REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

COMM CASE NO. E626 OF 2025

BETWEEN

NJUGUNA BUILDERS PLUMBING AND DRAINAGE CONTRACTORS LIMITED.....1ST PLAINTIFF

CHRISTINE MWIKALI MUTHOKA.....2ND PLAINTIFF

AND

PETER NJENGA GITAU .....1ST DEFENDANT

REGISTRAR OF COMPANIES.....2ND DEFENDANT

RULING

Introduction and Background

1. This court is being called upon to determine two applications; The Plaintiffs' Notice of Motion dated 23rd September 2025 that principally seeks temporary injunction orders restraining the 1st Defendant ("Peter") from interfering with the legal mandate of the 2nd Plaintiff ("Christine") conferred upon her by the minutes and

resolutions of the 1st Plaintiff ("the Company") and the specific power of attorney both dated 28th October 2018, and restrain him against implementation of the purported illegal resolutions passed by himself as a sole director of the Company and from further passing any new resolutions pending the hearing and determination of the suit.

2. This application is supported by Christine's affidavits sworn on 23rd September 2025 and 27th October 2025 and it is opposed by the Defendants through Peter's replying affidavit sworn on 14th October 2025 and the Grounds of Opposition dated 13th October 2025. The other application is that of Peter filed through the Amended Notice of Motion dated 15th October 2025 seeking to strike out the suit for not disclosing a reasonable cause of action, being frivolous, vexatious and a gross abuse of the court process. He further seeks to have the firm of *Messrs. Mutua Nyongesa Muthoka Advocates* disqualified from acting for the Company in these proceedings and that its name struck out from these proceedings. It is supported by grounds on its face and Peter's affidavit sworn on 24th October 2025 and opposed by the Plaintiffs through Christine's replying affidavit sworn on 22nd October 2025.

3. The court directed that the two applications be canvassed by way of written submissions which are on now on record and which together with the pleadings I have considered and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

4. Having gone through the parties' submissions, I find that the following issues arise for the court's determination:

    1) *Whether the Defendants' application is fatally defective for not being supported by an affidavit*
    2) *Whether the Defendant's application is fatally defective for being amended without leave of the court*
    3) *Whether the Defendant's application seeks substantive final orders that can only granted upon the hearing of the main suit*

4) *Whether the firm of Messrs. Mutua Nyongesa Muthoka Advocates should be disqualified from acting for the Company in these proceedings*

5) *Whether the name of the Company should be struck out of these proceedings.*

6) *Whether the Plaintiffs' application and the entire suit should be struck out or otherwise dismissed in limine for disclosing no reasonable cause of action, being frivolous and vexatious and a gross constituting a gross abuse of the Court process*

7) *Whether the injunctive orders sought in the Plaintiffs' application should be granted.*

Lack of an affidavit in the Defendants' application

5. The Plaintiffs have submitted that under **Order 51 Rule 4** of the ***Civil Procedure Rules,*** applications grounded on facts must have an affidavit but that the Defendants' application lacks this, meaning there is no evidence before the court. I note that the Defendants' application is grounded on inter alia **Order 2 Rule 15(1) (a)** of the ***Rules*** and that **Order 2 Rule 15(2)** provides that "*No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made".*

This means that the court is only limited to taking into account grounds set out in body of the application and no regard is given to affidavits or documents filed together with the application. In short and I agree with Peter, an application founded on the ground that a pleading discloses no reasonable cause of action must not be supported by an affidavit and any application under **Order 2 Rule 15(1)(a)** that is accompanied by an affidavit is defective and liable to be struck out (see **Ringsview Apartments Limited v KCB Bank Kenya Limited & 4 others [2024] KEHC 4025 (KLR)**] and **Devshibhai & Sons Limited v Muhugu Limited & another [2025] KEHC 15566 (KLR)].**

6. It is therefore my finding that Peter's application is not defective for not being accompanied by an affidavit as the same is grounded on inter alia **Order 2 Rule 15(1)(a)** of the ***Rules*** that expressly prohibits evidence by way of affidavits. This

ground by the Plaintiffs fails.

Amendment of the application

7. The Plaintiffs have also taken issue with Peter amending his application submitting that **Order 51** of the ***Rules*** does not permit the amendment of an application, as it is not a primary pleading like

a Plaint. In support of this position, they rely on the court's (Prof. Sifuna J.,) holding in **Jaribu Credit Traders Limited v Fidelity Bank Limited & another [2024] KEHC 3412 (KLR)** where he held that an application under the ***Rules*** is not amendable. I respectfully disagree with my learned brother on this position and I will explain why.

8. Whereas I agree with him that the principal **Order** on Applications is **Order 51** and that amendments is not mentioned therein, I note that he conceded that if at all an application is a pleading, *"…then it is a pleading sui generis. In fact, a pleading within a pleading*". The ***Rules*** provide for the amendment of pleadings under **Order 8 Rules 1-5** where **Rule 5** provides that *"For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either on its own motion or on the application of any party order any documents to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just.*" In any event, even if I am to say that a Notice of Motion is not a pleading, I associate myself with the finding of Maina J., in **Cheruiyot v Ethics & Anti-Corruption Commission; Makhanu (Interested Party) [2022] KEHC 13059 (KLR)** that "*a Notice of Motion application*

would be capable of amendment under Section 100 of the Civil Procedure Act and Order 8 Rule 5 of the Civil Procedure Rules which provides for a general rule to amend proceedings as opposed to Order 8(1) Rule 1 and which provides for amendment to pleadings. Indeed, in the case of ***Fredrick Mwangi Nyaga v Garam Investments and another [2013] eKLR*** *Havelock J was categorical that applications are not pleadings as defined by Section 2 of the Civil Procedure Rules and hence applications for amendments of a Notice of Motion should be made under Section 100 of the Civil Procedure Act and Order 8 Rule 5 of the Civil Procedure Rules…….. The principal consideration in an application for leave to amend ought not to be based on the form but on whether the amendment sought is necessary for the determination of the real issues in controversy in a suit and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs. Indeed, the courts have in the recent past allowed oral applications for amendment of applications and pleadings, bearing in mind the overarching responsibility to administer justice without undue regard to procedural technicalities.*

9. It should not be lost that as a general practice, applications for amendment of pleadings are permitted unless it is shown that such application is "*mala fides*" or that it will prejudice the other party. Courts generally exercise their discretion in favour of allowing an amendment where the application has been made in good faith. Further where an amendment is found to be necessary in order to properly bring out the real issue in controversy it will be allowed (see **MNM v MNJ (Miscellaneous Application 183 of 2015) [2024] KEHC 7772 (KLR)**

10. Having looked at the amended application, I find that no prejudice has been occasioned on the part of the Plaintiffs as the same was amended almost immediately after the initial application was filed and the Plaintiffs have had the opportunity to respond to the same. The substratum of the application remains the same as Peter still challenge the participation of the firm of *Messrs. Mutua Nyongesa Muthoka Advocates* and the Company in these proceedings and questions whether a cause of action against him exists. I find that amendments were made in good faith and were not done to steal a march on the Plaintiffs in any way. This ground by the Plaintiffs also fails.

Application seeking substantive final orders

11. The Plaintiffs have submitted that Peter is seeking substantive final orders that should only be determined after a full trial, not during an interlocutory application. As stated, Peter seeks to strike out the Plaintiffs' suit against them, have the firm of *Messrs. Mutua Nyongesa Muthoka Advocates* disqualified from acting for the Company and strike out the Company's name from these proceedings. I find that these are preliminary issues that have rightly been raised early enough at this point and I find that the orders being sought are not final in nature. Applications to strike out a suit for disclosing no reasonable cause of action, being frivolous/vexatious, or an abuse of court process are by definition designed to be determined before a full trial hence the reason why the court can entertain such an application *"At any stage of the proceedings."* as set out in **Order 2 Rule 15(1)**. They address a fundamental defect in the pleadings that, if proven, makes a trial unnecessary.

12. I also find that a prayer seeking disqualification of a firm of advocates can be properly raised as an interlocutory issue as deciding on questions of conflict of interest, breach of confidentiality, or professional ethics this early ensures the trial, if it all it is to proceed, is conducted fairly and preserves the integrity of

the proceedings. Allowing a potentially conflicted advocate to continue through the course of the proceedings and trial could cause irreversible prejudice and complicate the entire process.

13. Further, a prayer for the striking out of a party that is based on a clear point of law apparent from the face of the pleadings would be suitable for an interlocutory decision and this court can determine, as a preliminary point, whether the Company is a proper party to the suit at all. It is therefore my overall finding that the application by Peter and the prayers sought therein are timely and appropriate at this interlocutory stage.

Disqualification of the firm of Messrs. Mutua Nyongesa Muthoka Advocates

14. Peter has averred and submitted that there is sufficient material on record to demonstrate that the said firm is conflicted and cannot be reasonably expected to act in an objective way and in the best interest of the Company. To start with, they have filed this suit without the authority of the Company in furtherance of their partner's, that is Christine, alleged 30% stake in the arbitral award in favor of the Company and in defence of her alleged agency and mandate under the contested and illegal power of attorney and

champertous agreement dated 28th October, 2018. That the said firm drew and witnessed the contested and illegal power of attorney and champertous agreement which are subject of this litigation and will be required to attend court as witnesses to testify on the circumstance in which the said documents were drawn and executed at night on 28th October, 2018.

15. Peter also submits that the said firm and Christine have failed to disclose and provide information relating to the status of the arbitration proceedings and the recovery of the debt owed to the Company despite requests by Peter including a written request from the new advocates for the Company. Further, that the firm has previously filed an application for revocation of grant and contempt of court in the name of the Company and Christine without any authorization of the Company and that the firm and Christine have acquired an interest in the subject matter of the dispute between the Company and the Government of Kenya and cannot be reasonably expected to act in the best interest of the Company. They allege that Christine has constituted herself a creditor of the company through the contested and illegal arrangement to finance the arbitration proceedings.

16. In response, the Plaintiffs aver that firm's authority derives from board resolutions dated 28th October 2018, where the Company resolved to appoint them and terminate the previous advocates. That Christine's authority as the Company's principal agent is based on a Specific Power of Attorney executed by the Company through its directors on 28th October 2018 and the Power of Attorney was duly registered under the ***Registration of Documents Act*** making it legally enforceable and that it was granted by the Company itself, not by the directors in their personal capacity. Therefore, the death of the donor directors does not terminate it.

17. They deny any conflict of interest asserting that the firm was properly retained by Company resolution and that preparing documents for a client such as the Company is part of their legitimate role. The Plaintiffs claim that Peter is an absentee director who was always drunk and disorderly and failed to attend the critical 2018 meeting, and showed no interest in the Company's arbitration for years. That his sudden interest is attributed to greedy third parties exploiting him now that a lucrative arbitration award has been secured claiming that his actions are opportunistic. They aver that Peter violated a court order in a Succession Cause by

illegally allotting himself shares and changing the Company's CR12 in May 2025, which changes are fraudulent and void.

18. Christine states that she financed the stalled arbitration, paid deposits and experts, and was instrumental in securing the award and that her 30% interest is a legitimate facilitation fee for these efforts. They state that Peter's logic is contradictory in that if her authority is invalid, then the entire arbitration award is illegal, null and void, which would destroy the asset he now seeks to control.

19. Whether and under what circumstances an advocate should be barred from representing a party was discussed in detail by the Court of Appeal in **Delphis Bank Ltd v Channan Singh Chatthe & 6 others [2005] KECA 297 (KLR)** as follows:

> *The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness. There is otherwise*

no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this Court is whether real mischief or real prejudice will in all human probability result. The authorities we allude to are King Woolen Mills Ltd & Anor vs. M/S Kaplan & Stratton [1993] LLR 2170 (CAK), (C.A 55/93) and Uhuru Highway Development Ltd & others vs Central Bank of Kenya Ltd & others (2), [2002] 2 EA 654.

20. In the earlier case of **King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd & another v M/s Kaplan & Straton Advocates [1993] KECA 57 (KLR)** the Court of Appeal distilled the applicable principles as follows:

    1. *An advocate should not accept instructions to act for two or more clients where there is a conflict of interest between those clients*
    2. *A retainer creates contractual relationship between the advocate and the client irrespective of whether two or more clients are involved.*

3. *An advocate cannot act in a manner prejudicial to his client or disclose any confidential information to anyone without the client's consent.*
4. *An advocate who has acted for two common clients cannot later act for either party in litigation when a dispute arises between the common clients. Concerning the original transaction or the subject matter for which he acted for the clients as a common advocate (RE: A firm of solicitors [1992] 1 ALL ER 353 followed; Rukeson versus Ellis Munday and clerk [1912] KL831 distinguished).*
5. *Acting for two or more common clients did not remove the necessity of confidentiality between the advocate and each of the clients separately.*
6. *Conclusion of the transaction for which the retainer was made did not extinguish the duties and obligations of the common advocate*
7. *Delay in objecting, to an advocates continued representation of a certain client does not defeat or change the duty or obligations of the common advocate imposed on him under the retainer.*

8. *There must be real anticipated prejudice and mischief if the advocate were to be permitted to continue acting for one of the parties.*

21. In addition to the principles I have set out above, an advocate, is bound by the professional regulations issued from time to time by the Law Society of Kenya in the form of the ***Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct*** ("the ***Code***") which defines 'conflict of interest' in **Rule 6 para. 93** as follows:

> *A conflicting interest is an interest which gives rise to substantial risk that the Advocate's representation of the client will be materially and adversely affected by the Advocate's own interests or by the Advocate's duties to another current client, former client or a third person.*

22. **Rule 6 para. 96** of the ***Code*** enumerates instances in which a conflict of interest might arise. They include:

> *(a) Where the interests of one client are directly adverse to those of another client being represented by the Advocate or the firm, for instance in situations where the representation involves the assertion of a claim by one client against another client;*

(b) Where the nature or scope of representation of one client will be materially limited by the Advocate's responsibilities to another client, a former client, a third person or by the personal interests of the Advocate.

(c) Where in the course of representing a client there is a risk of using, wittingly or unwittingly, information obtained from a current or former client to the disadvantage of that other client or former client.

23. Ultimately, the courts have emphasized that each case must turn on its own facts in order to establish whether real mischief and prejudice would result (see **Wardy Communications Limited & 2 others v Chase Bank (Kenya) Limited (in Liquidation); Weya (Interested Party) [2023] KEHC 991 (KLR)**]

24. Going through the principles set out above and the factual matrix presented in the pleadings, I find that there is a strong, compelling case for disqualifying the firm of *Messrs. Mutua Nyongesa Muthoka & Co. Advocates* from representing the Company for a number of reasons. One, the firm is in a position of direct conflict of interest in that they are simultaneously representing the Company allegedly to protect the arbitral award proceeds to the Company and also Christine who is also a partner in the firm and who personally claims

a 30% beneficial interest in the same arbitral award. The firm's duty to zealously advocate for the Company's 100% interest in the award is materially and directly limited by its duty and inherent loyalty to its partner, Christine, who claims a 30% slice of it. The firm cannot pursue the Company's full recovery without potentially harming its partner's claimed 30% stake, and vice-versa. This is the essence of a conflict.

25. Two, Christine is not just an advocate, she is a party to the suit with a direct financial interest which violates the fundamental rule against an advocate having a proprietary interest in the subject matter of litigation as set out in **Rule 76** of the ***Code,*** rightly cited by Peter. Three, there is a likelihood that Christine could be a compellable witness in this case as the validity of her Power of Attorney and the 2018 agreement have been impeached and Peter has stated that she needs to testify regarding the meeting, the donors' capacity, and her financing of the arbitration. An advocate cannot be both a witness and an advocate in the same matter, as it compromises their objectivity and the integrity of the evidence.

26. Four, it is uncontested that the firm drafted and witnessed the disputed 2018 Power of Attorney and the Recovery and Facilitation

Agreement between the Company and Christine. On one side were the donors, that is the late directors and on the other side was the donee/beneficiary, the firm's own partner, Christine. As the parties' common advocate, the firm owed fiduciary duties including confidentiality and undivided loyalty to both sides of that 2018 transaction. The current litigation is a direct dispute about that very transaction and as per ***King Woolen Mills(supra)*** principle no. 4, the firm is now prohibited from acting for either party, that is Christine or the Company in this litigation concerning that subject matter.

27. Five, in acting for the Company now, the firm is in possession of all confidential information from the 2018 transaction. Given that Christine, as the beneficiary is a partner, there is an inevitable and substantial risk that the firm's representation of the Company will be influenced by confidential information from the 2018 transaction that benefits their partner. The duty of confidentiality to the deceased donors is also implicated. Lastly, I am of the view that real mischief and prejudice is highly probable because as stated, the Company's interest in retaining 100% of its award is being advocated by a firm whose partner claims 30% of it. The Company cannot trust that its advocate's strategy is purely for its benefit, not

for securing its partner's contingent fee. There is also prejudice to the administration of justice as the court cannot have confidence in the fairness of the process when the advocate for a party is also a major beneficiary and a potential witness. This creates an appearance of impropriety that undermines the integrity of the proceedings.

28. In summary, I find that the circumstances here present a textbook example of a disabling conflict of interest that offends multiple core principles of legal ethics and procedural fairness. The firm’s representation of the Company is materially and adversely affected by the personal financial interest of its partner in the outcome, its historical role as a common advocate in the disputed transaction and the dual role of its partner as advocate, plaintiff, and witness. The right of the Company to an advocate of its choice is outweighed by the overriding need to protect the integrity of the judicial process, ensure undivided loyalty, and prevent probable prejudice. Peter’s prayer to disqualify the firm is well founded and I allow the same. The Company is at liberty to secure independent legal representation, free from these debilitating conflicts, before the substantive issues in the case can be justly determined.

Striking out the Company from these proceedings

29. Peter has urged the court to strike out the Company from these proceedings for the reasons that the Company has not authorized the filing of these proceedings, the document relied on by the firm is not a recent document but one purportedly dated 28th October 2018 and on the face of it does not authorize the said firm to institute these proceedings in the name of the Company. That the joinder of the Company as a co-plaintiff is improper as there is no common cause of action between the Company and Christine, the Company has not complained about the changes effected in its register and the records at the Registrar and that the complaint is by Christine who claims that the changes are being used to interfere with her contested and illegal mandate under the fabricated illegal power of attorney and the contested champertous Recovery and Facilitation Agreement.

30. He avers that Christine who has executed the verifying affidavit is not an officer of the Company and does not appear in the records kept by the Registrar as confirmed in the letter dated 31st July 2025 from the Registrar. That the execution of the verifying affidavit by a

stranger to the Company violates the clear provisions of **Order 4 Rule 4** of the ***Rules*** and that a suit filed in the name of a company without its authorization through a resolution is bad in law and incompetent.

31. It has always been the position of this court that lack of a verifying affidavit or board resolution authorizing the filing of a suit is not fatal and can be cured by providing the relevant resolution as there is no requirement in the ***Rules*** that an authority to file suit must be filed or that it cannot be produced at a subsequent date (see **First Community Bank Limited v Cecil G. Miller t/a Miller & Company Advocates [2021] KEHC 284 (KLR)**, **Leo Investments Limited v Trident Insurance Company Limited [2014] KEHC 8664 (KLR)** and **Primedia Limited (Superbrands East Africa) v Topscorebrands Global Limited [2024] KEHC 15608 (KLR)**]. What is important is that the court is satisfied that there is authority to file the suit.

32. Christine deponed that the Company had authority to sue as evidenced by the minutes and Board Resolutions of the Company dated 28th October 2018. However, going through the said resolution, I am in agreement with Peter that from the face of it, there is no express resolution authorizing the filing of this suit. From

Peter's deposition, he annexed a CR12 search dated 15th July 2025 and a confirmation letter from the Registrar dated 31st July 2025 confirming that Peter is the sole surviving director and shareholder of the Company and that Christine does not appear anywhere in the records of the Company. It therefore follows that as it stands, Christine is a stranger to the Company and that there is no valid resolution authorizing the filing of this suit. Even if I am to allow Christine to seek a resolution or authority from the Company, she is unlikely to get it as Peter, as the sole director, represents the Company's will, and he denies any grievance. In my view, the Company has been improperly joined as a vehicle for Christine's personal suit. The real dispute is between Christine and Peter over control of the arbitration award. The Company appears to be a nominal party whose name is being used to lend legitimacy to a personal claim and it is therefore only fair and practical that the name of the Company be struck out from these proceedings.

Cause of action

33. As stated, Peter averred that the Plaintiffs have no cause of action against him and thus the suit ought to be struck out. As I have found, the Company's presence as a plaintiff is unauthorized. Peter, the sole surviving director, denies the Power of Attorney and

Board Resolution. The Registrar's records do not recognize Christine. Therefore, the Company lacks the capacity to sue through Christine in this manner and by joining herself with the Company, Christine's personal claim for interference with her mandate becomes dependent on the Company's valid participation. As the Company has been struck out, her claim for an injunction restraining Peter from interfering with her mandate as an alleged agent, collapses, because the principal, the Company is no longer a party asserting that authority. For these reasons, I find that Christine has no cause of action against the Defendants in this suit as the reliefs she seeks for herself are parasitic on the Company's status as a plaintiff, which is unsustainable.

Injunction orders sought

34. Having found that the Company is to be struck out from these proceedings and that Christine cannot sustain a cause of action against the Defendants and that the suit is to be struck out, it follows that the prayers for injunction cannot be considered.

Conclusion and Disposition

35. In the foregoing, the Plaintiffs' suit is hereby struck out with costs being borne by Christine, the 2nd Plaintiff and to be paid to Peter, the 1st Defendant.

DATED SIGNED AND DELIVERED virtually at NAIROBI this 19TH DAY OF FEBRUARY 2026

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Makokha for the Plaintiff/Applicant.
2. N/A for the Respondent.
3. Amos- Court Assistant