



**Gitau (Suing through the Administrator) & another v Muthoka; Njuguna Builders,  
Plumbing and Drainage Contractors Limited (Interested Party) (Civil Case E675 of 2024)  
[2025] KEHC 15539 (KLR) (Commercial and Tax) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15539 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E675 OF 2024  
F GIKONYO, J  
OCTOBER 30, 2025**

**BETWEEN**

**THE ESTATE OF DAMARIS WANGARI GITAU (SUING THROUGH THE  
ADMINISTRATOR) ..... 1<sup>ST</sup> APPLICANT**

**THE ESTATE OF JAMES GITAU NJUGUNA (SUING THROUGH THE  
ADMINISTRATOR) ..... 2<sup>ND</sup> APPLICANT**

**AND**

**CHRISTINE MWIKALI MUTHOKA ..... RESPONDENT**

**AND**

**NJUGUNA BUILDERS, PLUMBING AND DRAINAGE CONTRACTORS  
LIMITED ..... INTERESTED PARTY**

**RULING**

**PO not to be used to delay case**

1. This ruling determines the preliminary objection (PO) dated 4.12.2024 by the respondent and the interested party.
2. The applicant initiated these proceedings through the originating summons (OS) dated 7.11.2024, primarily under order 37 rule 1 of the Civil Procedure Rules, seeking a declaration that the power of Attorney dated 28.10.2018 registered on 28.11.2018 and the recognition and facilitation agreement dated 28.10.2018 are illegal, null and void ab initio.
3. The PO against the OS is on the following grounds: -



1. the court lacks jurisdiction to entertain, hear and determine the above-mentioned suit on account of the arbitration clause in the agreement dated 28.10.2018 between the parties.
  2. the OS is bad in law and fatally defective as the applicants are not legal entities or persons capable of suing or being sued.
  3. notwithstanding the foregoing defect, the suit is fatally defective and cannot be cured as in any event, the administrators of the estate of the 1<sup>st</sup> applicant have not taken out letters of administration ad litem to enable them to acquire the requisite locus standi to bring a suit against the respondent and interested party.
  4. the 2<sup>nd</sup> applicant is not capable of instituting a suit against the respondent and interested party, as the sole administrator of the said estate is deceased.
4. The PO was canvassed through written submissions.
5. The respondent and interested party filed written submissions dated 28.1.2025. They urged the court to strike out the OS as the court has no jurisdiction to hear, entertain or determine the dispute. They added that the suit is a non-starter having been brought by non-legal entities unknown in law. They relied on the following cases: -
1. Mukisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors (1969) EA 696
  2. Seven Seas Technologies Limited v Eric Chege [2014] eKLR
  3. Okiya Omtatah Okoiti & another v Kenya Power & Lighting Company Limited (KPLC) & 4 others [2020] eKLR
  4. Thiani v Kedong Ranch Limited, [2025] KEELC 21 (KLR)
6. The applicants filed written submissions dated 10.6.2025. The applicants submitted that the OS challenges the Power of Attorney and the Recovery Facilitation Agreement. The grounds are that its purported signatory, Damaris Gitau lacked the mental capacity to comprehend or execute them. Secondly, that the other purported signatory, Patrick Karanja Gitau, had no locus standi to act on behalf of the Interested Party, not being a director, shareholder, or officer of the company at any material time.
7. The applicants also submitted that the basis of the OS is founded on apprehension of fraud perpetrated against the interested party/ its owners through the misuse and falsification of legal instruments purportedly executed in dubious and patently irregular circumstances.
8. The applicants asserted that the issues raised through the OS warrant a full consideration by the court and not a summary dismissal through the PO.
9. The applicants relied on the following cases: -
1. Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] KECA 376 (KLR)
  2. The County Government of Kirinyaga v African Banking Corporation Limited [2020] eKLR
  3. In Re Estate of William Cherop Murgor (Deceased) (Probate & Administration 112 of 2022 [2023] KEHC 3977 KLR

### **Analysis and Determination**

10. The issue before the court is whether the PO will hold sway and dispose of the suit.



11. According to the case of Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Ltd [supra], Law JA, observed that: -

“...for a preliminary objection to succeed, the facts pleaded by the other party are assumed to be correct, it must be a matter of law which is capable of disposing off the suit, it must not be blurred by factual details calling for evidence and it must not call upon the court to exercise discretion.”

### **Jurisdiction/ Referral to arbitration**

12. The first ground of objection is that the court lacks jurisdiction to hear and determine the dispute due to an arbitration agreement dated the dated 28.10.2018.
13. The applicants countered the objection, arguing that the OS challenges the validity of the agreement of 28.10.2018. They also argued that, under section 6 of the *Arbitration Act*, a referral of a dispute to arbitration is sought through an application, not a PO. They further contended that the court ought to consider the validity of an arbitration agreement before referral of a dispute to arbitration.
14. In Niazonz (K) Limited v China Road & Bridge Corporation (Kenya) [supra], the Bosire JA, expressed that: -

“A finding as to whether or not there exists a dispute capable of being referred to arbitration cannot in my view be the subject matter of a preliminary objection. Likewise the finding one way or the other whether an arbitration agreement is inoperative or incapable of being performed also requires an examination of the evidence.”
15. If the respondent wishes the dispute to be referred to arbitration, should make the appropriate application which would allow the court to act in accordance with section 6 of the *Arbitration Act*. Rather than filing a PO based on existence of arbitration clause in their agreement. It is important hint that, upon referral of a dispute to arbitration under section 6 of the Arbitration, the proceeding remains undetermined casting doubt how that position of the law would interplay with the requirement that a PO should dispose of the suit. By dint of the procedure provided in section 6 of the *Arbitration Act*, I doubt a case would be made to supplant the procedure with a PO.
16. There is no contention that the OS seeks to challenge the validity of the agreement of 28.10.2015, containing an arbitration clause.
17. Guided by the above and case cited, I find that first ground is not merited. It therefore fails.

### **Capacity to sue**

18. The second and fourth grounds relate to the 1<sup>st</sup> and 2<sup>nd</sup> applicant estates' capacity to sue.
19. The second ground is that the OS is bad in law and fatally defective as the applicants are not legal entities or persons capable of suing or being sued.
20. The applicants asserted that they have complied with the requirement that the suit filed on behalf of a deceased's estate is by its legally recognized administrators.
21. The applicants pointed out that in the certificate of urgency that was filed alongside the OS, clearly captures that the applicant estates are suing through their administrators. They asserted that the omission of the statement in the OS and the supporting affidavit is an error of form, not substance.



22. A close study of the certificate of urgency shows that the suit was filed by the estates of Damaris Wangari Gitau and James Gitau Njuguna through the administrators.
23. The supporting affidavit to the OS is sworn by Tabitha Njeri Gitau on 7.11.2024. She exhibited a copy of letters of administration intestate issued to her on 21.06.2022.
24. From the foregoing, I find that the second ground lacks merit. In any case, such is an issue that would require probing of evidence completely removing it from the summary procedure of preliminary objection. The PO would still have failed on this account.

### **Sole administrator of the 2<sup>nd</sup> applicant estate is deceased**

25. The fourth ground is that the 2<sup>nd</sup> applicant is not capable of instituting a suit against the respondent and interested party, as the sole administrator of the said estate is deceased.
26. The applicants did not contest the fact that the sole administrator has passed away. They, however, asserted that Tabitha Njeri Gitau and her co-administrators applied for substitution of the administrator in Succession Cause No. 2965 of 2003 and letters of a grant of letters of administration issued in their favour.
27. The applicants submitted that the respondent filed for revocation of the grant which led to a temporary suspension of the grant on 14.4.2025. They alluded to the fact that the respondent's actions were aimed at obstructing the course of justice by preventing the issuance and finalization of the grant and to defeat the instant suit.
28. The court has already found that the applicant estates filed the suit through its administrators and that the administrator of the 1<sup>st</sup> applicant estate produced a copy of the letters of administration.
29. I do not think that in the circumstances of this case the fact that the sole administrator of the 2<sup>nd</sup> applicant estate is deceased is a ground for summary dismissal of the suit.
30. Nonetheless, the issues raised by the applicants under the 4<sup>th</sup> ground do require consideration of the evidence by the court and may be later canvassed substantively in the suit. Therefore, I say no more.
31. The applicants have indicated their willingness to produce the entire record of the pleadings and proceedings filed in Succession Cause No. 2965 of 2003 upon the court's direction.

### **Grant ad litem**

32. The third ground is that the administrators of the estate of the 1<sup>st</sup> applicant have not taken out letters of administration ad litem to enable them to acquire the requisite locus standi to bring a suit.
33. Grant ad litem is a temporary grant issued for a limited purpose and scope specified in the limited grant such as to file or defend a suit. It is issued to a person before the issuance of the grant of letters of administration. for a limited purpose such as to pursue a or defend a suit. The limited grant enables a person to file or defend a suit or preserve the estate before the full grant of administration is issued. But, a holder of a grant of representation-probate or letters of administration-does not require grant ad lien in order to file or defend suit or take any lawful action in respect of the estate.
34. In this case, the court has found that letters of administration intestate were issued to the administrators of the 1<sup>st</sup> applicant estate on 21.06.2022. This was before these proceedings were instituted through the OS dated 7.11.2024.
35. Therefore, ground 3 lacks merit.



### **Conclusion and Disposal**

36. As submitted by the applicants, the PO dated 4.12.2024 was a complete waste of court's precious time. It was an assembly of contested issues requiring probing of evidence. It is therefore, dismissed for want of merit with costs to the applicants.

**DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 30<sup>TH</sup> DAY OF OCTOBER, 2025.**

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**F. GIKONYO M**

**JUDGE**

In the presence of:

Okwach for Applicant

Mutua for Respondent & Interested Party

CA- Kinyua

