

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VOI**

**CIVIL SUIT NO. E006 OF 2025**

**LOHIM LIMITED.....**

**PLAINTIFF**

**=VERSUS=**

**TAVEVO WATER & SEWERAGE COMPANY LIMITED.....**

**DEFENDANT**

**JUDGMENT**

1. The Defendant filed a notice of preliminary objection (NOPO) dated 21<sup>st</sup> of January 2026. The Defendant argues in the NOPO that the applicant's motion dated 19th December 2025 is legally flawed and should be struck out.
2. First, the objection contends that the application is a misuse of Order 22 Rule 22 of the Civil Procedure Rules, which only applies to staying execution of decrees, yet there is no decree, judgment, or execution process before the court; instead, the dispute concerns encashment of a

performance guarantee, which is an independent contractual and banking matter.

3. Second, the court is already functus officio because it previously heard and dismissed the applicant's request for injunctive relief on the same issue, specifically ruling on the independence of the performance guarantee, so the new application improperly seeks to re-litigate settled matters.
4. Third, the application is premature and incompetent as it asks for interim relief to preserve a subject matter for arbitration that has not actually been commenced, although the contract was terminated in October 2025, the applicant has not initiated arbitral proceedings, issued any request for arbitration, proposed an arbitrator, or taken any concrete step toward arbitration, making the request speculative and an abuse of process.
5. Consequently, the respondent asks the court to strike out the applicant's motion with costs.
6. The Notice of Motion is dated 19th December 2025 filed by **LOHIM LIMITED**, the Plaintiff/Applicant, against **TAVEVO WATER & SEWERAGE CO. LTD**, the

Defendant/Respondent, in the High Court at Voi, Kenya (HCOMM No. E006 of 2025).

7. The application seeks to stay a ruling delivered by this court on 18th December 2025. The stay is requested pending the outcome of arbitration between the parties, as their contract contains an arbitration clause that has not yet been exhausted.
8. The applicant argues that without a stay, the Defendant may encash a performance guarantee issued under Contract No. TVO/TVT/T/CW/006/2023/2024, which would render the arbitration nugatory and cause the Plaintiff substantial and irreparable loss.
9. The motion is brought under Order 22 Rule 22 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, and other enabling laws.
10. It asks that the ruling be stayed, that the application be certified urgent with service dispensed with initially, and that the Defendant bear the costs.
11. The motion is supported by an affidavit sworn by Esther Panga Thongori, a director of the Plaintiff company, who reiterates that the Defendant would suffer no

prejudice while the Plaintiff faces severe damage if the guarantee is encashed.

12. The Defendant submitted that the Plaintiff/applicant's motion dated 19th December 2025 should be struck out because it is fatally defective and an abuse of process.

13. The Defendant raises the preliminary objection based on pure points of law, following the principles in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd**, meaning the objection can dispose of the application without examining evidence.

14. First, the Defendant contends that the applicant misapplied Order 22 Rule 22 of the Civil Procedure Rules, which governs stay of execution of decrees, because there is no decree or executable order arising from the court's previous ruling of 18th December 2025 that dismissed the applicant's motion. Without a decree, any application for stay is premature and the provision is inapplicable.

15. Second, the Defendant argues that the court is functus officio, having already heard and determined the applicant's earlier request for injunctive relief, dismissed it

on merit, and pronounced on the independence of the performance guarantee.

16. The applicant's new application for a stay is an impermissible attempt to relitigate settled issues, and the proper avenue would be an appeal.
17. Third, the Defendant submits that the requested stay seeks to preserve a speculative arbitration that has not been commenced: the applicant has not issued a request for arbitration, proposed an arbitrator, or taken any steps to initiate arbitration under the contract, despite contractual timelines having expired.
18. Relying on **Sinohydro Corporation Limited v GC Retail Limited & Equity Bank Limited**, the respondent notes that interim relief cannot issue for merely intended arbitration, and the performance guarantee's proceeds are unlikely to constitute arbitrable subject matter.
19. Thus, the application is premature, incompetent, and an abuse of court process, and the respondent prays for it to be struck out with costs.
20. The applicant, Lohim Limited, opposes the Defendant's preliminary objection dated 21st January 2026, arguing

that it does not meet the legal threshold for a proper preliminary objection as established in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*.

21. The applicant contends that a valid preliminary objection must raise a pure point of law capable of disposing of the matter without factual inquiry, whereas the respondent's objection improperly invites the court to investigate contested factual issues such as the nature of the guarantee, the status of dispute resolution mechanisms, and the effect of the court's earlier ruling.
22. The applicant further argues that even if Order 22 Rule 22 of the Civil Procedure Rules is not strictly applicable due to the absence of a decree, the court retains inherent jurisdiction under Sections 1A, 1B, and 3A of the Civil Procedure Act, as well as Article 159(2)(d) of the Constitution, to grant interim preservatory relief and prevent irreparable harm.
23. Citing **Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 Others**, the applicant warns against using preliminary objections as procedural swords to defeat substantive justice.

- 24.** On the issue of *functus officio*, the applicant submits that the doctrine only bars a court from re-opening and re-determining the merits of a concluded matter, and does not prevent the court from granting interim relief pending appeal or preserving the subject matter of litigation, as clarified in **Telkom Kenya Limited v John Ochanda**.
25. The applicant emphasizes that it is not seeking to reverse or vary the earlier ruling, but merely temporary preservation orders pending intended appellate and arbitral proceedings.
26. Concluding, the applicant urges the court to dismiss the preliminary objection with costs and allow its notice of motion as prayed.
27. The sole issue for determination is whether the Defendant's Notice of Preliminary Objection meets the legal threshold for such an objection as established in the locus classicus case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**.
28. The court must ascertain if the objections raised are pure points of law that can dispose of the Applicant's motion

dated 19th December 2025 without delving into the merits of the factual evidence.

29. The law on preliminary objections is now well-settled in our jurisdiction. A preliminary objection must be based on a pure point of law, pleaded on the assumption that all facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

30. As stated by Sir Charles Newbold, P. in the Mukisa Biscuit case, a preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

31. The first ground of the preliminary objection contends that the Applicant's motion is a misuse of Order 22 Rule 22 of the Civil Procedure Rules, which only applies to staying execution of decrees, yet there is no decree, judgment, or execution process before the court.

32. The Defendant/ Respondent argues that the dispute concerns the encashment of a performance guarantee, an independent contractual and banking matter. While this appears to be a valid legal argument regarding the

applicability of a specific procedural provision, it does not, standing alone, dispose of the motion entirely.

33. The Applicant has invoked not only Order 22 Rule 22 but also Section 3A of the Civil Procedure Act (the inherent power of the court to make orders necessary for the ends of justice) and "other enabling laws."

34. The Court of Appeal has consistently held that the inherent jurisdiction of the court, preserved under Section 3A, cannot be ousted by procedural technicalities.

35. Even if the specific provision of Order 22 Rule 22 is inapplicable due to the absence of a decree or executable order as defined in the Civil Procedure Rules, the court may still have the residual power to preserve the subject matter of litigation pending appeal or arbitration

36. The question of whether the inherent powers of the court can be invoked in the absence of a decree is not a pure point of law that closes the door to the Applicant; it is a legal argument that goes to the merit of the motion itself.

37. Therefore, this ground does not meet the Mukisa threshold for a preliminary objection because it does not conclusively dispose of the matter; it merely challenges

the legal sufficiency of one of the several provisions cited in the motion.

38. The court cannot strike out an entire application on a preliminary objection when the applicant has invoked the court's inherent jurisdiction, which does not require the existence of a decree.
39. The second ground raised by the Defendant is the doctrine of *functus officio*, arguing that the court is already *functus officio* because it previously heard and dismissed the applicant's request for injunctive relief on the same issue, specifically ruling on the independence of the performance guarantee.
40. The ruling delivered on 18th December 2025 dismissed a request for an injunction. The applicant is not asking this court to sit on appeal over its own ruling or to vary the orders of 18th December; they are seeking a stay of the effect of that ruling pending arbitral proceedings and an intended appeal.
41. The *functus officio* doctrine does not bar a court from granting interim relief to preserve the subject matter of litigation, which is what the applicant seeks here.

42. The ruling on the injunction did not extinguish the underlying dispute; it merely denied a particular type of relief.
43. Seeking a stay of that ruling to pursue arbitration or an appeal is a separate and distinct prayer that does not require the court to re-open the settled merits of the earlier ruling.
44. Determining whether the court has become functus officio would require examining the exact orders made on 18th December 2025 and distinguishing between a final determination and an interlocutory ruling.
45. This is a matter of judicial interpretation and discretion, not a pure point of law that can be determined on the assumption that the Defendant's facts are correct.
46. Consequently, this ground also fails to meet the threshold for a preliminary objection as it invites the exercise of judicial discretion.
47. The third and perhaps most substantial ground of the preliminary objection is that the application is premature and incompetent as it seeks interim relief to preserve a

subject matter for arbitration that has not actually been commenced.

48. The Defendant contends that the applicant has not initiated arbitral proceedings, issued any request for arbitration, proposed an arbitrator, or taken any concrete step toward arbitration since the contract was terminated in October 2025.

49. This ground is not a pure point of law capable of being determined in a vacuum because it relies heavily on contested factual issues regarding the status of the dispute resolution mechanisms between the parties.

50. The Applicant argues that the contract contains an arbitration clause that has not yet been exhausted, and the stay is sought pending the outcome of arbitration.

51. The question of whether arbitral proceedings have been sufficiently commenced or whether the parties are merely in the pre-arbitration phase requires an examination of the contract, correspondence between the parties, and statements regarding the intent to arbitrate.

52. The Defendant heavily relies on the case of **Sinohydro Corporation Limited v GC Retail Limited & Equity**

**Bank Limited [2016] eKLR** , but that authority is distinguishable on its facts.

53. In **Sinohydro**, the court was dealing with the merits of an application for injunction to restrain the calling of a performance bond, and the finding was that the applicant had failed to prove fraud.
54. The court did not lay down an absolute rule that interim relief can never issue for intended arbitration regardless of the proximity of the steps taken.
55. The principle from **Sinohydro** is that banks assume an irrevocable obligation to honour performance bonds save for instances of fraud, and that mere disputes between the parties to the contract do not concern the bank unless fraud is proved.
56. That is a substantive law principle on the merits of a performance guarantee claim, not a jurisdictional or procedural bar that can be raised as a preliminary objection to strike out an application for stay.
57. Whether the applicant has taken sufficient steps towards arbitration to warrant the protection of the court pending the actual commencement of arbitration is a discretionary

determination that requires the court to weigh the evidence, the terms of the contract, and the conduct of the parties. It is not a pure point of law that can dispose of the motion without inquiry.

58. Having found that none of the three grounds raised by the Defendant constitute pure points of law as defined in the Mukisa Biscuit case and its progeny, the court must uphold the Applicant's submissions.

59. The Respondent's Notice of Preliminary Objection dated 21st January 2026 is an abuse of the court process as it seeks to circumvent a full hearing of the Applicant's motion on its merits.

60. The objection attempts to dress up factual disputes and arguments on the exercise of judicial discretion as pure points of law, which is precisely the mischief that the Mukisa principle was intended to prevent.

61. The proper avenue for the Defendant is to file a replying affidavit and canvass the substantive issues raised in the Notice of Motion, including the applicability of Order 22 Rule 22, the doctrine of *functus officio*, and the prematurity of the application for arbitration.

62. These are all arguments that go to the merit of the motion and must be determined after a full hearing, not summarily at the preliminary stage.

63. Consequently, the final decision of this court is as follows:

**(i) The Defendant/Respondent's Notice of Preliminary Objection dated 21st January 2026 is hereby dismissed for lacking merit as it improperly invites the court to investigate contested factual issues and exercise judicial discretion.**

**(ii) The Applicant's Notice of Motion dated 19<sup>th</sup> December 2025 shall be heard on its merits**

64. Each party to bear its own costs of the NOPO.

**Dated, signed and delivered this 30<sup>th</sup> day, April 2026 in open court at Voi High Court.**

**ASENATH ONGERI**

**JUDGE**

**In the presence of:-**

**Court Assistant: Millicent**

.....**for Plaintiff**

.....**for Defendant**