

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**CIVIL CASE NO. E149 OF 2024**

**DU CHANG**

**JIANG.....PLAINTIFF**

**VERSUS**

**TANG JIANGCHENG.....1<sup>ST</sup>**

**DEFENDANT**

**TANG PANLIN .....2<sup>ND</sup>**

**DEFENDANT**

**EABEST COMPANY LIMITED.....3<sup>RD</sup>**

**DEFENDANT**

**RULING**

1. The Court is called to determine the Defendants’ Notice of Preliminary Objection dated 16<sup>th</sup> November 2024. The objections seek to strike out the Plaintiff’s suit on the grounds that:

- i. The suit offends Section 34 of the Civil Procedure Act;*
- ii. The matter is barred by the doctrines of res judicata under Section 7 of the Civil Procedure Act.*
- iii. This Court is functus officio in view of the decision rendered in HCCOMM Misc. Application No. 164 of 2018 – Du Changjiang v Tang Jingcheng, Tang Panlin, Hou Yan & Eabest Limited.*

2. The Defendants contend that the Plaintiff's grievances arise from and relate directly to orders issued in *HCCOMM Misc. Application No. 164 of 2018*, particularly those concerning rectification of the company register and provision of accounts. They argue that any dissatisfaction with compliance ought to have been pursued within execution proceedings and not by a fresh suit, by dint of Section 34 of the Civil Procedure Act.
3. They further submit that the issues raised herein were either determined or ought to have been raised in the previous proceedings, thereby attracting the doctrines of *res judicata* and *functus officio*, and that permitting the suit to proceed would amount to an abuse of the court process.
4. The Plaintiff opposes the objection, and filed submissions dated 7<sup>th</sup> April 2025, contending that the present suit raises substantive and distinct causes of action, including unlawful removal as a director and shareholder, breach of fiduciary duty, oppressive conduct, misappropriation of company assets, and claims for damages.
5. It is the Plaintiff's position that the prior proceedings were a miscellaneous application, limited in scope, and incapable of accommodating the substantive reliefs now sought, which require pleadings, discovery, and a full trial. The Plaintiff argues that the objection calls for factual interrogation and

therefore falls outside the scope of a proper preliminary objection.

### **Analysis and determination**

6. The Court considers that the issues arising for determination are:

- i. Whether the Preliminary Objection meets the threshold of a proper preliminary objection in law; and*
- ii. Whether the suit is barred by Section 34 of the Civil Procedure Act, or by the doctrines of res judicata and functus officio.*

7. The law on preliminary objections is settled. In **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, Law JA stated at page 700 that:

***“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.”***

Sir Charles Newbold, P added:

***“A preliminary objection is like 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.”***

The Court further cautioned that a preliminary objection cannot be raised where facts require ascertainment or where judicial discretion is involved.

8. The objection herein is anchored on jurisdictional bars under Sections 34 and 7 of the Civil Procedure Act. Jurisdictional objections are pure points of law. In **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1**, Nyarangi JA stated:

***“Jurisdiction is everything. Without it, a court has no power to make one more step.”***

9. The objection therefore meets the **Mukisa Biscuit** threshold.

On Section 34 of the Civil Procedure Act

10. I will first address the issue of **section 34** of the **Civil Procedure Act**, which provides that:

***“All questions arising between the parties to the suit in which the decree was passed...and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”***

11. The Defendants argue that the present suit seeks to enforce and expand upon the orders issued in Misc. Application No. 164 of 2018, particularly the audit and financial disclosure directives. Conversely, the Plaintiff argues that the present claims concern damages and personal liability which were not determined in the previous matter.
12. A perusal of the decree in the Miscellaneous Application shows that the Court (Odera, J.) on 22<sup>nd</sup> June 2022 issued orders rectifying the register of Eabest Company Limited, restoring the Plaintiff as shareholder and director, and directing production of financial records for analysis.
13. In the present suit, the Plaintiff seeks, inter alia: A declaration that his removal as director/shareholder of the 3<sup>rd</sup> Defendant was unlawful and oppressive; Compensation for losses arising from the alleged unlawful removal; Personal liability against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for alleged sale of company machinery; and Costs and interest. Those claims go beyond mere execution of the decree. They introduce claims for compensatory relief and personal liability.
14. Section 34 bars a separate suit only where the issues relate to execution, discharge or satisfaction of the decree. From the pleadings, the present suit raises allegations of

unlawful removal, breach of fiduciary duty, oppressive conduct, misappropriation of assets, and claims for damages. These are **not execution questions**, but substantive corporate and commercial disputes requiring pleadings, discovery, and evidentiary proof.

15. In **Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd [2017] eKLR**, the Court of Appeal emphasized that Section 34 cannot be invoked to shut out substantive claims merely because the parties were previously engaged in execution proceedings.

16. Determining whether the suit is merely an execution dispute disguised as a fresh action would require examination of pleadings and evidence. That inquiry is incompatible with a preliminary objection.

17. I am therefore not persuaded that Section 34, per se, renders the suit incompetent.

On res judicata

18. The doctrine of *res judicata* is anchored 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”***

19. In **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR**, the Court of Appeal held:

***“For res judicata to apply, the issue must have been directly and substantially in issue in the former suit, between the same parties, litigating under the same title, and must have been heard and finally determined by a court of competent jurisdiction.”***

20. The parties in both matters are substantially the same. The earlier matter conclusively determined, the rightful shareholding and directorship, and the rectification of the company register.

21. However, the issue of damages for alleged oppressive conduct, personal liability for sale of machinery, and compensation for losses was not adjudicated in the Miscellaneous Application.

22. The earlier proceedings were initiated by way of a Miscellaneous Application limited in scope, primarily seeking

rectification and disclosure. There was no final adjudication on compensatory relief or quantified damages.

23. While the factual background overlaps, the reliefs presently sought were neither directly in issue nor finally determined.

24. Consequently, the ingredients of *res judicata* are not fully satisfied.

On functus officio

25. The doctrine of *functus officio* bars a court from revisiting a matter it has already finally determined. In **Raila Odinga & Others v IEBC & Others, Supreme Court Petition No. 5 of 2013**, the Court held:

***“The doctrine of functus officio is one of the mechanisms by means of which the law gives expression to the principle of finality.”***

26. The present suit is not an application to review or vary the decree issued in Misc. Application No. 164 of 2018. It is a separate action seeking substantive relief.

27. The Court that determined the Miscellaneous Application became *functus officio* in respect of those specific orders. However, that does not preclude this Court from entertaining a fresh cause of action not previously determined.

28. I find that the Preliminary Objection dated 16<sup>th</sup> November 2024 does not raise pure points of law and is therefore without merit, and is hereby dismissed with costs.

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

This **12<sup>th</sup>** day of **February** 2026.

**PETER M. MULWA**

**JUDGE**

**In the presence of:**

*Ms. Luvai* for Plaintiff

*Mr. Mwenda h/b for Mr. Kamau Kuria, SC* for Defendant

Court Assistant: *Carlos*