



**Shah v Bank of Africa Kenya Limited & 3 others (Commercial
Case 803 of 2002 & Civil Case 804 of 2002 (Consolidated))
[2025] KEHC 10999 (KLR) (Commercial and Tax) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 803 OF 2002 & CIVIL CASE 804 OF 2002 (CONSOLIDATED)**

AA VISRAM, J

JULY 23, 2025

BETWEEN

SANJITA SHAH PLAINTIFF

AND

BANK OF AFRICA KENYA LIMITED 1ST DEFENDANT

GANSHYAM CHHOTABHAI PATEL 2ND DEFENDANT

WILFRED JC KHASHOMI 3RD DEFENDANT

PALLINDER HOLDINGS LIMITED 4TH DEFENDANT

JUDGMENT

1. I have considered the 1st Defendant's Notice of Preliminary Objection dated 6th November, 2023, together with the submissions filed by both parties, and the applicable law.
2. The Preliminary Objection is based on several grounds, namely: -
 - i. That the suit against the 1st Defendant is time-barred under section 4 of the [Limitation of Actions Act](#);
 - ii. That the Plaintiff lacks locus standi as there was no privity of contract between her and the 1st Defendant;
 - iii. That the Verifying Affidavit is fatally defective; and
 - iv. That the 1st Defendant is not a necessary party to these proceedings.



3. It is well established, and need not be belabored, that a Preliminary Objection must raise a pure point of law. The principles governing preliminary objections were set out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. Sir Charles Newbold, P. stated: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law... It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

4. With the above in mind, I turn to the grounds raised.

Limitation

5. The objection that the suit is time-barred is contested. While the 1st Defendant contends that the cause of action arose in 1996 and that it was only enjoined in 2023, almost 28 years later, the Plaintiff on the other hand asserts that the 1st Defendant assumed the liabilities of Credit Agricole Indosuez Limited in 2004; and was properly substituted with leave of the court. Whether the 1st Defendant indeed acquired those liabilities is a factual matter that requires evidentiary interrogation.
6. In *Thuranira Karauri v Agnes Ncheche* [1997] eKLR the Court of Appeal affirmed that the issue of limitation goes to jurisdiction of the court. Noting the same, to my mind, where contested facts exist regarding when the cause of action accrued or who assumed liability, those questions may not be determined without evidence. I therefore find that this ground does not qualify as a pure point of law.
7. Additionally, it is not lost on me that this question was, or ought to have been, raised as part of the subject of litigation that was before the court that determined and allowed the application seeking substitution of the 1st Defendant. As a court of concurrent jurisdiction, and leave having been granted to substitute the party, I do not think this Court may re-deliberate that issue.
8. On this point, it is not in dispute that 1st Defendant previously filed an application seeking to strike out the Amended Plaint dated 26th February, 2003, based on the following grounds: -
 1. There is no legal entity by the name Credit Agricole Indosuez Limited.
 2. The Plaintiff is a stranger to the 1st Defendant as there never existed any legal relationship of bank and customer between the Plaintiff and the 1st Defendant.
 3. No fair trial is possible since the 2nd and 3rd Defendants and the third party are no longer participating in these proceedings.
 4. Further, there has been a delay of over 20 years in this matter thus it is no longer possible to have a fair trial.
9. In a Ruling delivered on 20th April, 2023, the Court dismissed the said application and directed that the costs of the said application be borne directly by Counsel on record for the 1st Defendant. The Plaintiff submitted that the court arrived at this conclusion on the basis that the application was not only hopeless, but had been contrived for the ulterior purpose of derailing the hearing of this suit. This submission was not contested.
10. The prayers in the said application as stated above are strikingly similar to the grounds raised in the present preliminary objection. In particular, the issues of locus and limitation appear to be a rehash of the previously determined issue albeit merely clothed in different language. However, if I am wrong, for the sake of completeness, I have considered the issues.



Locus Standi and Privity

11. The 1st Defendant submitted that the Plaintiff lacks locus standi because there was no legal relationship between her and the Bank. This issue turns on the nature of the transaction, and whether the 1st Defendant assumed obligations from Credit Agricole Indosuez Limited, or, as Counsel put it, whether the 1st Defendant stepped into the shoes of Credit Agricole Indosuez Limited.
12. The Plaintiff's position is that the 1st Defendant received and acknowledged cash deposits, thus becoming the party responsible for the funds. These assertions are factual in nature and contested and their resolution would require this Court to assess evidence, including the bundle of documents filed by the Plaintiff. To my mind, such a task precludes a determination of the question of locus and privity at this stage, and as a Preliminary Objection.

Verifying Affidavit

13. The 1st Defendant submitted that the Plaintiff's Verifying Affidavit is defective because it was sworn in Nairobi, but by a deponent whose postal address is in the United Kingdom. The Plaintiff, on the other hand, clarified that her physical presence in Nairobi at the time of swearing the affidavit has not been controverted, and submitted that her foreign postal address is not determinative.
14. In my view, the question of whether or not the affidavit is defective is a matter of fact that may only be determined with reference to the evidence on record. The Court is being called upon, as a matter of fact, to ascertain where exactly the Plaintiff swore the Verifying Affidavit. This ground accordingly fails to muster the test set out in *Mukisa* (Supra).

Necessary Party

15. As to whether or not the 1st Defendant is a necessary party? This question is a matter of fact and law. It requires the Court to consider the underlying claims and evidence on the record. This is especially so, given the contested facts as stated above. The question of necessity ought to be evaluated in light of the documents and pleadings, and may be resolved without recourse to the facts.
16. It is also not lost on me that a court of concurrent jurisdiction may have already addressed its mind to this issue, and reached a conclusion in respect of the same, when it granted leave to substitute the present party in the place of Credit Agricole Indosuez Limited. I do not intend to sit on appeal of that decision.

Conclusion

17. In light of the above, I find that none of the grounds raised by the 1st Defendant meet the threshold of a Preliminary Objection as set out in *Mukisa Biscuits* (supra). The issues raised are contested, require evaluation of evidence, and fall outside the narrow ambit of Preliminary Objections.
18. Accordingly, the Preliminary Objection dated 6th November, 2023, is without merit and is hereby dismissed with costs to the Plaintiff.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 23RD DAY OF JULY, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;



Court Assistant: Sakina

.....for Plaintiff

.....for 1st Plaintiff

.....for 2nd Defendant

.....for 3rd Defendant

.....for Third Party

