

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELCLC NO. E318 OF 2025

HARSHA ATULKUMAR MAGANLAL PLAINTIFF/APPLICANT		SHAH.....1ST
NEEL ATUL PLAINTIFF/APPLICANT		SHAH.....2ND
-VERSUS-		
ANKOOR DEFENDANT/RESPONDENT		SHAH.....1ST
DIAMOND TRUST BANK KENYA DEFENDANT/RESPONDENT		LIMITED.....2ND
DALALI TRADERS DEFENDANT/RESPONDENT		AUCTIONEERS.....3RD

RULING

1. There are two applications and a notice of preliminary objection that are the subject of this ruling. The first notice of motion is dated 26th June, 2025 filed by the plaintiffs/ applicants and it is expressed to be brought under **Order 40 Rules 1,2,3, and 4** and **Order 51 Rule 1** of the **Civil Procedure Rules** seeking the following orders:-

1. *Spent.*
2. *Spent.*
3. *That a temporary injunction does issue restraining the 2nd defendant and 3rd defendant or their agents or servants from selling, alienating, disposing of or otherwise dealing with the suit property known as House no. 9 Magnolia Hills on LR. No.*

2951/2011 (Original no. 2951/122/2) pending the hearing and determination of this application and determination of the suit herein.

4. That a temporary injunction be and is hereby issued restraining the 2nd and 3rd defendants from offering for sale through public auction or otherwise all that property known as House no. 9 Magnolia Hills erected on LR. No. 2951/2011 pending hearing and determination of this application and the main suit.

5. That costs of this application be in the cause.

2. The application is premised on the grounds *inter alia* that the plaintiffs/applicants are the registered owners of the property known as house no. 9 magnolia hills situated on LR. No. 2951/2011 originally no. 2951/122/2. The application is further supported by the affidavit of the 1st plaintiff/ applicant sworn on even date. The 1st plaintiff/applicant deposed that by a letter of offer dated 19th October, 2017 and together with the 2nd plaintiff/applicant, they agreed with the 2nd defendant/respondent to charge the suit property as a security for a loan facility of Kshs.260,000,000/- which was executed on 30th March, 2018. According to the 1st plaintiff/ applicant the

loan facility was fully repaid in accordance with the terms of the charge and the letter of offer on 23rd June, 2020.

3. The 1st plaintiff/applicant deposed that unknown to them, the 2nd defendant/respondent and in collusion with the 1st defendant/respondent and tusker mattresses limited extended further loan facilities using the suit property as additional security which he stated, they were not privy to and further did not authorize the use of their property to secure the facility extended on 13th February, 2019. It was deposed that during this period they were residing in the United Kingdom and that they were not contacted at any point by the 2nd defendant/respondent. Further, that despite the full repayment, the 2nd defendant/respondent issued a statutory notice dated 9th May, 2022 demanding Kshs.2,562,461,949. 35/= a debt which they are not liable for.
4. The 1st plaintiff/applicant deposed that on 30th August, 2022 they were served with a 40-day redemption notice, and that on 29th April, 2025 the 3rd defendant/respondent issued a notification of sale based on a valuation conducted in 2016. He deposed that the 3rd defendant/respondent now intends to sell the suit property by way of public auction, and that unless this court intervenes, they stand to lose their home through a fraudulent and irregular sale process.

5. The 1st defendant/respondent filed his replying affidavit sworn on 17th July, 2025. He deposed that he never communicated directly with the 2nd defendant/respondent regarding the letter of offer and neither did he purport to engage the said party on behalf of the plaintiffs/applicants. He also deposed that he did not collaborate with Orakam Holdings Limited, tusker mattresses limited and the 2nd defendant/respondent or any other party to facilitate the transaction in question.
6. The 1st defendant/respondent deposed that he was contacted by an officer of Orakam Holdings Limited who informed him of the existence of a new letter of offer dated 19th May, 2020 and that the same contained few disjointed and random pages which included pages requiring the signatures of the plaintiffs/applicants. He deposed that these pages were sent without the accompanying substantive terms of the facility, and that he sought to be furnished with the full version of the said letter of offer. The 1st defendant/respondent deposed that the officer from Orakam Holdings Limited promised to communicate the proposed revision to the 2nd defendant/respondent and that none of the recommendations he suggested were implemented, and since there was no

communication, he was left with the impression that the matter had stalled or was no longer being pursued.

7. Further, he deposed that he did not sign the letter of offer dated 19th May, 2020 and he also did not communicate with the plaintiffs/application for their review or execution. He deposed that the transaction proceeded without the knowledge of the plaintiffs/applicants and without endorsement on his part. The 1st defendant/respondent deposed that after reviewing the documents filed by the 2nd defendant/respondent in HCCOMM no. E387 of 2022, and according to him, the 2nd defendant/respondent in concert with Orakam Holdings Limited altered the documents to create the false impression that the plaintiffs/applicants had accepted the use of the suit property as security for the loan advancement.
8. The 1st defendant/respondent deposed that in addition to not signing the letter of offer, the plaintiffs/applicants never executed the deed of guarantee. He denied engaging in any fraud, misrepresentation or collusion with the 2nd defendant/respondent to charge the suit property, and that the allegations levelled against him are baseless.
9. The 2nd defendant/respondent filed its replying affidavit sworn on 21st July, 2025 by Faith Ndonga. The 2nd

defendant/respondent deposed that the application is an abuse of the court process for the reason that suit was filed in the high court in HCCOMM no. E387 of 2022 which was heard and determined in a judgment delivered on 22nd April, 2025. It was deposed that the plaintiffs/applicants did not inform this court of the said proceedings including the application seeking stay of execution.

10. Further, it was deposed that the 2nd defendant/respondent instructed the 3rd defendant/respondent to issue a 45 days' redemption notice where a valuation of the suit property was scheduled to take place on 8th July, 2025. The 2nd defendant/respondent deposed that the plaintiffs/applicants are attempting to relitigate the entire dispute which has already been determined by introducing allegations of fraud and collusion. Further, that the loan facilities were secured by a registered charge dated 30th March, 2018 which was registered on 13th April, 2018 and the borrower subsequently obtained further financial facilities with the knowledge of the plaintiffs/applicants.

11. The 2nd defendant/respondent deposed that having already litigated the legal questions and the facts surrounding the dispute between the parties before a court of competent jurisdiction, the only recourse available to the

plaintiffs/applicants would be through an appeal. Further, that the nature of this application is intended to frustrate and delay its ability to realize the fruits of the judgment in HCCOMM no. E387 of 2022.

12. In response thereto, the 1st plaintiff/applicant filed the further affidavit sworn on 30th September, 2025. He deposed that the issues before the commercial court involved the indebtedness under the charge instrument which are different from the issues in this case which now involve the circumstances in which subsequent facilities were not lawfully secured as a charge. Further, the issues surrounding fraud fall for determination by this court and cannot be deemed as *res judicata*. Further, the valuation report dated 4th July, 2025 was filed after the instant application which is an afterthought and cannot cure the defects of the earlier process.

13. The 1st plaintiff/applicant further deposed that assuming that the issues in this suit are *res judicata*, the court is required to sever that specific issue and proceed to determine the remaining distinct issues. Further, that this suit is materially different from the suit filed in the commercial court as the parties are different and also its targets the 2025 enforcement process.

14. The 2nd defendant/respondent filed the notice of preliminary objection dated 21st July, 2025 challenging the instant application on the following grounds:-

1. This honourable court lacks jurisdiction to hear the application and the suit which are barred by the doctrine of res judicata under Section 7 of the Civil Procedure Act. The issues raised in the application and the suit have already been determined by a court of competent jurisdiction in High court commercial case no. E387 of 2022- Harsha Artul Kumar Magnalal Shah v Diamond Trust Bank Kenya Limited and Tusker Mattresses Limited in which judgment was delivered on April 22, 2025 by the learned Hon Lady Justice Dr. Githiru Freda Mugambi.

2. The application is an abuse of court process and amounts to forum shopping for the following reasons:

a. The issues raised before this honourable court and the remedies sought, including but not limited to the validity of the charge instrument, chargee's right of tacking and consolidation, enjoining the 2nd defendant from exercising its statutory rights and interests through sale of the charged property (house no. 9 magnolia hills situated on LR. No. 2951/2011) by public auction were adjudicated and determined in the judgment of the court in HCCCOM no. E387 of 2022- Harsha

Artul Kumar Magnalal Shah v Diamond Trust Bank Kenya Limited and Tusker Mattresses Limited.

b. The applicants filed two applications seeking stay of execution of the judgment in HCCOMM no. E387 of 2022-Harsha Artul Kumar Magnalal Shah v Diamond Trust Bank Kenya Limited and Tusker Mattresses Limited. Those applications were determined in a ruling delivered on July 7, 2025.

c. The applicants are before the court of appeal seeking an order of stay of execution in Civil Appeal (Application) no. E466 of 2025-Harsha Abul Magnalal Shah & Another v Diamond Trust Bank.

3. The application is incurably and fatally defective as the supporting affidavit and the annexures thereto fail to conform to the mandatory requirements of Section 5 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya.

15. In response thereto, the plaintiffs/applicants filed their grounds of opposition dated 15th September, 2025. They averred that the application dated 26th June, 2025 is meant to arrest the unlawful sale of the plaintiffs/applicants property scheduled for July, 2025 by the 3rd defendant/respondent. Further, the plaintiffs/applicants admitted to taking out the charge using the title to the suit property as security for a loan advanced by the

2nd defendant/respondent in the amount of Ksh.260,000,000.00 through the letter of offer dated 19th July, 2017. Further, that the loan facility was repaid in full and the plaintiffs/applicants never authorized the use of the title to the suit property as security for any other loan facility from the 2nd defendant/respondent. The plaintiffs/applicants contended that the issues raised in their application are not *res judicata* because the same were not ventilated before the high court including: alteration of the charge instrument by the 2nd defendant/respondent without their knowledge and spousal approval, and, lack of compliance with **Section 97** of the **Land Registration Act** as read together with **Rule 11 of the Auctioneers Rules** in terms of procuring a current forced sale valuation of the suit property.

16. The third application is the notice of motion dated 17th September, 2025 filed by the plaintiffs/applicants, and it is expressed to be brought under **Articles 50** and **159 (2)** of the **Constitution**, **Sections 1A,1B** and **3A** of the **Civil Procedure Act** and **Order 2 Rule 15**, and **Order 51 Rule 1** of the **Civil Procedure Rules** seeking the following orders:-

1. *The preliminary objection dated 21st July filed by the 2nd defendant be struck out in limine for being incompetent and fatally defective.*

2. *The said preliminary objection be declared not to raise any pure point of law as required*

under the well-settled principles in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696.

3. The said preliminary objection be declared incurably defective for raising contested issues of fact, vague averments and matters outside the pleadings.

4. Costs of this application be provided for.

17. The application is premised on the grounds on its face. It is further supported by the affidavit of the J.M Kamenju, the learned counsel on record for the plaintiffs/applicants sworn on even date. The learned counsel deposed that the notice of preliminary objection does not raise pure points of law as there are contested facts which require proof to establish the same. He deposed that the objection offends the principles enunciated in the case of **Mukisa Biscuits** and that it is necessary that it be struck out to safeguard the overriding objectives under **Sections 1A and 1B** of the **Civil Procedure Act**.

18. The defendants/respondents did not file their responses to this application. This court directed that the two notices of motion and the preliminary objection be canvassed through written submissions.

19. The plaintiffs/applicants filed their written submissions dated 13th October, 2025, and listed five issues for determination as hereunder:-

(1) Whether the 2nd defendant's preliminary objection is competent in law.

(2) Whether the present suit is barred by the doctrine of res judicata.

(3) Whether the plaintiffs' supporting affidavit is defective.

(4) Whether the Plaintiffs have satisfied the legal threshold for grant of an interlocutory injunction.

(5) What reliefs should this Honourable Court grant.

20. The defendants/respondents did not file their written submissions. Be that as it may, this court has considered both applications, the notice of preliminary objection, the replies thereof and the written submissions filed by the plaintiffs/applicants. The following issues are for determination by the court:-

i. Whether the 2nd defendant's preliminary objection is competent in law.

ii. Whether the present suit is barred by the doctrine of res judicata as raised by the 2nd defendant/respondent in its replying affidavit.

iii. Whether the Plaintiffs have satisfied the legal threshold for grant of an interlocutory injunction.

21. The substantive law on *res judicata* is found in **Section 7** of the **Civil Procedure Act Cap 21** which provides 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.”

22. **Black’s law Dictionary 10th Edition** defines “*res judicata*” as:-

“An issue that has been definitely settled by judicial decision...the three essentials are(1) an earlier decision on the issue,(2) a final judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

23. In the instant case, the 2nd defendant/respondent alleges that the issues raised by the plaintiffs/applicants through the application dated 26th June, 2025 were determined by the court in HCCOM No. E387 of 2022 vide the

judgment delivered on 22nd April, 2025 which cause involved the parties herein. In response, the plaintiffs/applicants argued that the issues of collusion between the 1st and 2nd defendants/respondents regarding the 2025 sale of the suit property through auction and improper exercise of the statutory power of sale by the 3rd defendant/respondent with regard to auctioning the suit property were not the subject of the high court's decision dated 22nd April, 2025 hence, their application dated 26th June, 2025 is not *res judicata*.

24. Law, J.A. in **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** stated as follows:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration...”

25. Also, in the case of **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR**, it was held that: -

“The position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both sides.

Once raised the preliminary objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law.”

26. In applying the principles in the above cited authorities, I am of the view that a preliminary objection is not the most effective tool in determining whether the instant suit and application are *res judicata*. I say so for the reason that while a preliminary objection arises from pleadings, the pleadings referred herein are not contained in this file, and that would form the basis for enquiring into another matter which is to a great extent combing through evidence. See the case of **George Kamau Kimani & 4 others v County Government of Trans-Nzoia & another [2014] KEELC 104 (KLR)** and **Margaret Njeri Gitau v Julius Mburu Gitau & 2 others [2022] KEELC 1219 (KLR)**. For that reason, I am not satisfied that grounds 1 and 2 of the notice of preliminary objection raise pure points of law.

27. Secondly, the 2nd defendant/respondent faulted the 1st plaintiff/applicant's supporting affidavit sworn on 26th June, 2025 for non-compliance with the requirements of **Section 5** of the **Oaths and Statutory Declarations Act**, which provides as follows:-

“Every commissioner for oaths before whom any oath or affidavit is taken or made

under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

- 28.** I have carefully perused the supporting affidavit sworn by the 1st plaintiff/applicant, in particular, the last page thereof bearing the deponent’s signature. On the foregoing page, the name, place and address of the notary public who commissioned the affidavit in question is clearly and legibly indicated. It is undisputed that the plaintiffs/applicants are based in the United Kingdom as is the commissioner for oaths who commissioned the said affidavit. In that case, the court is not persuaded that the aforesaid affidavit flouts the provisions of **Section 5** of the **Oaths and Statutory Declarations Act**.
- 29.** From the above, it is clear that the notice of preliminary objection lacks merit, and the same is for dismissal. A determination of this objection directly determines the notice of motion dated 17th September, 2025 as it seeks to strike out the preliminary objection.
- 30.** In dealing with the second issue, on whether the suit is barred by the doctrine of *res judicata* as contended by the 2nd defendant/respondent in its affidavit, I will reiterate paragraphs 21 and 22 stated above. The 2nd defendant/respondent argued that the instant suit and application are *res judicata* by virtue of

the suit in HCCOMM no. E387 of 2022 which was heard and determined vide the judgment delivered on 22nd April, 2025. In contending against these allegations, the plaintiffs/applicants argued that the issues in this suit are distinct and different from the issues in that suit, including the parties. Particularly, they argued that the present suit arises from fresh statutory notices issued in 2025, and the conduct of the 3rd defendant/respondent as well as the unlawful variations of the charge without consent.

31. At this juncture, I find it necessary to reproduce the prayers sought in the amended plaint dated 19th July, 2025 which seeks the following reliefs:-

i. A DECLARATION that the charge registered by the 2nd Defendant, Diamond Trust Bank Kenya Limited, over the Plaintiffs` parcel of land known as [House No. 9 Magnolia Hills situated on L.R No. 2951/2011 (Original No. 2951/122/2)] only secured liabilities and obligations that were expressly provided for in the charge instrument dated 30th March 2018 and could not be lawfully extended to secure future, contingent, or third-party unrelated obligations without express Consent of the Plaintiffs.

ii. A DECLARATION that any attempt by the 1st Defendant to unilaterally or retrospectively extend the scope of the letter of offer dated 19th October, 2017 and charge dated 30th March, 2018 to secure credit facilities or financial obligations advanced

to Tusker Mattresses Limited (or any third party) without the Plaintiffs' express consent and participation is/was unlawful, fraudulent and void ab initio.

iii. A DECLARATION that the use of the Plaintiffs' property as security for facilities not directly or contractually connected to the Plaintiffs, and which were advanced to Tusker Mattresses Limited, violated the provisions of the Land Act, 2012, the Land Registration Act, 2012, and the constitutional right to property under Article 40 of the Constitution of Kenya 2010.

iv. A DECLARATION that a chargee owes a statutory duty under Section 83 of the Land Act, 2012 not to deal with the charged land in a manner inconsistent with the terms of the charge and that any deviation from such terms without the chargor's written consent is ultra vires, illegal, and unenforceable.

v. A DECLARATION that the Plaintiffs have fully repaid the facility advanced under the letter dated 19th October, 2017 and that the charge over property known as House No. 9 Magnolia Hills situated on L.R No. 2951/2011 (Original No. 2951/122/2) located within Nairobi County stands fully discharged.

vi. A DECLARATION that the plaintiffs are not liable under the facilities advanced by the 2nd Defendant through letters of offer dated 13th February, 2019 and 19th May, 2020 and that the property known

as House No. 9 Magnolia Hills situated on L.R No. 2951/2011 (Original No. 2951/122/2) located within Nairobi County was not validly charged as security for any amount arising therefrom.

vii. A PERMANENT INJUNCTION restraining the 2nd and 3rd Defendants from advertising for sale, selling, transferring, or in any other way interfering with the Plaintiffs' rights and interest in the property known as House No. 9 Magnolia Hills situated on L.R No. 2951/2011 (Original No. 2951/122/2) located within Nairobi County.

viii. A DECLARATION that the statutory notice dated 9th May, 2022 the redemption notice dated 19th August, 2022 and notification of sale dated 29th April, 2025 are null, void and of no legal effect.

ix. A MANDATORY ORDER COMPELLING the 2nd Defendant, Diamond Trust Bank Kenya Limited, to execute and register a discharge of charge over the Plaintiffs' property known as House No. 9 Magnolia Hills situated on L.R No. 2951/2011 (Original No. 2951/122/2) within thirty (30) days of the date of the judgment or such period as the court may direct AND in default thereof, the Deputy Registrar of this Honourable Court be empowered and authorized to execute the discharge of charge and all necessary instruments to give effect to this order on behalf of the 2nd Defendant, and that the Land Registrar be directed to accept and act upon such executed instruments as if executed by the 2nd Defendant.

x. Costs of this suit.

xi. Any other or further relief that this Honourable Court may deem fit and just to grant.

xii. A DECLARATION that the 2nd Defendant cannot lawfully vary the terms of the Charge Instrument dated 30th March, 2018 or purport to secure further facilities thereunder unless and until the Plaintiffs have expressly consented and signed a memorandum of acceptance in accordance with Section 84 of the Land Act.

32. First and foremost, it is correct and true that the 1st and 3rd defendants/respondents were not parties in the former suit. However, does that mean that the suit is not *res judicata* by virtue of these two parties now present in this suit? I think not. In the case of **ET vs Attorney General & another (2012) eKLR**, it was held that:-

“The courts must always be vigilant to guard litigants evading the doctrine of res-judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit”. In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another

Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of doctrine of res judicata.....”.

33. A cursory look at the prayers sought in the amended plaint and the judgment delivered by the court on 22nd April, 2025 reveals that most of the issues in this suit in fact, prayers (i) to (vi) were dealt with in the former suit. In fact, one would wonder why the plaintiffs/applicants did not raise the issue of lack of consent or allegations of fraud in the high court. Having said that, and while the plaintiffs/applicants rightly submitted that the court can sever the said part and deal with issues that were not dealt with in the former suit, the purported issues said to have arisen post judgment are in my view a tactic to frustrate the 2nd defendant/respondent from enjoying the fruits of the judgment.

34. In the **Joseph Kimatu -vs- Jones Alaka Kimatu & another [2019] eKLR**, the court observed as follows:-

“15. In Gurbachau -vs- Yowani Ekori (1958) EA 450, the Court of Appeal of Eastern Africa, while considering the doctrine of res judicata, cited at page 453 a passage from the judgment of the Vice

Chancellor in Henderson -vs- Henderson (1), 67 ER 313 at page 319 wherein it was stated that:

“In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time.”

- 35.** The judgment delivered on 22nd April, 2025 emanated from a court of competent jurisdiction and which judgment was final. The plaintiffs/applicants cannot claim fraud or lack of consent as issues that were not dealt with in the former suit. Nothing stopped them from raising these issues before that court. The

plaintiffs/applicants cannot litigate in piecemeal and expect to find audience in this court.

36. This court finds that the instant suit is *res judicata* by virtue of the judgment delivered on 22nd April, 2025. Thus, the notice of motion dated 26th June, 2025 and the notice of motion dated 17th September, 2025 lack merit and they are both dismissed, the notice of preliminary objection dated 21st July, 2025 does not raise pure points of law and is hereby dismissed. The amended plaint dated 19th July, 2025 is hereby struck out with costs to the 2nd defendant/respondent.

It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 2ND DAY OF MARCH, 2026.**

**HON. MBOGO C.G.
JUDGE
02/03/2026.**

In the presence of:

Ms. Benson Agunga - Court assistant

Mr. Biko Angwenyi for the 2nd and 3rd Defendants/Respondents

Mr. Musonye holding brief for Mr. Kamenju for the

Plaintiffs/Applicants

No appearance for the 1st Defendant/Respondent

ORIGINAL