



**Chile Kenya Motors Limited v Itotia & 2 others (Civil Appeal  
E141 of 2024) [2025] KEHC 12244 (KLR) (29 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 12244 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL E141 OF 2024  
M THANDE, J  
AUGUST 29, 2025**

**BETWEEN**

**CHILE KENYA MOTORS LIMITED ..... APPELLANT**

**AND**

**PETER NGARUIYA ITOTIA ..... 1<sup>ST</sup> RESPONDENT**

**JEREMIAH NGALA NGOJA ..... 2<sup>ND</sup> RESPONDENT**

**KARISA NGOWA CHEMBE ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 6.8.25, the Appellant seeks the following orders:
  1. Spent.
  2. Pending hearing and determination of the appeal, this Honourable Court be and is hereby pleased to issue an order for restitution of the motor vehicle registration number KDQ 268E to the Appellant/Applicant.
  3. Alternatively to prayer (2) above, the Honourable Court be and is hereby pleased to issue a mandatory injunction order for the 1<sup>st</sup> Respondent, his advocates and/or auctioneers to unconditionally release the motor vehicle registration number KDQ 268E to the Appellant/Applicant.
  4. The costs of this application be provided for.
2. The Appellant's case as set out in the affidavit sworn on even date by Talha Arshad, its director, is that the motor vehicle registration number KDQ 268E (the vehicle) was seized by Misa Auctioneers under instructions by the 1<sup>st</sup> Respondent's advocates in execution of the decree in Kilifi MCCC No. E396 of 2022: *Peter Ngaruiya Itotia v Chile Kenya Motors Limited & 2 Others*. Further that it deposited



the unsettled decretal amount in court in compliance with the condition for stay of execution granted by the Court on 11.7.25. The Appellant stated that in addition to stay of execution, it had sought in its application dated 18.12.24, a mandatory injunction for production of the vehicle in court but that the Court did not expressly pronounce itself on the same. The 1<sup>st</sup> Respondent through its advocates and auctioneers did not produce the vehicle in court and have declined to hand over the same to the Appellant. As a result, the Appellant continues to suffer unmitigated economic loss as a result of the detention of the vehicle since 16.8.24.

3. The 1<sup>st</sup> Respondent opposed the application through a replying affidavit sworn on 8.8.25 by his counsel, Geoffrey Kilonzo. He averred that the Application is brought in bad faith and is meant to deny the Respondent the fruit of litigation, is bad in law, incompetent and is an abuse of the court process. He added that the Application is *res judicata* as the Appellant filed a similar application seeking release of the vehicle which was heard and determined. Further that parties are bound by own pleadings and that in its application dated 18.12.24, the Appellant did not seek release of the vehicle and the Court could not therefore grant orders not sought. As such, the Appellant's demand for release of the vehicle was deceitful and misrepresented the orders granted. Further that the auctioneers have never been served with orders for the release of the vehicle and are ready and willing to comply with such orders if and when issued. He 1<sup>st</sup> Respondent opposed the unconditional release of the vehicle which has been in storage since 16.8.24, when the same was attached.
4. In Talha Arshad's further affidavit sworn on 11.8.25, the Appellant reiterated its earlier averments and denied the averments in the replying affidavit. It was asserted that the auctioneer is not entitled to storage costs as the vehicle was unlawfully and violently seized by Misa M. Auctioneers without giving proper notice as required under rules 12 and 14 of the [Auctioneers Rules](#) and that this was stated in its application dated 19.8.24 before the trial court.
5. In his further replying affidavit sworn on 12.8.25, Geoffrey Kilonzo reiterated his earlier averments and insisted that the vehicle was lawfully attached. He added that the Appellant's record of appeal contains a proclamation notice served upon its driver on 27.7.24, a letter informing the court that service was effected and that the goods would be removed in 7 days if the decree would not have been settled and a notification of sale showing that the vehicle was attached on 16.8.24. Further that these documents were attached to the Appellant's own application indicating that they had been served prior to the attachment of the vehicle.
6. Parties filed their written submissions which I have duly considered. The issues that fall for determination are:
  - i. Whether the Application is *res judicata*.
  - ii. Whether the Appellant is entitled to the orders sought.

#### **Whether the Application is Res Judicata.**

7. The doctrine of *res judicata* is set out in Section 7 of the [Civil Procedure Act](#) which provides:

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.



8. For a party to succeed in an objection on ground of *res judicata*, such party must demonstrate each of the elements in Section 7 of the *Civil Procedure Act*. This requirement was set out by the Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, as follows:

Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:

- i. The suit or issue was directly and substantially in issue in the former suit.
- ii. That former suit was between the same parties or parties under whom they or any of them claim.
- iii. Those parties were litigating under the same title.
- iv. The issue was heard and finally determined in the former suit.
- v. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

9. The Court went on to state:

The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.

10. The parties in this Application are the same as in the application dated 18.12.24. The previous application was before a court of competent jurisdiction, as is the present Application. However, the issue in both applications is not the same. In the previous Application, the Appellant had not sought release of the vehicle, as it has done in the present Application, but that the same be produced in court. As such, the issue of release of the vehicle to the Appellant was not directly and substantially in issue in the previous application. Indeed the 1<sup>st</sup> Respondent stated as much and said that parties are bound by their own pleadings. In light of this, my finding is that the Application is not *res judicata*. As such, this Court is not barred from entertaining the same.

### **Whether the Appellant is Entitled to the Orders Sought**

11. In its ruling of 11.7.25, this Court granted stay of execution of the decree of the trial court on terms that the outstanding decretal amount is deposited in Court. The Appellant thus prays that the attached vehicle be released to it. The 1<sup>st</sup> Respondent is opposed to the unconditional release of the vehicle without payment or storage charges.
12. It is not disputed that the Appellant complied with the order of this court of 11.7.25 to deposit the unsettled the decretal amount. Having met the condition for stay of execution granted, there is no justification for not granting the prayer sought for the release of the vehicle to the Appellant.



13. The question that then begs is whether the vehicle should be released unconditionally, without payment of storage charges. Under the *Auctioneers Rules*, an auctioneer is entitled to payment of charges which include storage charges. The Appellant however contends that the attachment of the vehicle was done unlawfully and without proper notice. As such, storage charges are not payable.
14. I have looked at the record of appeal filed by the Appellant as well as its exhibited application before the trial court dated 19.8.24. In his affidavit in support of that application Talha Arshad stated that he was served with the warrants of attachment and sale of moveable property as well as a proclamation of attachment and notification of sale of movable property.
15. The foregoing notwithstanding, I am mindful of the fact that the judgment giving rise to the attachment of the vehicle is under attack in the Appeal herein. The justice of the case requires that the Application dated 6.8.25 be allowed. I therefore allow the same and direct that motor vehicle KDQ 268E be released to the Appellant forthwith. The issue of payment of the auctioneers' storage charges shall abide the outcome of the Appeal. Similarly, the costs of this Application shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 29<sup>TH</sup> DAY OF AUGUST 2025**

**M. THANDE**

**JUDGE**

