REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

FAMILY DIVISION

MISCELLANEOUS SUCCESSION CAUSE NO. E151 OF 2025

IN THE MATTER OF THE ESTATE OF SANJIVAN SUNILKUMAR MUKHERJEE (DECEASED)

ENKO AFRICA PRIVATE EQUITY FUND..... APPLICANT

VERSUS

CHAITANYA SANJIVAN MUKHERJEE .....1ST RESPONDENT

NIVEDITA SHARMA .....2ND RESPONDENT

RULING

1. The Court is presently seized of two fiercely contested, interrelated Applications that sit at the complex intersection of corporate regulatory compliance, constitutional rights of access to justice, and the procedural administration of deceased estates. The dispute pits a foreign institutional creditor against the priority beneficiaries of an unrepresented estate, raising profound questions about the jurisdictional capacity of foreign entities to access Kenyan courts and the mechanisms available to prevent the administrative paralysis of an estate.

2. The first application is a Summons for an Order to Bring in a Will or to Attend for Examination, dated 21 May 2025, brought pursuant to Rules 24 and 49 of

the Probate and Administration Rules. The Applicant seeks a mandatory herein seeks the following orders:

(i) This Honourable Court be pleased to issue an order directing the Respondents herein to bring in the last Will or any testamentary instrument that was executed by SANJIVAN SUNILKUMAR MUKHERJEE (DECEASED);

(ii) In the alternative, this Honourable Court be pleased to summon the Respondents to attend court on such a date as the Court may direct to be examined and produce documents with respect to:
(a) The efforts taken to trace the Deceased's last Will, if any;
(b) Evidence in support of the efforts taken to trace the Deceased's last Will; and
(c) Efforts taken to administer the Estate of the Deceased; and

(iii) The Respondents do file the petition for grant with respect to the estate of the Deceased within thirty (30) days from the date of the order herein.

iv) Costs of the Summons be borne by the Estate of the Deceased herein.

3. The second Application is Notice of Motion dated 30 June 2025 filed by the 2nd Respondent seeks the following orders:

(i) Spent
(ii) This Application be heard in priority to the Applicant's Summons dated 21 May 2025;
(iii) The Summons dated 21 May 2025 be struck out;
(iv) That the costs of these proceedings be paid by the Applicant

4. The Application is vehemently supported by the 1st Respondent. It is grounded upon sections 18, 19, and 975 of the Companies Act. The central thesis of the Application is that the Applicant, being a foreign body corporate incorporated in Mauritius, is not registered to carry on business in Kenya as strictly mandated by section 974 of the Companies Act. Consequently, the Respondents submit that the Applicant is legally non-existent within this jurisdiction and lacks the requisite *locus standi* to institute, sustain, or maintain these proceedings.

5. Given the mutually destructive nature of the legal and factual issues raised—where the success of the 30 June 2025 Preliminary Objection would automatically render the 21 May 2025 Summons a nullity—the Court issued directions that both applications be canvassed simultaneously by way of written submissions. I have carefully perused the pleadings, the Affidavits on record, the bundles of authorities, and the rival submissions.

Brief Background

6. The Applicant is a Private Equity (PE) Fund incorporated as a limited liability company in Mauritius. The underlying commercial relationship between the parties stems from a Share Purchase and Subscription Agreement (SPSA) executed on 17/18 September 2018. Through this SPSA, the Applicant invested in a Kenyan entity known as Software Technologies Limited (STL) by purchasing existing shares and subscribing to new ones. The SPSA was executed between the Applicant, the Deceased, the 1st Respondent, and the late Jyoti Mukherjee (the Deceased's wife and the Respondents' mother), among other parties.

7. The commercial relationship subsequently deteriorated. The Applicant alleges that prior to the registration of the shares, it emerged that the shares in STL had been substantially overvalued, constituting a material breach of

the warranties contained within Clause 8 and Schedule C of the SPSA. The Applicant issued a Claims Notice dated 22 April 2020, initially claiming USD 3,433,615, subject to adjustment. Evidence has been adduced, in the form of a Non-Binding Term Sheet dated 9 April 2021, indicating that the Deceased and the Respondents offered to settle the Applicant's claims by paying a sum of USD 3,890,010.41 in instalments, which the Applicant frames as an admission of indebtedness. The Applicant has since initiated arbitration proceedings before the London Court of International Arbitration (LCIA Case No. 256482) to formally recover this debt.

8. The succession dynamics that complicate this commercial dispute unfolded sequentially. Jyoti Mukherjee passed away on 24 January 2020. She left a Will dated 24 April 2003, bequeathing her estate to the Deceased, who subsequently filed a Petition for Probate and was issued a Certificate of Confirmation of Grant on 9 March 2021 (Milimani Succession Cause No. E389 of 2020). Consequently, the Deceased inherited the assets and liabilities of Jyoti Mukherjee's estate.

9. The Deceased subsequently passed away in December 2024. Following his demise, the estate has remained unrepresented. On 30 April 2025, the Applicant's Advocates issued a statutory notice of intention to file a citation for a Grant of Probate, demanding that the Respondents, as priority beneficiaries, initiate succession proceedings. On 13 May 2025, the 1st Respondent replied, acknowledging the existence of a Will but stating it could not be traced. The Applicant, perceiving this as a stratagem to delay the LCIA arbitration and dissipate the estate, filed the instant Summons on 21 May 2025

Analysis & Determination

10. The Court must *in limine* determine the 2nd Respondent's Notice of Motion dated 30 June 2025. This Application operates as a Preliminary Objection to the jurisdiction of the Court and the capacity of the Applicant. It is an established tenet of law that jurisdiction is everything; without it, a Court must down its tools, as any subsequent proceedings would be a nullity.

11. The 2nd Respondent, supported by the 1st Respondent, relies heavily on a strict, literal interpretation of section 974 of the Companies Act, 2015. Section 974(1) provides that a foreign company shall not carry on business in Kenya unless it is registered under the Act. Subsection (6) elaborates on the definition of "carrying on business," including offering debentures or being a guarantor.

12. The Respondents argue that the Applicant, a Mauritian entity, has executed a commercial agreement (the SPSA) in Nairobi, acquired shares in a Kenyan company, and is now seeking judicial enforcement of commercial entitlements. They submit that this constitutes carrying on business and, because the Applicant has failed to produce a certificate of registration as a foreign company, it has committed an offence and is statutorily barred from maintaining any legal proceedings.

13. To buttress this position, the Respondents rely on the decisions in ***Root Capital Incorporated v Tekangu Farmers Co-operative Society Ltd & Another KEHC 3735 (KLR)*** and ***Stichting Rabo Bank Foundation v Ava Chem Limited & Another KEHC 9931 (KLR)***. In ***Root Capital*****,** the Court dismissed a suit by an unregistered US-based lender seeking to enforce its security upon default by a Kenyan borrower. In ***Stichting Rabo***, the Court struck out a suit by an unregistered Netherlands-based foundation, holding that a foreign entity must be registered under Section 974 to acquire *locus standi*; failing which, it is a ‘non-existent person’ incapable of maintaining a

cause of action. The Respondents urge the Court to apply this rigid standard and strike out the Applicant's Summons with costs.

14. The Applicant counters this narrative on 3 primary fronts. First, it asserts a fundamental distinction between ‘making an investment’ and ‘carrying on business’. Through its Investment Director, Tineyi Kuipa, the Applicant deposes that it is a Private Equity Fund that took a passive equity stake in STL. It argues that business entails active involvement in management and daily operations, whereas investment entails availing capital with an expectation of returns. It submits that conflating the two would unfairly lock out foreign capital providers who have no physical presence requiring regulatory oversight in Kenya.

15. Second, the Applicant cites the Capital Markets (Foreign Investors) Regulations, 2002, which explicitly allow foreign body corporates to acquire shares in local companies without mandating prior registration as a condition precedent.

16. Third, and most critically, the Applicant relies on the constitutional right of access to justice and recent jurisprudential shifts, notably ***Bruton Gold Trading LLC v Anne Atieno Amadi & 6 others HCCC No. E211 of 2023*****.** The Applicant submits that under Article 260 of the Constitution, a "person" includes a juristic entity, and that foreign incorporation confers legal personality globally, irrespective of registration under the Companies Act.

17. The question of whether an unregistered foreign company possesses the *locus standi* to institute legal proceedings in Kenya has been a subject of intense judicial debate, resulting in conflicting precedents over the last decade. The restrictive posture adopted in ***Root Capital*** **(2016)** and revived in ***Stichting Rabo*** **(2024)** conflated regulatory non-compliance with the total extinguishment of legal personality. This conflation created an untenable commercial environment. Allowing local debtors to use section 974 as a

shield against legitimate contractual obligations struck at the heart of Kenya's reputation as a welcoming destination for cross-border investment.

18. However, a trilogy of highly persuasive, if not binding, decisions from 2025 and 2026 has fundamentally altered the landscape: ***Bruton Gold Trading LLC v Anne Atieno Amadi***, ***Truvalu Enterprises 1 B.V v Muli & 2 others [2025] KEHC 17202*****,** and ***U.B Gold Inc v Ondaba t/a Ondaba & Partners [2026] KEHC 1208***.

19. To clarify the current state of the law, I have mapped the evolution of this jurisprudence. In ***Roots Capital vs Tekangu Farmers [2016],*** the judicial posture on foreign company *locus standi* was highly restrictive. The Court held that an unregistered foreign lender lacked capacity to sue to enforce security over Kenyan assets. Similarly, in ***Stichting Rabo Bank -vs- Ava Chem [2024],*** the judicial posture was restrictive. The Court held that a foreign company must be registered under section 974 to acquire *locus standi*.

20. In 2025, the judicial posture on foreign company *locus standi* changed to expansive and evidentiary. The Court held that legal existence is established upon incorporation in the home country and that section 974 prohibits carrying on business, not the right to sue. The same position prevailed in ***Truvalu Enterprises -vs- Muli [2025]*** and ***UB Gold Inc -vs- Ondaba [2026].*** In the latter case, the Court held that access to justice is a constitutional imperative. Carrying on business is a factual issue unsuitable for a preliminary objection.

21. Applying the principles crystallized in ***Bruton Gold*****,** ***Truvalu*****,** and ***U.B. Gold Inc*****,** this Court makes the following determinations. First, a foreign company's legal existence is not born of Kenyan statute; it is derived from the *lex incorporationis*—the law of the jurisdiction where it was incorporated. The Applicant in this matter has provided unrefuted evidence that it is a legally

incorporated entity in Mauritius. Incorporation confers universal legal personality. The failure to register a branch under section 974 of the Companies Act does not automatically dissolve the entity into a "non-existent person," as erroneously held in ***Stichting Rabo*****.** To hold otherwise violates established tenets of private international law and corporate theory stemming back to ***Salomon v Salomon & Co Ltd*****.**

22. Second, the right to institute legal proceedings must be evaluated through the prism of The Constitution. Article 48 guarantees the right of access to justice for all persons, and Article 50 guarantees the right to a fair hearing. As the Court in ***Bruton Gold*** correctly noted, barring an unregistered foreign company from seeking judicial remedies erects an unconstitutional barrier to justice. A party's standing is determined by its sufficiency of interest in the subject matter. In the present case, the Applicant has a highly documented debt claim against the Deceased's estate, rendering its interest indisputable.

23. Third, the prohibition in section 974 is specific: it prohibits carrying on business without registration. It does not expressly state that unregistered companies cannot access the courts. As established in ***Truvalu Enterprises***, filing a claim to enforce contractual rights or recover a debt arising from a past commercial transaction does not, in itself, constitute carrying on continuous business operations. The Applicant’s distinction between a passive investment and active carrying on business is sound. The deployment of equity capital via an SPSA by a foreign Private Equity fund into a Kenyan target company, without establishing a physical office or operational footprint, aligns with cross-border capital investment rather than the continuous trading envisioned by section 974.

24. Fourth, and critically, the 2nd Respondent brings this challenge by way of a Preliminary Objection. It is a foundational principle of civil procedure, firmly

entrenched since ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd EA 696*****,** that a preliminary objection must consist of a pure point of law, argued on the assumption that all the facts pleaded by the opposite party are correct. It cannot be raised if facts need to be ascertained or if the court is required to exercise judicial discretion.

25. As explicitly held in ***Truvalu Enterprises*** and ***U.B. Gold Inc***, the question of whether a foreign company is carrying on business in Kenya to the extent that it triggers the mandatory registration requirements of section 974 is a deeply factual inquiry. It requires the adduction of evidence regarding the scope, continuity, and nature of the entity's physical and commercial operations in Kenya. It is wholly unsuitable for determination *in limine* via a preliminary objection.

26. Therefore, it is the finding of this Court that the Applicant possesses the requisite legal personality and constitutional *locus standi* to institute these succession proceedings. Section 974 of the Companies Act cannot be deployed as a procedural sword to execute a pre-emptive strike against a legitimate creditor seeking to preserve its interests in a deceased debtor's estate. The 2nd Respondent's Notice of Motion Application dated 30 June 2025 lacks legal merit and is accordingly dismissed.

Summons dated 21 May 2025

27. Having dispensed with the jurisdictional challenge, the Court turns to the substantive merits of the Applicant's Summons dated 21 May 2025. The Applicant seeks an order under Rule 24 of the Probate and Administration Rules compelling the Respondents to bring the Deceased's last Will into the High Court registry, or alternatively, to attend Court for examination on interrogatories regarding the same, and to formally file a petition for a Grant of representation within 30 days.

28. The Applicant's core grievance is that the Respondents' failure to commence succession proceedings, more than six months after the Deceased's demise, is a calculated strategy of attrition. The Applicant avers that by leaving the estate unrepresented, the Respondents are frustrating the ongoing LCIA arbitration and preventing the recovery of the USD 3.89 million debt. The Applicant is profoundly sceptical of the Respondents' claims that the Will cannot be traced, pointing out contradictions between the 1st and 2nd Respondents' Affidavits. The Applicant argues that a father would not disclose the existence of a Will to his children without disclosing its location, and asserts that the letter produced by the 1st Respondent to evidence his search efforts was a mere afterthought procured after the institution of the present suit.

29. The Respondents, conversely, swear that they are acting in utmost good faith but are victims of circumstance. The 1st Respondent deposes that the Deceased was a highly mobile international entrepreneur with business networks spanning Kenya, India, Dubai, and Taiwan. He asserts that while the Deceased did execute a Will in 2019, its current physical location is genuinely unknown. To corroborate this, the 1st Respondent produced a letter dated 7 July 2025 from Hon. Mr. Justice Emmanuel Washe. The letter confirms that the Honourable Judge, while in private practice, drafted and executed a Will for the Deceased in 2019, but upon his elevation to the bench, handed the original back to the Deceased for safe custody due to the winding up of his firm. The 1st Respondent also produced flight itineraries to Mumbai, India, evidencing his recent physical attempts to trace the document.

30. The Respondents argue that an Application under Rule 24 is discretionary and not automatic. They submit that Rule 24 requires the Applicant to lay a factual foundation demonstrating that the person cited actually has the document in their custody or control, or is deliberately suppressing it.

Because the Applicant has failed to meet this threshold, they contend that compelling them to file a petition or attend for examination is premature and procedurally improper.

31. Rule 24(1) of the Probate and Administration Rules empowers the Court to make an order requiring any person to bring into the registry any testamentary instrument which is shown to be in the possession or under the control of such other person. The evidentiary burden rests squarely upon the Applicant. The evidence presented demonstrates, without a doubt, that a Will was indeed executed in 2019. However, the existence of a document does not equate to the Respondents' possession of it. The 1st Respondent's Affidavit, supported by the letter from Justice Washe and the flight itineraries to Mumbai, establishes that a *bona fide* search has been undertaken. The Applicant's scepticism, while commercially understandable given the adversarial context and the magnitude of the exposed debt, does not cure the evidentiary deficit required by Rule 24.

32. There is no concrete evidence showing that the Respondents are deliberately suppressing a document physically within their grasp. The law does not operate in the realm of the impossible; equity and justice cannot issue orders in vain, nor compel a party to produce that which they do not possess. An order directing the physical production of an untraceable Will would be an empty threat. Furthermore, summoning the Respondents for an examination on interrogatories at this juncture would merely result in a reiteration of the facts already deposed in their Affidavits, expending scarce judicial time without yielding the missing document.

33. Accordingly, the specific prayer for an order directing the Respondents to physically bring the Will into Court must fail, as the mandatory threshold of possession or control under Rule 24(1) has not been met.

34. While the Court accepts that the Will is currently untraceable, this factual reality cannot be utilized as an indefinite moratorium on the administration of the Deceased's estate. The Deceased passed away in December 2024. The estate remains unrepresented. This creates a legal vacuum that directly prejudices third-party rights, specifically the Applicant's ongoing LCIA arbitration and its debt recovery efforts.

35. The Law of Succession Act is unambiguous regarding the protection of creditors and the prevention of estate dissipation. Section 45(1) of the Act strictly prohibits any person from taking possession, disposing of, or otherwise intermeddling with the free property of a deceased person without an express grant of representation. As established in cases such as ***Benson Mutuma Muriungi vs. CEO Kenya Police Sacco & Another [2016] eKLR***, intermeddling is defined broadly to include any act or acts which will dissipate, diminish, or put at risk the free property of the deceased. An indefinite delay by priority beneficiaries in seeking a grant of representation exposes the estate to such risks of diminution, operating to the severe prejudice of creditors.

36. The Respondents' assertion that compelling them to file a petition is premature because the Will is missing reflects a profound misunderstanding of probate procedure. The loss, misplacement, or destruction of an original Will does not freeze the machinery of succession. The Fifth Schedule of the Law of Succession Act, alongside established probate practice, provides clear mechanisms for such eventualities. For instance, if an authenticated copy of the Will exists, probate can be granted limited until the original is found. If no copy exists, but the contents can be proved by competent witnesses, mechanisms exist for proof of oral or lost wills.

37. More pertinently, if a Will simply cannot be found and is presumed revoked or lost, the estate does not remain in perpetual suspension; it must be administered under the rules of intestate succession. Alternatively, the law

provides for a limited Grant *ad colligenda bona defuncti* under section 67 of the Act. This limited Grant can be issued urgently to protect the estate and provide a legal representative capable of suing or being sued on behalf of the estate pending the issuance of a full Grant. The refusal of the priority beneficiaries to utilize any of these statutory mechanisms operates to the immense detriment of the Applicant.

38. The Applicant is an admitted creditor of the Deceased. Section 66 of the Act explicitly recognizes creditors as persons entitled to apply for a grant of letters of administration when those with prior rights fail or refuse to do so. The precise procedure for a creditor to compel action is through the issuance of a citation under Rule 22 of the Probate and Administration Rules, calling upon the priority beneficiaries to accept or refuse a Grant.

39. As articulated in ***In re Estate of Dominic Mukui Kimatta (Deceased) [2022] KEHC 10119 (KLR)*****,** a creditor who is owed substantial sums by the deceased has the unquestionable *locus standi* to cite the deceased's family to take out letters of administration. If the cited parties fail to act, the creditor is perfectly within their rights to petition the Court to be appointed as the administrator, primarily to realize the debt owed.

40. The Respondents cannot approbate and reprobate. They cannot simultaneously claim priority over the estate by virtue of consanguinity while abdicating the corresponding legal duty to administer it, thereby leaving creditors in a state of legal paralysis. The administration of justice dictates that the estate must have a personal representative to answer to the claims pending before the LCIA and to prevent the dissipation of assets.

41. Therefore, invoking the inherent powers of the Court and the provisions for applications not otherwise provided for under Rule 49 of the Probate and Administration Rules, the Court finds merit in the Applicant's alternative prayer. Rule 49 provides the Court with the necessary elasticity to craft

remedies that suppress the mischief of administrative delay and advance the remedy of swift estate distribution.

42. The Respondents must be compelled to initiate the formal administration of the estate. If they are unable to produce the original Will, they must petition for a Grant of Letters of Administration Intestate, or at the very least, a limited Grant *ad litem* or *ad colligenda bona*, to ensure the estate is legally represented and capable of defending the ongoing arbitration. Should they fail to execute this duty within a specified timeframe, the Applicant, as a creditor, shall be at liberty to petition for a Grant of administration to protect its commercial interests.

43. In light of the exhaustive analysis above, the Court issues the following orders:

    (i) The Notice of Motion Application dated 30 June 2025 is hereby dismissed.

    (ii) The Summons dated 21 May 2025 succeeds in part. An order is hereby issued compelling the Respondents to jointly or severally file a Petition for a Grant of Representation in respect of the Estate of Sanjivan Sunilkumar Mukherjee (Deceased) within thirty (30) days from the date of this Ruling.

    (iii) In default of compliance with Order No. (ii) above, the Applicant, in its capacity as a creditor to the Estate, shall be at liberty to file a Petition for Grant of Letters of Administration to facilitate the legal representation of the Estate and the adjudication of its claims.

    (iv) The costs of both the Application dated 30 June 2025 and the Summons dated 21 May 2025 shall be borne by the Respondents, jointly and severally.

DATED AND DELIVERED AT NAIROBI THIS 17 DAY OF APRIL 2026

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For the Applicant: Kibe

For the 1st Respondent: Ms Kimanthi

For the 2nd Respondent: Edwin Otieno h/b Mr. Anzala

Court Assistant: Lucy Mwangi