



**In re Estate of Nazario Gitonga (Deceased) (Miscellaneous Succession Cause E007 of 2025) [2025] KEHC 9959 (KLR) (8 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9959 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
MISCELLANEOUS SUCCESSION CAUSE E007 OF 2025**

**SM GITHINJI, J**

**JULY 8, 2025**

**IN THE MATTER OF THE ESTATE OF NAZARIO GITONGA – DECEASED**

**BETWEEN**

**JAMES MUGENDI GITONGA ..... APPLICANT**

**AND**

**DAMARIS KAROKI ..... RESPONDENT**

**RULING**

1. For determination is the Respondent’s Preliminary Objection dated 20<sup>th</sup> May, 2025 on the grounds that;
  1. The reliefs sought – namely injunctive orders, provision of employment records, and accounting – are final and substantive and are not lawfully obtainable through an application for a limited grant ad colligenda bona.
  2. The Application offends Rule 36 of the Probate and Administration Rules, as it lacks a properly framed Petition and supporting affidavit justifying issuance of a temporary grant.
  3. The Application constitutes an abuse of the court process, is misconceived in law, and is calculated to undermine the rights of the lawful widow of the deceased.
2. The Applicant opposed the Preliminary Objection through grounds of opposition dated 24/6/2025 that;
  1. The PO herein bears an incurable defect and offends the mandatory provisions of section 67 & 68 of the law of succession and Articles 22, 48, 50, 159 & 160 of *the Constitution* of Kenya, 2010.



2. The PO is not a proper preliminary objection – because “it goes far and wide to canvass facts, to support its validity.”
  3. It is impossible to argue the PO without going into the evidence since prayer two (2) of the application dated 9<sup>th</sup> April 2025 seeks limited grant ad Colligenda bona to collect and preserve the estate of the deceased as envisaged under section 67 of the law of succession cap 160 laws of Kenya, whereof the respondent ought to file her objection within the stipulated period.
  4. The PO raised is a mere technicality which cannot be upheld at the expense of Substantive Justice, and Right to a Fair Hearing.
  5. The Application equals an attempt to undermine the Independence of the Judiciary and Judicial Authority.
  6. The Preliminary Objection is misconceived and bad in law as a Preliminary Objection cannot be raised where both facts and law have to be ascertained.
  7. The allegations made therein do not solve the dispute once and for all as there are factual issues involved on the proper distribution of the deceased funds to all beneficiaries.
  8. Section 38 of the *Law of Succession Act* entitles dependants to reasonable provision to which the making of a grant of representation under Rule 36 or 37 shall be without prejudice to the right of the representative so appointed or of any other person to apply under any other provision of these Rules for a grant of representation to the deceased. (2) Upon the making of a grant under any provision of these Rules other than Rules 36 and 37, any earlier grant made under either of those rules (in this subrule called the temporary grant) shall cease to have effect, but without prejudice to any act or other thing lawfully done thereunder, and the holder of the temporary grant shall forthwith surrender that temporary grant and account to the court for all the assets collected and shall be given credit for any payments properly made and expenses properly incurred by him as such holder.
  9. The defendant’s Preliminary Objection is frivolous, vexatious and an abuse of the process of the Court and the same ought to be dismissed.
  10. The PO lacks merit and deserves to be dismissed with Costs.
3. The Preliminary Objection was canvassed by way of written submissions which were duly filed by counsels.
  4. The Applicant through the firm of Kiogora Mugambi & Co. Advocates filed submissions dated 24/6/2025. Counsel argued that the Preliminary Objection is unmerited, untenable and incurably defective as it offends sections 67 and 68 of the *Law of Succession Act* and Articles 22, 48, 50, 159 and 160 of *the Constitution*. Counsel contended that the application is limited for purposes of preserving, managing and collection of properties of the estate as well as directing the director of pensions to withhold the deceased’s retirement benefits/gratuity funds pending determination of the beneficiaries, and cited Re Estate of Stanley Lumumba Barungu Thikanyi (Deceased) (Succession Cause E003 of 2020) [2023] KEHC 8809 (KLR) (Ruling).
  5. The Respondent through the firm of P. Kanyike & Co. Advocates filed submissions dated 30/5/2025. Counsel submitted that the orders sought by the Applicant far extend the narrow and preservative purpose of a limited grant ad Colligenda bona, and cited Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696, Re Estate of Njine Mwara (Deceased) [2020] KEELC 1333 (KL) and Re Estate of the Late Wanyugi Gicharu (Deceased) [2020] eKLR. Counsel asserted that pension



benefits do not constitute free property for purposes of administration and distribution under the Law of Succession Act, and cited *Benson Mutuma Muriungi v C.E.O Kenya Police Sacco & another* (2016) KEHC 7145 (KLR). Counsel relied on *Re Estate of Elijah Dolfus Nyaseme (Deceased)* [2013] KEHC 2461 (KLR) where the court emphasized that a limited grant ad colligenda bona does not confer authority to distribute, litigate over, or otherwise dispose of estate property.

### **Determination**

6. The sole issue for determination is whether the Preliminary Objection has been properly raised.
7. What constitutes a Preliminary Objection has been defined in the locus classicus case of *Mukisa Biscuit Company v Westend Distributor Limited* (1969) EA 696 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 argued 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.”
8. In his summons dated 9/4/2025, the Applicant seeks a Limited Grant Ad Colligenda Bona to collect and preserve the estate of the deceased. It is said that the Respondent has been misappropriating the retirement benefits/gratuity of the deceased, to the detriment of the other beneficiaries, and it is imperative that the estate is preserved from further wanton wastage. That is the application that the Respondent terms as offensive to the provisions of Rule 36 of the Probate and Administration Rules and misconceived. The Applicant is accused of seeking injunctive reliefs which are final in nature and thus incapable of being granted through an application for a limited Grant Ad Colligenda Bona.
9. I note that the Applicant moved the court for Grant Ad Colligenda Bona through Summons as opposed to a Petition supported by an Affidavit as mandated by the provisions of Rule 36 of the Probate and Administration Rules. I find that to be a mere technicality because the court is enjoined by the provisions of Article 159 (2) (d) of the Constitution to render substantive justice without undue regard to procedural technicalities. Suffice to state, the court will at all times prioritize substance over form.
10. Section 67 (1) of the Law of Succession Act provides that; “No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.”
11. In my respectful view, it would be premature, at this interlocutory stage, to decide whether the orders sought by the Applicant are final in nature and legally impermissible under a limited grant Ad Colligenda Bona, without potentially pre-empting the determination of substantive application dated 9/4/2025.
12. The upshot from the foregoing is that the Preliminary Objection dated 20/5/2025 was improperly raised and it is hereby dismissed.

**DATED AND DELIVERED AT MERU 8<sup>TH</sup> THIS JULY, 2025**

**S.M. GITHINJI**

**JUDGE**

Appearances:-

Ms. Kanyike for the Respondent.



Mr. Kiogora for the Applicant (absent).

