



**Kabundu Holdings Limited v Githui (Miscellaneous Civil Application  
576 of 2016) [2025] KEHC 14969 (KLR) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14969 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CIVIL APPLICATION 576 OF 2016**

**G MUTAI, J**

**OCTOBER 23, 2025**

**BETWEEN**

**KABUNDU HOLDINGS LIMITED ..... APPLICANT**

**AND**

**RICHARD M. GITHUI ..... RESPONDENT**

**RULING**

1. What is before the Court is a Notice of Motion dated 18<sup>th</sup> March 2025 vide which the respondent/applicant seeks to have the director of the applicant/respondent, Mr Patrick Mukiri Kabundu, cross examined on the status, assets and financial position of the applicant/respondent, for the corporate veil to be lifted and for Mr Kabundu to be held personally liable to pay the costs as ordered by the Court plus interest and costs.
2. The grounds upon which the application is brought are that the applicant/respondent filed a miscellaneous cause against the respondent/applicant. The same was dismissed, whereafter costs were assessed. Consequently, a certificate of costs of Kes.128,745/- was issued on 19<sup>th</sup> May 2022. Despite the respondent/applicant's attempts to recover the said costs, payment has not been obtained. It was averred that Mr Kabundu had held himself out as the director of Kabundu Holdings in an affidavit sworn on 14<sup>th</sup> September 2016, and that it was therefore fair and just that he be summoned for purposes of cross-examination and that he be held personally liable for the company's debts. The applicant prayed that the Court grant the orders sought to enable execution of a lawful decree.
3. In response, the applicant/respondent filed a notice of preliminary objection dated 23<sup>rd</sup> May 2025 in which it was averred that the application was misconceived and frivolous, and that Mr Patrick Mukiri Kabundu could not be cross-examined again as he had previously been cross-examined, pursuant to a summons dated 4<sup>th</sup> April 2017.



4. The applicant/respondent also filed a replying affidavit. In the replying affidavit, he swore on 23rd May 2025, Mr Kabundu reiterated that a similar application was filed by the respondent/Applicant on 29<sup>th</sup> June 2016. The Court issued a Summons to Mr. Patrick Kabundu to appear in Court on 24th April 2017 for cross-examination. He deposed, relying on authorities, that he could not be made to appear in Court again as the matter was res judicata. He further deposed that it was necessary that litigation be brought to an end and that no party should be vexed twice over the same cause. He therefore prayed that the application be dismissed.
5. The parties filed written submissions in respect of the preliminary objection and the application.
6. I have considered the matter and the submissions of the parties. In my view, the issues are
  1. Whether the preliminary objection was properly raised?
  2. Whether the Court should lift the corporate veil and have Mr Patrick Mukiri Kabundu cross-examined and made to bear personally the debts of the company.
7. What then is a preliminary objection? What amounts to a preliminary objection was defined in the case of Mukisa Biscuits Manufacturing Co. Ltd -Versus-West End Distributors Ltd (1969) EA 696 in the following terms:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
8. Sir Charles Newbold, JA added as follows: -

“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 has to be ascertained or if what is sought is the exercise of judicial discretion.”
9. Is that the case in this matter? I am afraid not. What the applicant/respondent relies on are factual matters that need to be ascertained. That is, whether Mr. Kabundu was actually cross-examined, whether the previous matter was substantially similar to this matter, and whether the parties were the same.
10. With respect to Mr Kabundu, the preliminary objection wasn't properly taken in this matter. Consequently, the preliminary objection is dismissed. In doing so, I would like to echo the words of Sir Charles Newbold in the Mukisa Biscuit case, wherein he stated laconically as follows: -

“The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”
11. Having dismissed the preliminary objection, I now turn to the application. Is the same merited?
12. It is true that the Court issued a summons dated 22nd March 2017 for Mr Patrick Kabundu to attend Court on 24th April 2017 for purposes of cross-examination pursuant to orders issued by Judge Njoki Mwangi. The cause, which is the subject of the summons, was, however, different from this one. The



summons was issued in HCC No. 489 of 2016. In this latter suit, the respondent/applicant sought to compel the applicant/respondent company to pay a decretal sum arising from CMCC No 3624 of 2003 between Richard M Githui and Kabundu Holdings Ltd.

13. The matter before this Court is, however, different. It seeks to have the applicant/respondent compelled to pay costs arising from this matter after it was dismissed.
14. In my view, the matters are different. They are related to different causes that arise from different proceedings. That being the case, the doctrine of res judicata is not applicable.
15. I am guided by the decision of the Supreme Court in the case of Independent Electoral & Boundaries Commission – Versus - Maina Kiai & 5 Others [2017] eKLR. In the said case, the apex court distilled the elements which must be present for the doctrine of res judicata to be raised successfully as being the following:-
  - a. The suit or issue was directly and substantially in issue in the former suit.
  - b. That former suit was between the same parties or parties under whom they or any of them claim.
  - c. Those parties were litigating under the same title.
  - d. The issue was heard and finally determined in the former suit.
  - e. 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.”
16. Applying the above case to this matter, it would appear to me that the test has not been met.
17. It would appear to me that the applicant/respondent is doing everything to avoid paying the respondent/applicant. Litigation, as has been said, must come to an end. That said, litigation must come to an end in a just manner. Mr Patrick Mukiri Kabundu has previously held himself out as a director of the applicant/respondent. In the circumstances, it is necessary, fair, and just to cross-examine him so that justice is done.
18. The upshot of the foregoing is that the notice of motion dated 18<sup>th</sup> March 2025 has merit. The same is allowed as follows. I order that Patrick Mukirir Kabundu attend Court on 5th November 2025 for the purposes of being cross-examined. Upon his cross-examination, this court will determine whether he should be held personally liable for the applicant/respondent's debts.
19. Costs follow the event. I award the respondent/applicant costs of Kes.30,000/- to be paid within 30 days of the date hereof.
20. It is so ordered.

**DATED AND SIGNED THIS 23<sup>RD</sup> DAY OF OCTOBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr Patrick Mukiri Kabundu (pro se litigant) – Absent;

Mr Oddiaga, for the Respondent/Applicant; and



Arthur – Court Assistant.

