

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**MISC. APPLICATION NO. E460 OF 2025**

**IN THE MATTER OF THE ARBITRATION ACT, 1995**

**EMBAKASI JUA KALI HOUSING (*Suing through JAMES BILLY ANUNDA, MESHACK MAGATI, JOHN MUYA*)....**

**.....APPLICANT**

**VERSUS**

**EMBAKASI DEVELOPERS LIMITED.....1<sup>ST</sup>**

**RESPONDENT**

**BHANUMATIBEN RASIKHBAI PATEL.....2<sup>ND</sup>**

**RESPONDENT**

**RASIKHUMAR DAIHYABHAI PATEL.....3<sup>RD</sup>**

**RESPONDENT**

**RULING**

1. This ruling is the upshot of the Respondents' Notice of Preliminary Objection dated 2<sup>nd</sup> July 2025 seeking to strike out the Applicant's application dated 8<sup>th</sup> May 2025.
2. The Respondents contend that the application is incompetent on the grounds that:
  - i. The properties which are subject matter of the applicant's application are already pending before the Environment and Land Court in ELC No. 1002 of 2015 (OS), and before the Court of Appeal, where the*

*applicant is seeking status quo orders in Civil Application No. E326 of 2025.*

- ii. That the agreement that forms the subject of the Applicant's application has been determined in previous rulings delivered on 26<sup>th</sup> September 2024 and 6<sup>th</sup> May 2025.*
- iii. The court lacks jurisdiction to determine the application.*
- iv. Consequently, the application is sub judice, res judicata, and amounts to forum shopping and abuse of the court process.*

3. The Applicant opposes the Preliminary Objection. The Applicant submits that the application before this Court arises from a Share Purchase Agreement dated 11<sup>th</sup> July 2019, which contains an arbitration clause, and that the reliefs sought are interim measures pending arbitration under the Arbitration Act. According to the Applicant, the dispute before this Court concerns a commercial transaction involving the sale of shares, while the proceedings before the Environment and Land Court concern claims of adverse possession over land, and therefore the doctrines of *sub judice* and *res judicata* are inapplicable.

4. I have considered the submissions tendered by both advocates representing the disputing parties.

5. The law on preliminary objections is settled. In **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, Law JA stated:

***“So far as I am aware, a Preliminary Objection consist of a point of law which has been pleaded or which arises by clear implication out of the 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.”***

6. Sir Charles Newbold P. in the same case emphasized that:

***“A 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”***

7. In the present matter and in regard to the preliminary objection taken by the Defendants, the issue is whether it satisfies the established threshold. According to the Defendants, the present suit is *res judicata* as well as *sub judice*. These are legal concepts codified under Sections 6 and 7 of the Civil Procedure Act, respectively and if they are successfully invoked by a party they would operate as a bar to the current suit owing to the determination of a previous suit on the same subject matter and similar issues and/or

owing to the pendency of an earlier suit on the same subject matter and on the same facts.

8. **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”***

9. **Section 7**, deals with the aspect of *res judicata* and provides as follows:

***“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.”***

10. I am satisfied that the preliminary objection taken raises a pure point of law and therefore meets the legal threshold. I now proceed to determine it on merit.

11. The Respondents' objection is anchored on the pendency of *ELC No. 1002 of 2015 (OS)* and the existence of prior rulings delivered on 26<sup>th</sup> September 2024 and 6<sup>th</sup> May 2025, and contends that, for that reason, the Applicant's motion dated 8<sup>th</sup> May 2025 is *sub judice, res judicata*, an instance of forum shopping, and an abuse of the court process
12. The Applicant on the other hand, maintains that the motion before this Court is brought under Section 7 as read with Section 10 of the Arbitration Act and the Arbitration Rules, seeking interim measures of protection pending arbitral proceedings arising from a Share Purchase Agreement dated 11<sup>th</sup> July 2019, is not an attempt to re-litigate adverse possession or land title, therefore a different cause and subject falling within a commercial dispute.
13. Section 6 hereinabove stated, bars a court from proceeding where "*the matter in issue is also directly and substantially in issue*" in a previously instituted suit between the same parties (or parties litigating under the same title) and pending before a court of competent jurisdiction.
14. The Court in **Kenya National Commission on Human Rights v Attorney General, Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (Advisory Opinion Reference 1 of 2017) [2020] KESC 54 (KLR)** observed that:

***"The purpose of the sub judice rule is to stop filing of multiplicity of suits between the same***

***parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of Courts with competent jurisdiction issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before Court with jurisdiction the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit.”***

15. The concept of *sub judice* is one that bars a Court from trying a matter that is in one way or another before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence, if both Courts were to proceed with the matters on merit and determine them, without deference to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the relief or a conflict of them, which would be a recipe for confusion and chaos in the legal system. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one still pending would be *res judicata*.
16. In the present case, it is not disputed that the parties in the two proceedings are substantially similar. However, the material placed before the Court demonstrates that the

subject matter and causes of action are fundamentally different. The proceedings before the Environment and Land Court concern claims relating to ownership and occupation of land, particularly a claim of adverse possession, whereas the dispute before this Court arises from rights and obligations flowing from a commercial Share Purchase Agreement and seeks interim relief pending arbitration. The two disputes, therefore arise from different legal relationships and are governed by different statutory regimes.

17. The doctrine of *res judicata*, on the other hand, is anchored in Section 7 of the Civil Procedure Act. It embodies the principle of finality in litigation and bars a court from trying any suit or issue that has been directly and substantially in issue in a former suit between the same parties, or parties litigating under the same title, where such issue has been heard and finally determined by a court of competent jurisdiction.
18. The applicable principles were restated by the Supreme Court in **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)**, to the effect that for *res judicata* to apply there must be a former final decision on the merits by a competent court and identity of parties, subject matter, and cause of action.

19. The Respondents submit that the issues and prayers sought in the present application have already been substantially addressed in rulings delivered in *ELC No. 1002 of 2015 (OS)*, and that the Applicant is in effect seeking to obtain interlocutory relief that has previously been declined by the Environment and Land Court.
20. I have carefully considered the material placed before the Court. From the parties' own presentation, it is evident that ELC No. 1002 of 2015 (OS) is a dispute founded upon a claim of adverse possession over parcels described as Nairobi Block 263/4091-4607. The ruling annexed in the Respondents' bundle shows that the Environment and Land Court addressed issues relating to injunctive relief and contempt within the context of that land dispute. The ELC court did not, and indeed could not, determine the contractual rights and obligations arising from the Share Purchase Agreement, which forms the substratum of the intended arbitration.
21. The doctrine of *res judicata* must be applied with circumspection. While it serves the important public policy objective of ensuring finality in litigation, it should not be extended beyond its statutory elements, particularly where the subsequent proceedings are founded upon a different juridical basis and raise a distinct question for determination.
22. On the material presented, I am not satisfied that the Respondents have demonstrated that a competent court has

previously made a final determination on the precise issue now before this Court, namely whether interim measures should issue pending arbitration in aid of the arbitral process contemplated under the dispute resolution clause of the Share Purchase Agreement. The Applicant's position is that the dispute arising from the Share Purchase Agreement has not been litigated on the merits in any forum and is contractually destined for arbitration, with this Court's intervention limited to the supervisory role contemplated under the Arbitration Act.

23. Consequently, I am not persuaded that the doctrines of *sub judice* or *res judicata* have been established.
24. The Respondents further contend that this Court lacks jurisdiction and that the application amounts to forum shopping and abuse of the court process.
25. The Applicant, however, maintains that the dispute is a commercial one arising from a share purchase transaction and governed by the arbitration clause contained in the agreement. According to the Applicant, the Court's jurisdiction is invoked only to the extent permitted under the Arbitration Act, particularly for the grant of interim measures pending arbitration.
26. It is trite that jurisdiction flows from the Constitution and statute. Article 165 (3)(a) of the Constitution confers upon the High Court unlimited original jurisdiction in civil matters. Further, Section 7 of the Arbitration Act expressly

empowers the High Court to grant interim measures of protection before or during arbitral proceedings.

27. The present application seeks interim relief pending arbitration in respect of disputes arising under a commercial Share Purchase Agreement. Such relief falls squarely within the jurisdiction of the High Court and, more specifically, within the remit of its Commercial and Tax Division.

28. The Respondents' argument that the dispute falls exclusively within the jurisdiction of the Environment and Land Court is therefore misplaced. The mere existence of parallel disputes involving the same parties does not, without more, amount to an abuse of the court process. The Court must be satisfied that the subsequent proceedings are oppressive, vexatious, or intended to undermine the orderly administration of justice.

29. I accordingly find that this Court is not divested of jurisdiction merely because there exists a land dispute in another forum, and I decline to strike out the proceedings on generalized allegations of forum shopping and abuse.

30. In the result, I find that the Respondents' Preliminary Objection dated 2<sup>nd</sup> July 2025 is devoid of merit and is hereby dismissed. Costs shall be in the cause.

31. The application dated 8<sup>th</sup> May 2025 shall proceed to hearing on its merits.

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

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

**P.M. MULWA**  
**JUDGE**

**In the presence of:**

*Ms. Kibet h/b for Mr. Esuchi for Applicant*

*Mr. Mungai & Mr. Wanyoike for Respondents*

*Court Assistant: Carlos*