

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. E532 OF 2025

DIVYESH INDUBHAI PATEL.....1ST

PLAINTIFF

ALPA DIVYESHKUMAR PATEL.....2ND

PLAINTIFF

VERSUS

UNITED CREDIT LIMITED.....1ST

DEFENDANT

EQUIP AGENCIES LIMITED.....2ND

DEFENDANT

RULING

1. This ruling concerns the 1st Defendant’s Preliminary Objection dated 26th September 2025. The objection is premised on the grounds that this Court lacks jurisdiction to entertain the present suit on account of *res judicata*, *sub judice*, and abuse of the court process. It is contended that the issues raised herein are substantially similar to those previously adjudicated, or still pending, in ***High Court Commercial Case No. E105 of 2025 - Divyesh Indubahi Patel & Another v United Credit Limited***, and that the Plaintiffs are engaged in forum shopping.

2. The Preliminary Objection was canvassed by way of written submissions.
3. The 1st Defendant submits that HCCOMM E105 of 2025 is still pending. It is argued that in that suit the Plaintiff applied for injunctive relief, which this Court dismissed in a ruling delivered on 19th June 2025, effectively determining the issue of injunction and rendering the present application *res judicata*.
4. The 1st Defendant further submits that the 3rd Plaintiff in the earlier suit is now the 2nd Defendant in the present suit, and that the subject matter in both matters is identical. It is also pointed out that the Plaintiffs have filed an application seeking stay of the ruling of 19th June 2025, scheduled for hearing on 4th December 2025. Additionally, the 1st Defendant asserts that the Plaintiffs previously filed ***MCCOMMSU No. E865 of 2015 - Equip Agencies v United Credit***, over the same subject matter, which was withdrawn on 7th August 2025. Counsel contends that the multiplicity of suits amounts to forum shopping and abuse of the court process.
5. The 2nd Respondent opposes the objection, submitting that it does not meet the legal threshold of a true preliminary objection as set out in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696***. According to the 2nd Respondent, the objection is founded on contested facts, namely, the status, parties, and issues in

the previous suits, which cannot be determined without evidence.

6. The 2nd Respondent relies on **Oraro v Mbaja [2005] 1 KLR 141**, and **Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another (2014) eKLR**, to submit that where factual issues arise, a preliminary objection cannot stand.
7. Further, it is submitted that the suit allegedly forming the basis of *res judicata* MCOMMSU No. E865 of 2015, was withdrawn, and therefore cannot ground *res judicata* or *sub judice*.
8. The Plaintiffs similarly oppose the Preliminary Objection, arguing that it is misconceived, legally untenable, and aimed at delaying the substantive hearing of the matter.
9. The Plaintiffs contend that a withdrawn suit cannot satisfy the requirements of sections 6 and 7 of the Civil Procedure Act, as *sub judice* requires a pending suit and *res judicata* requires a suit that has been heard and finally determined. They submit that the Preliminary Objection rests on incorrect factual assertions and fails the test of a valid preliminary objection as articulated in **Mukisa Biscuit**. They urge that the objection be dismissed with costs.

Analysis and determination

10. The sole question for determination is whether the preliminary objection is merited.

11. A preliminary objection must be founded on a pure point of law and based on uncontroverted facts. In **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, the court held that:

“A preliminary objection consists of a point of law which has been pleaded...and which if argued as a preliminary point may dispose of the suit. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

12. The first question is therefore whether the issues raised are purely legal. A pure point of law is one that can be argued on the presumption that all the factual allegations in the pleadings are true. Where facts must be established, verified, or interrogated, a preliminary objection cannot stand. (See **Oraro v Mbaja [2005] 1 KLR 141**).

13. In the instant case, the 1st Defendant argues that this suit is *res judicata* or *sub judice*, High Court Commercial Case No. E105 of 2025. It is contended that the parties and subject matter are the same, save that the 2nd Defendant herein was a plaintiff in the earlier suit.

14. **Section 6** of the **Civil Procedure Act** provides that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or

any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

15. For *sub judice* to apply, the earlier suit must be pending, the parties must be the same or claiming under the same title, and the issues must be directly and substantially the same. Whether the identity of parties is preserved where a party shifts from plaintiff to defendant is a factual question requiring evaluation of pleadings, not suitable for a preliminary objection.

16. For *res judicata*, **Section 7** of the **Civil Procedure Act** requires that:

“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.”

17. The 1st Defendant relies heavily on the ruling of 19th June 2025 in HCCOMM E105 of 2025, arguing that the dismissal of an injunction application finally determined the issues. However, injunctive applications, being interlocutory,

do not amount to a final determination of rights, and courts have consistently held that interlocutory findings cannot ground *res judicata*.

18. More importantly, whether the issues in HCCOMM E105 of 2025 are identical to those in the present suit is strongly contested. The Court would be required to compare pleadings, applications, parties, and prayers, matters outside the four corners of a pure point of law.
19. Furthermore, the reliance on MCOMMSU No. E865 of 2015 is untenable because a withdrawn suit cannot form the basis of either *res judicata* or *sub judice*, as there is no pending suit nor a final determination.
20. From the foregoing, the Preliminary Objection cannot be said to be founded on uncontested facts. It invites the Court to interrogate disputed matters, it fails the legal test in ***Mukisa Biscuit***. I thus find it is devoid of merit.
21. The 1st Defendant's Preliminary Objection dated 26th September 2025 is dismissed. Costs in the cause.

RULING delivered virtually, dated and signed at **NAIROBI**

This **11th** day of **December** 2025.

P.M. MULWA
JUDGE

In the presence of:

Mr. Wachira h/b for Mr. Kimere for Plaintiff/Applicant

Mr. Ochwa for 1st Defendant

Mr. Mirie for 2nd Defendant

Court Assistant: *Carlos*