



**Aswa Developers & Contractors Limited v Capital Square Limited & another (Civil Case E294 of 2023) [2025] KEHC 9919 (KLR) (Commercial and Tax) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9919 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E294 OF 2023  
BK NJOROGE, J  
JULY 10, 2025**

**BETWEEN**

**ASWA DEVELOPERS & CONTRACTORS LIMITED ..... PLAINTIFF**

**AND**

**CAPITAL SQUARE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**SYNERGY INDUSTRIAL CREDIT LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff herein filed the Complaint dated 27<sup>th</sup> June 2023, and in response, the 2<sup>nd</sup> Defendant filed a Notice of Preliminary Objection dated 22<sup>nd</sup> October 2024 on the following points of law;
  - a. The suit as against the 2<sup>nd</sup> Defendant is res judicata and should be struck out in limine since the issues herein as against the 2<sup>nd</sup> Defendant have been decided in Milimani High Court Commercial Case No. E808 of 2021: Aswa Developers and Contractors Limited vs Synergy Industrial Credit Limited & Anor and a decree issued on the 13<sup>th</sup> July 2023 in favour of the 2<sup>nd</sup> Defendant.
  - b. This suit as against the 2<sup>nd</sup> Defendant is incompetent as it contravenes Section 34 of the [Civil Procedure Act](#).
  - c. The Plaintiff's entire suit against the 2<sup>nd</sup> Defendant is frivolous, scandalous, and vexatious and amounts to an abuse of the court process.

**Issues for Determination**

2. The Court has carefully considered the parties' respective written submissions and the only issue for determination is;



- a) Whether the Preliminary Objection is merited.

### **Analysis and determination**

3. It was the Objector's submission that the questions of res judicata as well as contravention of Section 34 of the *Civil Procedure Act* are clear points of law which may dispose of the suit. To the contrary, the Respondent submitted that the Preliminary Objection is not anchored on a pure point of law.
4. Before the Court can determine whether the Objection is merited, it must first determine whether what has been raised amounts to a Preliminary Objection. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696* to mean: -
- “A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.
5. In order for the Court to ascertain whether or not the matter is res judicata, it will have to confirm the facts as pleaded by the Applicant and probe the evidence filed in support thereof. The Court will be required to examine the facts of the suit in the *Milimani High Court Commercial Case No. E808 of 2021: Aswa Developers and Contractors Limited vs Synergy Industrial Credit Limited & Anor* against the facts of the present suit. It is only after such examination that the Court can conclude whether or not the suit is indeed res judicata. In doing so, the Court will be probing evidence. In the case of *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another [2014] eKLR*, the Court held that:
- “That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objections. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections improperly.”
6. The Court concurs with the holding in the case of *George Kamau Kimani & 4 Others v County Government of Trans Nzoia & Another [2014], eKLR*, where the Court held that a ground of res judicata cannot be raised by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of a Notice of Motion where pleadings are annexed to enable the Court to determine whether the current suit is res judicata.
7. In conclusion, therefore, the issues raised do not qualify as a true Preliminary Objection. As such, the Court finds the Preliminary Objection to be without merit.
8. As to costs, the same follow the event. The successful party being the Plaintiff is entitled to costs.

### **Determination**

9. The Notice of Preliminary Objection dated 22nd October 2024 is dismissed for lack of merits.
10. The costs thereof are awarded to the Plaintiff.



11. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MILIMANI ON THIS 10<sup>TH</sup> DAY OF JULY 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOROGE BENJAMIN K.**

**JUDGE**

In the presence of:

Miss Odhiambo holding brief or Miss Kiiru for the Plaintiff/Respondent.

Miss Wambuta holding brief for Mr. Hannington Amol for the 1<sup>st</sup> Defendant/Respondent.

Mr. Meeme for the 2<sup>nd</sup> Defendant/Applicant.

Court Assistant Mr. Luyai.

