



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Edith Wanjiku Gitao (Deceased) (Succession Cause E948 of 2020)  
[2025] KEHC 8821 (KLR) (Family) (4 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8821 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE E948 OF 2020  
CJ KENDAGOR, J  
JUNE 4, 2025**

**BETWEEN**

**MILTON KUYERS ..... 1<sup>ST</sup> PROTESTOR  
KENNETH NYAGA MWIGE ..... 2<sup>ND</sup> PROTESTOR  
RESTITUTION CHAMBERS KENYA LIMITED ..... 3<sup>RD</sup> PROTESTOR**

**AND**

**ANTHONY PHILIP GITAO ..... 1<sup>ST</sup> PETITIONER  
WINIFRED WANGARI KARANI ..... 2<sup>ND</sup> PETITIONER  
SOSPETER NATHAN GITAO ..... 3<sup>RD</sup> PETITIONER**

**RULING**

1. The Deceased, Edith Wanjiku Gitao, died on 16<sup>th</sup> May, 2017 and Letters of Administration intestate over her estate were granted to Anthony Philip Gitao, Winfred Wangari Karani, and Sospeter Nathan Gitao (the Petitioners herein) on 14<sup>th</sup> June 2021. The Petitioners filed Summons for Confirmation of grant dated 4<sup>th</sup> February, 2022 and an affidavit identifying the assets of the Deceased and their proposed mode of distribution. Milton Kuyers (the 1<sup>st</sup> Protestor herein) filed a Protest to the Confirmation. He claimed he was a creditor to the estate of the Deceased and sought for payment of his debt prior to the distribution of the estate of the Deceased.
2. The Petitioners raised a preliminary objection through a Notice of Preliminary Objection dated 10<sup>th</sup> February, 2025. They argued that the Court lacks jurisdiction to hear and determine the debt dispute raised by the 1<sup>st</sup> Protestor. They stated that the debt being claimed is based on a loan agreement dated 10<sup>th</sup> December, 2011. They claimed that one of the terms of the said loan agreement was that any dispute emanating from the agreement would be referred to Arbitration and that the Arbitrator's



decision would be final. Thus, they argued that this Court's jurisdiction has been ousted by the said Arbitration Clause.

3. Another protest was lodged by the 2<sup>nd</sup> and 3<sup>rd</sup> Protestors through an Affidavit of protest dated 18<sup>th</sup> April, 2024. They protested against the proposed confirmation of Grant of Letters of Administration made to the Petitioners on grounds of forgery and deceit. They later filed an application dated 28<sup>th</sup> February, 2025 in which they sought the following orders;
  1. Spent.
  2. The original Will dated 15<sup>th</sup> November, 2010 be subjected to forensic document examination by a Document Examiner at the Directorate of Criminal Investigations to investigate the signatures, handwriting, and prints to ascertain its authenticity.
  3. The original Will dated 21<sup>st</sup> June, 2000 be subjected to forensic document examination by a Document Examiner at the Directorate of Criminal Investigations to investigate the signatures, handwriting, and prints to ascertain its authenticity.
  4. That upon completion of the forensic examination of the wills, the investigative agency be allowed to file a report in this Honourable Court on its finding.
  5. That the Protestors be granted leave to file additional documents in Court.
  6. The costs of the forensic document examination be borne by the Estate.
4. The grounds of the Application are enumerated on the face of the Application. They argued that they are opposed to the proposed confirmation of Grant of Letters of Administration made to the Petitioners on grounds of forgery and deceit. They sought an order revoking and annulling the Grant of Letters of Administration intestate of the Estate of James Karani Gitao in Succession Cause No. 1422 of 2012 on grounds of false statements and deliberate concealment of material facts to the proper legal justification of the Grant.
5. They contended that the Last Will & Testament of James Karani Gitao, purportedly signed on 15<sup>th</sup> November, 2010 is a forgery. They also asserted that the true and authentic Last Will and Testament of James Karani Gitao is dated 21<sup>st</sup> June, 2000. They argued that in order to substantiate the allegations of forgery, this Honourable Court should authorize the engagement of a forensic document examiner to meticulously review and analyze both the wills dated 21<sup>st</sup> June 2000 and 15<sup>th</sup> November, 2010. They stated that this will help the Court in determining the question of validity of the purported Will.
6. They argued that the Deceased acquired some of the assets subject of this succession through the forged 2010 Will. They stated it was through the said forged Will that the Deceased was bequeathed Land Parcel L.R Number 27/65, 49% shareholding in Akiba Properties Ltd, and 49% shareholding in Central Impex Enterprises Ltd, among other properties. They argued that since the said assets were acquired through a forged Will, the gifts are defective and the Deceased does not have a legal title to them. In turn, they argued that her beneficiaries cannot acquire any rights to the said assets.
7. This ruling relates to the Notice of Preliminary Objection dated 10<sup>th</sup> February, 2025 and the Notice of Motion dated 28<sup>th</sup> February, 2025. The two applications were canvassed by way of written submissions. The parties filed their respective submissions and the same were carefully considered.

#### **Issues for Determination.**

8. Having considered the said applications, the affidavits filed by the parties, and their respective submissions, I find that there are two issues for determination:



- a. Whether the Preliminary Objection should be upheld.
- b. Whether the Court should issue orders subjecting the Wills dated 15<sup>th</sup> November 2010 and 21<sup>st</sup> June 2000 to forensic document examination.

### **Whether the Preliminary Objection should be upheld.**

9. The law on preliminary objections is well settled. The leading authority on this area of law is *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696, where the Court of Appeal held that a preliminary objection must be on a point of law. The Court held as follows;

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”

“... 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. Examples are an objection to the 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 dispute to arbitration.”

10. The 1<sup>st</sup> Protestor submitted that the preliminary objection should be dismissed. He argued that the Petitioners did not raise the preliminary objection within the time provided by law. He argued that the Petitioners ought to have raised and registered the objection in February, 2022, because that was the time when they initially responded to his Protest. The Court is being invited to determine whether the objection was raised within the period provided by law.

11. Section 6 of the *Arbitration Act* Cap 49 of the Laws of Kenya gives guidance on when a preliminary objection should be raised. It provided as follows;

“Stay of legal proceedings

(1)A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds — (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”

12. The Court of Appeal in *Lofty V Bedouin Enterprises Ltd – EALR (2005) 2 EA* interpreted the above provision as follows;

“We respectfully agree with these views, so that even if the conditions set out in paragraphs (a) and (b) of Section 6 (1) are satisfied the Court would still be entitled to reject an application for stay of proceedings and referral thereof to Arbitration, if the application to do so is not made at the time of entering an appearance or if no appearance is entered, at the time of filing any pleadings or at the time of taking any step in the proceedings.”



13. The court in *Abira v Maxcure Hospitals Limited (Civil Appeal E187 of 2023)* [2024] KEHC 2992 (KLR) (22 March 2024) (Judgment) interrogated the same Section and observed as follows;

“The rationale for the decision in the Lofty case is that an arbitration clause ought to be invoked when the Applicant enters appearance and not after the Applicant has taken any other step like filing of pleadings. The object of Section 6(1) is therefore to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings.”

14. The 1<sup>st</sup> Protestor filed the Affidavit of Protest on 21<sup>st</sup> May, 2021. The Petitioners responded by filing a Replying Affidavit (in opposition to the protest) dated 3<sup>rd</sup> February, 2022. The 1<sup>st</sup> Protestor filed a further affidavit dated 29<sup>th</sup> March, 2023. The Petitioners subsequently responded through a Supplementary Affidavit dated 22<sup>nd</sup> May, 2023. I have also looked at the court record and I have confirmed that the Petitioners appeared in court on several occasions between March, 2022 and 2024. I noted that all this while the Petitioners did not raise the issue of the Arbitration clause.
15. Clearly, the Petitioners did not raise the issue of the arbitration clause at the time they initially responded to the Protest. They neither raised the objection in their Replying Affidavit dated 3<sup>rd</sup> February, 2022 nor in their Supplementary affidavit dated 22<sup>nd</sup> May, 2023. They ought to have raised the preliminary objection when they were filing these initial pleadings. Instead, they only raised this issue more than three (3) years after the Protest was lodged.
16. Based on these facts and the authorities cited above, I find that the Petitioners have not satisfied the conditions set out in Section 6 (1) of the *Arbitration Act*. I find that the preliminary objection was not brought within the ambit of the law and at the right time and stage of the case. The same is hereby dismissed with costs to the 1<sup>st</sup> Protestor.

Whether the Court should issue orders subjecting the Wills dated 15<sup>th</sup> November 2010 and 21<sup>st</sup> June 2000 to forensic document examination

17. The 2<sup>nd</sup> and 3<sup>rd</sup> Protestors stated that the Certificate of Grant used to distribute the Estate of James Karani Gitao in Succession Cause No. 1422 of 2012 was obtained through fraud. They claimed that the Will dated 15<sup>th</sup> November, 2010 and used to obtain the grant was forged. They claimed they have new and compelling evidence to prove the forgery. They have produced another document dated 21<sup>st</sup> June, 2000 which they claim is the authentic Will. They have asked this Court to order that the two documents be subjected to forensic document examination to determine which of the two is authentic.
18. I have carefully read through the 2<sup>nd</sup> and 3<sup>rd</sup> Protestors' pleadings with a view to ascertaining the link between the Grant of Probate issued in the Estate of James Karani Gitao in Succession Cause No. 1422 of 2012 and the instant succession cause. The Protestors seem to argue that the Deceased acquired some of the assets (which are subject to this Succession Cause) through a fraudulent grant and therefore she does not have a legal right to those properties. In turn, they argued that her beneficiaries cannot acquire any rights to the said assets, and thus the grant should not be confirmed in their favour as outlined in the Summons for Confirmation.
19. This Court appreciates the import of the orders sought in the instant application. In my view, a determination on the authenticity of the two documents goes to the root of the legality of the Grant of Probate issued in the Estate of James Karani Gitao in Succession Cause No. 1422 of 2012. This Court is not privy to what transpired in Succession Cause No. 1422 of 2012. However, the Petitioners in their Replying affidavit dated 28<sup>th</sup> March, 2025 gave an overview of how the Succession Cause was finalized. They stated that the Court issued a Grant of Probate using the will dated 15<sup>th</sup> November, 2010.



20. In my analysis, for the Court to have issued the Grant of Probate using the will dated 15<sup>th</sup> November, 2010 it must have found it valid. Therefore, in my view, the Court in Succession Cause No. 1422 of 2012 made a factual finding on the question of the validity of the will dated 15<sup>th</sup> November, 2010. The Protestor has not filed an appeal or review to relook or reopen and dislodge that factual finding. If this Court subjects the document dated 15<sup>th</sup> November, 2010, to forensic examination, it will, in an actual sense be reopening that issue. I do not think this Court has the jurisdiction to do so in a separate file from the one in which the factual finding was made.
21. The 2<sup>nd</sup> and 3<sup>rd</sup> Protestors claimed that they have new and compelling evidence to prove that the document dated 15<sup>th</sup> November, 2010 was a forgery. In my view, this is not the proper Court to take the new evidence on this issue. This Court will only take the new evidence and reevaluate the issue if it is exercising appellate jurisdiction or review powers, which it is not in this case.
22. For the reasons outlined above, I find that this Court should not issue the prayers sought in the application dated 28<sup>th</sup> February, 2025. The 2<sup>nd</sup> and 3<sup>rd</sup> Protestors' application dated 28<sup>th</sup> February, 2025 is hereby dismissed with costs to the Petitioners.

**Disposition.**

23. The Petitioners' Notice of Preliminary Objection dated February 10, 2025 is hereby dismissed with costs to the 1<sup>st</sup> Protestor.
24. The 2<sup>nd</sup> and 3<sup>rd</sup> Protestors' Notice of Motion dated February 28, 2025 is hereby dismissed with costs to the Petitioners.
25. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 4<sup>TH</sup> DAY OF JUNE, 2025.**

.....

**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Beryl

Mr. Mugambi, Advocate for the Petitioners

Ms. Ndoigo, Advocate holding brief for Muia Advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> Protestors

No attendance for 1<sup>st</sup> Protestor

