as defendants.
6. The AG pleaded that the formation of parcel number 754 within Shirazi Bodo Adjudication Scheme was illegal; that the vendors were not beneficiaries of the Shirazi Bodo Adjudication Section; and that the creation of the property led to encroachment of parcel LR. No. 27742. The AG sought a declaration in the counterclaim that the property was illegally created. Other reliefs sought by the AG in the counterclaim included a declaration that the property forms part of LR No. 27742; and an order for cancellation of the title to the property.
7. By an application dated 3rd March 2022, the 1st respondent applied for an order to "strike out paragraph 14 and 15" of the amended plaint and "any paragraph touching on the exact boundaries of LR No. 27742" as the issues raised therein are res judicata having been settled in Constitutional Petition No. 8 of 2019 between Omar Mwitw & 5 Others vs. Kwale International (the 1st respondent). Other prayers in that application were: that "all consequential prayers in relation to the issues pleaded in paragraph 14 and 15 and any other paragraph...touching on the boundaries of LR 27742" be struck out; and that the court be pleased to "isolate and disregard all issues already determined" vide Constitutional Petition No. 8 of 2019 Omar Mwitw & 5 Others vs. Kwale International. The application was opposed by the appellant.
8. After hearing the application and submissions, the learned Judge of the ELC granted the orders to which we have already referred and struck out the appellant's suit in its entirety (although what had been sought in the application was an order to strike out certain portions of the suit). In doing so, the Judge expressed as follows:

"From my analysis herein it appears to me that the suit property is the same property that was litigated upon in the petition as the one in the present suit. That its ownership has already been determined in the judgment pronounced in Petition No. 8 of 2019 Omar Mwitw & others vs. Kwale International Sugar Co. Ltd & 8 others. If ownership of a suit property has been determined how then will another party who claims ownership of the same file another suit seeking for a determination of the same? Indeed, this would go against the very objectives of the doctrine of res judicata as to finality of litigation and in addition multiplicity of decisions that could as well embarrass the court and cause confusion in society."



9. It is the appellant's case that the judge erred in finding that its suit was res judicata; in striking out the entire suit when no such relief had been sought; and in allowing the counter claim without hearing the parties.
10. During the hearing of the appeal, the parties were represented by learned counsel who relied entirely on their respective written submissions. Mr. Billy Kongere appeared for the appellant. Mr. Kaminza held brief for Miss. Adunga for the 1st respondent. Mrs. Waswa appeared for the 2nd respondent.
11. For the appellant, it was submitted that the learned Judge incorrectly applied the res judicata doctrine; that the subject matter in the previous case involved LR No. 27742 which is different from the subject matter in the present case, namely; Kwale/Shirazi Bodo/754, and that the issues in the two actions are different. It was urged that the necessary ingredients of the doctrine of res judicata as pronounced by the Supreme Court in the case of John Florence Maritime Services Limited & Another vs. Cabinet Secretary Transport & Infrastructure & 3 Others [2021] KESC 39(KLR) are absent in this case.
12. It was submitted further that the judge erred by striking out the entire suit when only portions of claim had been challenged by the 1st Respondent's motion. It was urged that it was therefore not open to the Judge to grant relief that had not been sought. In support, the case of Kenya Ports Authority vs. Autoexpress Limited & 2 Others [2016] eKLR was cited.
13. Moreover, it was submitted, in the zeal to prematurely terminate the proceedings and nullify the appellant's title to the property, the judge improperly allowed the 2nd Respondent's counterclaim without giving the appellant an opportunity to be heard on it. Counsel concluded by urging the Court to allow the appeal, with costs, set aside the ruling of the ELC and refer the case back to the ELC before a different judge for hearing and determination.
14. For the 1st respondent, it was submitted that the judge was right in striking out the suit on basis of res judicata as the issues in the suit had already been decided in a previous case, namely; Constitutional Petition No. 8 of 2019; Said Omar Mwitw & 5 Others vs. Kwale International Sugar Company Limited and Others, making the suit res judicata under section 7 of the *Civil Procedure Act*. Regarding the rationale and ingredients of the doctrine, counsel cited the Supreme Court decisions in Kenya Commercial Bank Limited vs. Muiiri Coffee Estate Limited & another [2016] eKLR; and John Florence Maritime Services Limited & another vs. Cabinet Secretary Transport & Infrastructure & 3 Others (supra).

Also cited in further support is the decision of this Court in Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others [2017] eKLR.
15. It was further urged, that the judgment in the previous suit is a judgment in rem, binding on all parties, including the Appellant. The case of Kamunyu & others vs. Attorney General & Others [2007] 1 EA 116 was cited; and that the ELC was correct in striking out the suit as res judicata, and the appeal should be dismissed to avoid unnecessary litigation. It was added, for good measure, that the jurisdiction of the Court to entertain a boundary dispute is questioned able.
16. The 2nd respondent, in opposing the appeal, submitted that the dispute involves the parcel of land, KWALE/SHIRAZI BODO/754, which overlaps with land leased to the 1st respondent; that the land was originally part of Shirazi Adjudication Section established in 1982, and was later sub- leased to the 1st respondent; that the persons who purported to sell the property to the appellant were not beneficiaries of the Shirazi Adjudication Section and thus lacked the authority to sell the property to the appellant; and that the ELC was right in deeming the sale to the appellant illegal, and in cancelling the appellant's title.



17. Having considered the appeal and the submissions, we discern the issues arising to be whether the learned judge correctly applied the doctrine of res judicata; whether the judge erred in striking out the suit; and whether the judge erred in allowing the 2nd respondent's counterclaim without according the appellant an opportunity to be heard on the same.
18. The Supreme Court of Kenya in *John Florence Maritime Services Limited & Another vs. Cabinet Secretary Transport & Infrastructure & 3 Others* (supra) explained that the doctrine of res judicata is based on the principle of finality, which is a matter of public policy; that the principle of finality is one of the pillars upon which the judicial system is founded, and that the doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and that it ensures that litigation come to an end.
19. As regards the necessary ingredients, the Supreme Court in the same case held that for res judicata to be invoked in a civil matter, it should be demonstrated that there was a former judgment or order which was final; that the judgment or order was on merit; that the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and that there had to be between the first and the second action identical parties, subject matter and cause of action.
20. In the present case, and as already indicated above, the essence of the appellant's claim was that it was the registered proprietor of the property having purchased it from the original owners, and having exercised due diligence in its acquisition; and that the 1st respondent had trespassed on the property. It was on that basis that it sought to be declared as the registered and absolute owner of the property, and for the 1st respondent to be restrained from interfering with the property.
21. In its amended plaint, the appellant averred that it only became aware during the pendency of the suit that the 1st respondent was claiming that the property was part of a larger parcel LR No. 27742 allegedly leased to the 1st respondent by the Government of Kenya. No mention or reference was made in the respondents' statements of defence to the matter having been the subject of previous litigation. The 1st respondent's defence was generally a denial of the appellant's claim. On the other hand, the 2nd respondent, as already stated, pleaded that the original vendors who purportedly sold the property to the appellant were not beneficiaries of the adjudication section.
22. It was in the 1st respondent's application leading to the impugned ruling that it was asserted for the first time that there was previous litigation involving parcel LR No. 27742, namely, Constitutional Petition No. 8 of 2019 between Said Omar Mwitw & 5 Others (suing on their own behalf and on behalf of 610 residents of Mabatani, Nyumba Sita, Vidziani, Gonjora, Fahamuni, and Kigwede area-Msambweni-Kwale County) vs. Kwale International Sugar Company Limited and 9 Others.
23. Based on the judgment of the ELC at Mombasa (Munyao Sila J.) delivered on 13th January 2022 in that constitutional petition, the parties that are common to both suits are the 1st and 2nd respondents. The appellant was not privy to that petition, and neither are the petitioners in the constitutional petition privy to the present action. The subject matter in the constitutional petition was described as LR No. 5004/30/R but, in an amended petition, it was described as LR No. 27742. The petitioners in that petition asserted that the suit land was trust land and that as members of Digo tribe they had been in occupation from time immemorial. They sought orders from the court to be issued with title documents over that property as well as compensation.
24. The learned Judge in disposing of the constitutional petition identified two main issues for determination, namely, whether the petitioners were entitled to the prayer for cancellation of the title issued to the 1st respondent, and for an order for the property to be allocated to them; and, secondly,



whether the petitioners deserved any compensation. Clearly therefore, apart from the fact that the parties in the two actions were not the same, the issues for adjudication in the two actions are different.

25. As the Supreme Court stated in the afore-cited case *John Florence Maritime Services Limited & another vs. Cabinet Secretary Transport & Infrastructure & 3 Others* at paragraph 58:

“... 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. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 Others*, (2010) eKLR, under five distinct heads:

- (i) the matter in issue is identical in both suits;
- (ii) the parties in the suit are the same;
- (iii) sameness of the title/claim;
- (iv) concurrence of jurisdiction; and
- (v) finality of the previous decision.”

26. In our view, the learned judge failed to heed that guidance and erred in reaching her decision. Moreover, it is noteworthy, and bears repeating, that in its application the 1st respondent had only complained about, and sought the striking out of “paragraph 14 and 15” of the amended plaint and “any paragraph touching on the exact boundaries of LR 27742”. There is merit therefore in the complaint by the appellant that the relief granted by the learned judge was never sought.

27. The 2nd respondent’s counterclaim was neither prosecuted or canvassed. The appellant was not heard on it. We need not belabour the point that the appellant’s right to fair hearing was not honoured.

28. The ruling of the learned judge cannot therefore stand. It is hereby set aside in its entirety. The matter is remitted to the ELC before a judge other than A. E. Dena, J. for hearing and disposal. The appeal succeeds and is allowed with costs to the appellant.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL, 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

DR. K.I. LAIBUTA, Carb, FCIArb.

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original
signed



DEPUTY REGISTRAR

