

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. E452 OF 2025

SH TRADING DMCC 1ST

PLAINTIFF

CORD KABUS DUPREE 2ND

PLAINTIFF

=VERSUS=

AFRISWISS COMMODITIES TRADING LTD 1ST

DEFENDANT

LYNWOOD FARR 2ND

DEFENDANT

RULING

Introduction

1. Before this Court is the Plaintiffs' Notice of Motion dated **5th July 2025**, brought under **Order 39 Rule 1 of the Civil Procedure Rules**. The Plaintiffs seek temporary conservatory orders to preserve **USD 140,000** held in the 1st Defendant's bank account at **I&M Bank Kenya**, Eldama Park Branch, pending the hearing and determination of the main suit.

2. The application is supported by the affidavit sworn on 3rd July 2025 by **Cord Kabus Dupree**, the 2nd Plaintiff and CEO of the 1st Plaintiff, and is predicated on the grounds on the face of the application.
3. The Plaintiffs claim that by an agreement dated 9th May 2024, the parties entered into a contract for the sale of **25 Kg of gold bars** at a price of **USD 49,000 per Kg CIF Dubai**, and the 1st Plaintiff advanced **USD 118,000** to cover royalties, taxes, and handling fees. The Defendants issued a Corporate and Personal Guarantee on the same date to indemnify the Plaintiffs against losses.
4. The Plaintiffs contend that the Defendants, however, failed to deliver the gold or refund the advanced sums, despite acknowledging the debt in various communications, including WhatsApp messages and a letter dated **12th January 2025**.
5. The Plaintiffs express a reasonable apprehension that the Defendants may dissipate the funds to frustrate any eventual decree. Consequently, the Plaintiffs, by the present application, now seek conservatory orders to preserve funds held by the Defendants, apprehending dissipation.
6. In response to the application, the 2nd Defendant, **Lynwood Farr**, appearing in person, filed a Preliminary Objection dated **30th July 2025**, in which he contends that this Court lacks

jurisdiction because the transaction involves **WSH Holding AG**, since, in a prior correspondence, the original agreement with the 1st Plaintiff was cancelled and replaced by an arrangement with WSH Holding AG.

7. It was further the 2nd Defendant's contention that there is no privity of contract between the Defendants and the 2nd Plaintiff in his personal capacity. That, in any event, the contract required resolution through corporate channels.
8. The 2nd Defendant also averred in the Preliminary Objection that he had suffered a medical emergency following an accident and requires additional time to respond formally.
9. Upon directions of the Court, both the application and the preliminary objection were canvassed by way of written submissions. The Plaintiff filed two sets of submissions, one dated 29th July 2025 in support of its application, and the other dated 2nd August in opposition to the 2nd Defendant's Objection. No submissions were filed on behalf of the Defendants.

Analysis and Determination

10. Having considered the pleadings and submissions on record, the Court considers that the following issues arise for determination:

- i. Whether the Preliminary Objection is merited; and
- ii. Whether the Plaintiffs have satisfied the threshold for grant of preservatory orders pending trial.

Whether the Preliminary Objection is merited

11. The law on preliminary objections is settled. In **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, a preliminary objection was defined as a pure point of law which is argued on the assumption that all facts pleaded are correct.
12. This position has been reiterated by the Courts in several cases, including Oraro v Mbaja [2005] KEHC 3182 (KLR) and affirmed by the Supreme Court in **Hassan Ali Joho & Another v Suleiman Said Shabal & 2 Others [2014] eKLR** and subsequent decisions.
13. In the present case, the Plaintiffs' suit, as pleaded, is founded on an Agreement dated **9th May 2024** between **SH Trading DMCC** and **Afriswiss Commodities Trading Ltd**, together with alleged corporate and personal guarantees executed by the Defendants.
14. The contract between **WSH Holding AG** and the 1st Defendant, upon which the objection is anchored, is not

pleaded, nor is it admitted. Determining its existence, terms, and effect would require evidentiary interrogation, rendering the objection unsuitable for determination as a preliminary point.

15. Similarly, the question whether the 2nd Plaintiff has locus standi is intertwined with disputed facts regarding his role in the transaction and the guarantees relied upon. Such matters can only be resolved at trial.

16. The remaining grounds relating to correspondence and medical circumstances are factual and discretionary matters, and plainly fall outside the ambit of a preliminary objection.

17. Accordingly, the Preliminary Objection 30th July 2025 does not meet the threshold established in ***Mukisa Biscuit*** and is therefore for dismissal, with costs to the Plaintiffs.

Whether the Notice of Motion dated 5th July 2025 is merited

18. The Plaintiffs seek orders preserving at least **USD 140,000** held in the Defendants' bank account(s), pending hearing and determination of the suit.

19. The application is brought under **Order 39 of the Civil Procedure Rules**, which empowers the Court to order

preservation or attachment before judgment where necessary to prevent a decree from being rendered nugatory.

20. In **Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu & Others (1988) 2 KAR 126**, the Court held that such orders issue where there is clear proof that the defendant is about to dispose of or remove property with intent to obstruct or delay execution of a decree.

21. Here, the material before the Court demonstrates that substantial sums were remitted to the 1st Defendant pursuant to the agreement of 9th May 2024 and that the contractual objective was not achieved. The court also noted from the record that the defendants have acknowledged receipt of the funds and, at various times, acknowledged the obligation to refund.

22. In the preemies, there is therefore a reasonable apprehension, founded on conduct and correspondence, that the funds may be dissipated if not preserved.

23. While the Court does not at this stage determine liability, the Plaintiffs have established an arguable claim and a real risk that the substratum of the suit may be lost before judgment

24. Accordingly, the Court is satisfied that the Plaintiffs have met the threshold for grant of preservative orders pending determination of the suit.

25. In the result, the Court makes the following orders:

- i. The Notice of Preliminary Objection dated 30th July 2025 is dismissed with costs to the Plaintiffs.
- ii. The interim preservatory orders issued pursuant to the Notice of Motion dated 5th July 2025 are hereby confirmed.
- iii. Pending the hearing and determination of the suit, **at least USD 140,000** held in **Account No. 03803359231251**, Eldama Park Branch, I&M Bank Kenya, and/or any other bank accounts held by the Defendants, shall be preserved, and shall not be transferred, withdrawn, encumbered, or otherwise dealt with without leave of the Court.
- iv. Costs of the Notice of Motion shall be in the cause.

26. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI
THIS 17TH DAY OF APRIL 2026



HON. MR. JUSTICE MOSES ADO
Judge of the High Court

In the presence of: -

C/A - Moses

Mwangi..... for the Plaintiffs

N/A..... for the Defendants