



**Kagwima (On his Own Behalf and on Behalf of the Estate of Nancy Wangui Njuguna) v Gitau & 2 others (Miscellaneous Civil Application E641 of 2023) [2025] KEHC 7532 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7532 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
MISCELLANEOUS CIVIL APPLICATION E641 OF 2023**

**SN MUTUKU, J**

**MAY 28, 2025**

**BETWEEN**

**JAMES NJUGUNA KAGWIMA (ON HIS OWN BEHALF AND ON BEHALF OF THE ESTATE OF NANCY WANGUI NJUGUNA) ..... APPLICANT**

**AND**

**NANCY NJERI GITAU ..... 1<sup>ST</sup> RESPONDENT**

**JAMES MUTA GITAHI ..... 2<sup>ND</sup> RESPONDENT**

**MATHEW K. ITONGA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Notice Of Motion**

1. The Applicant has filed a Notice of Motion application dated 3<sup>rd</sup> August 2023 basing it on various provisions of the law as shown on the face of the application. He is seeking the following reliefs:
  - i. Spent.
  - ii. That Mr. Kamara Patterson M. be appointed as sole arbitrator to hear and determine the dispute between the Applicant and the Respondent in respect to the Memorandum of Understanding dated 18<sup>th</sup> May 2002 between James Muta Gitahi, Nancy Njeri and Nancy Wangui Njuguna.
  - iii. That in the alternative, the Court do appoint an arbitrator or direct the Chairman of the Chartered Institute of Arbitrators Kenya to appoint an Arbitrator to hear and determine the dispute between the Applicant and the Respondent in respect to the Memorandum of Understanding dated 18<sup>th</sup> May 2002 between James Muta Gitahi, Nancy Njeri and Nancy Wangui Njuguna.



- iv. That the 3<sup>rd</sup> Respondent be ordered to surrender the Original Title for NRB/Block 144/1382, two Transfer Forms, Sale Agreement, Valuation Form, Payment receipt for Valuation to the Applicants.
- v. That the costs of this application be provided for.
2. The grounds supporting the application are found on the face of it and in the Supporting Affidavit sworn by James Njuguna Kagwima on 3<sup>rd</sup> August 2023.
3. I have read the application and the grounds in support. I have understood the Applicant to be saying that he and his late wife Nancy Wangui Njuguna entered into a business venture to run a school with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on Plot No. 489. They signed a Memorandum of Understanding (MOU) dated 18<sup>th</sup> May 2002 for purposes of running the school. This did not run smoothly as anticipated, leading to filing of Nairobi CMCC No. 13299 of 2002 by the late Nancy Wangui Njuguna seeking to restrain the 1<sup>st</sup> Respondent from running the school.
4. The 1<sup>st</sup> Respondent filed a Notice of Motion application in that case seeking stay of the proceedings of the main suit. The 1<sup>st</sup> Respondent invoked a clause in the MOU that any dispute arising from the MOU shall be referred to arbitration by a mutually agreed arbitrator. The record shows that the parties engaged each other through various court proceedings in the lower court, the High Court and the Court of Appeal, culminating in the appointment of the 3<sup>rd</sup> Respondent as an arbitrator.
5. The Applicant claims that following the appointment of the 3<sup>rd</sup> Respondent as the arbitrator, the Applicants surrendered original title for NRB/144/1382, two signed Transfer Forms, Sale Agreement, Valuation Form and payment receipt for the valuation. However, the 3<sup>rd</sup> Respondent has not acted on the matter since February 2006 as a result of which the Applicants filed High Court Misc. Civil Application No. 618 of 2019 Nancy Wangui Njuguna & another v Nancy Njeri Gitau & 2 others seeking to terminate the tenure of the 3<sup>rd</sup> Respondent as an arbitrator. That application was allowed and the parties were allowed to appoint a new arbitrator in accordance with section 12 of the *Arbitration Act*.
6. Following the demise of Nancy Wangui Njuguna, the Applicant applied and was granted letters of administration over her estate. He sought to enforce the court order to appoint an arbitrator. Several correspondences were exchanged as evidenced through the attachments on the Supporting Affidavit of the Applicant without success in acquiring an arbitrator, leading to this application.
7. The Applicant claims that unless the orders sought herein are granted, he stands to be prejudiced.

#### **1<sup>st</sup> & 2<sup>nd</sup> Respondents' Replying Affidavits**

8. Nancy Njeri Gitau, the 1<sup>st</sup> Respondent, filed a Replying Affidavit sworn on the 14<sup>th</sup> November 2023 in opposition to the application. She has termed the application as mischievous, untrue, incompetent, bad in law and an abuse of the court process. The 1<sup>st</sup> Respondent has deposed that the Applicants have filed parallel cases/proceedings on the same cause of action as shown on the court record; that the applicant has, in total disregard and/or contempt of various orders/directions of the court, deliberately frustrated the arbitration process by refusing to submit to the arbitration under the 3<sup>rd</sup> Respondent to whom the matter had been referred by consent order dated 7<sup>th</sup> December 2006 and that the said consent order had not been reviewed or set aside.
9. It is further deposed that the Court (Angawa, J) in HCC 766 of 2006 directed the parties to proceed with and conclude the arbitration process within 150 days which was not complied with as the



Applicants sought to appeal those orders in Civil Appeal No. 98 of 2009, which appeal was dismissed and the orders of Justice Ang'awa upheld; that in HCC Misc. Application No. 618 of 2019, the Court (Justice J. Kamau) gave directions to the parties regarding the arbitration but the Applicants ignored those directions; that the Applicants sought to set aside the orders of the Court in a Notice of Motion dated 26th April 2013 which is still pending and to irregularly and unilaterally appoint various arbitrators contrary to directions of the court.

10. The 1<sup>st</sup> Respondent has deposed that it is untrue that it is the Respondents that have been frustrating the arbitration process; that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are unaware of the documents alleged to have been given to the 3<sup>rd</sup> Respondent.
11. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are asking this court to dismiss the application dated 3<sup>rd</sup> August 2023 for being an abuse of the court process.

### **Preliminary Objection**

12. In addition to the Replying Affidavit, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Notice of Preliminary Objection (PO) dated 14<sup>th</sup> November 2023 claiming that the Applicant has breached section 6 and 7 of the Civil Procedure Act and Order 3, Rule 4 of the Civil Procedure Rules. They have based the PO on the grounds that the subject matter and issues sought to be determined between the parties are the same issues in CMCC No. 13299 of 2004, HCCC No. 766 of 2006, HCC Misc. Application No. 618 of 2019 and Civil Appeal No 98 of 2009 in which clear directions/orders were given but which directions/orders were not complied with by the Applicant.
13. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have enumerated the cases and applications already filed by the Applicant and his late wife and termed the instant proceedings as an abuse of the court process.
14. They have stated further that the cause of action relates to an MOU dated 8<sup>th</sup> May 2002 executed between the 1<sup>st</sup> Respondent and Nancy Wangui Njuguna (deceased) which the 1<sup>st</sup> Respondent is alleged to have breached in or about 1<sup>st</sup> December 2004 leading to filing of Milimani CMCC No. 13299 of 2004. It is stated that the proceedings herein are barred by section 4(a) of the Limitations of Actions Act.
15. It is further stated that the Applicant was merely a witness and not a party to the MOU and therefore he lacks locus standi to file any proceedings in respect thereof on his own behalf and that the claim by Nancy Wangui Njuguna who died on 7<sup>th</sup> October 2020 in all the suits listed here has since abated for failure of the administrator to apply for substitution as required under Order 24 Rules 3 and 7 of the Civil Procedure Rules.

### **3<sup>rd</sup> Respondent's Replying Affidavit**

16. The 3<sup>rd</sup> Respondent filed his Replying Affidavit sworn on the 15<sup>th</sup> November 2023. He has deposed that he was appointed as an arbitrator by Nancy Njeri Gitau and Nancy Wangui Njuguna who were the only parties to an MOU dated 18<sup>th</sup> May 2002 pursuant to a consent order dated 7<sup>th</sup> December 2004 recorded in Milimani CMCC No. 13299 of 2004. He denied that he refused to act/proceed in the arbitration and stated that the arbitration was hindered by the applicants who denounced and/or reneged on the arbitral process and filed various suits where they expressly stated that they did not want to proceed with the arbitration and that his appointment was revoked pursuant to a Court Order dated 26<sup>th</sup> October 2020 in HCC Misc. No. 618 of 2019.
17. The 3<sup>rd</sup> Respondent denied that the Applicant and his deceased wife surrendered various documents to him and stated that the Applicant was not a party to the arbitral process. He stated that the Applicant



could not have handed any documents to him since he was never a party to, nor did he attend the arbitral proceedings. He stated that he has no interest in this matter whatsoever and that his name should be removed from the proceedings.

### **Applicant's Further Affidavit**

18. The Applicant deposed in his Further Affidavit that he is the administrator of the estate of Nancy Wangui Njuguna and her personal representative; that this matter is totally separate from prior suits; that it is false for the 3<sup>rd</sup> Respondent to claim that he was not issued with any documents as claimed by the Applicant.

### **Applicant's Submissions**

19. The Applicant's submissions are dated 13<sup>th</sup> December 2023. The Applicant has raised and submitted on the following issues:
  - i. Whether the Applicant has locus standi to institute this matter to which the Applicant has submitted that he has attached a copy of a grant of letters of administration in regard to the estate of Nancy Wangui Njuguna and therefore he is a personal representative empowering him to enforce this cause of action. He cited *Alexander Mutunga Wathome v Peter Lavu Tumbo & another* [2015] eKLR to support the submission that the Applicant has locus standi to bring this suit.
  - ii. Whether this matter is res judicata. It was submitted that the issue of res judicata does not arise because this matter has not been heard conclusively through arbitration; that this is a miscellaneous application independent from all other applications previously filed; that the intention of this application is to enable compliance with the orders of the court in Misc. Application No. 618 of 2006; that this application seeks to have an arbitrator appointed and is therefore different from other applications and therefore it is not res judicata.
  - iii. Whether this court should appoint an arbitrator. The Applicant cited section 11(2) of the *Arbitration Act* and the cases of *Nyoro Construction Co. Ltd v Attorney General* [2018] eKLR and *Magdalene M. Mjomba & 3 others v Information and Communications Technology Authority; Chairman Chartered Institute of Arbitrators (Interested Party)* [2021] eKLR to support his submissions that this court should appoint an arbitrator because the Respondents have frustrated all efforts to have an arbitrator appointed by parties.
  - iv. Whether the 3<sup>rd</sup> Respondent should return documents surrendered to him. It was submitted that the after failing to arbitrate on this dispute, the advocate for the applicants wrote several letters to the 3<sup>rd</sup> Respondent asking for the documents deposited with him at the beginning of the arbitration process but the 3<sup>rd</sup> Respondent has failed to return the documents. It was submitted that the 3<sup>rd</sup> Respondent should be compelled to return the documents to the applicants.
  - v. On who bears the costs of this application, it was submitted the applicant should be awarded costs of this application.

### **Respondents' submissions**

20. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents, without identifying any particular issue for determination, have submitted that application is barred by section 6 and 7 of the CPA and Orders 3 Rule 4 and Order 24 Rules 3 and 7 of APR due to the pendency of similar proceedings in various courts some of which



have been decided and for failure of the Applicant to apply for substitution of the Deceased within 12 months; that the Court lacks jurisdiction to proceed with this matter.

21. It was submitted that the claim of Nancy Wangui Njuguna, who died on 7<sup>th</sup> October 2020 abated for failure to substitute her by the administrator within 12 months as required under Order 24 Rules 3 and 7 CPR; that the Applicant was never a party to the MOU but was only a witness and therefore he cannot claim any rights under the MOU.
22. It was submitted that the present suit is time-barred under section 4 of the *Limitation of Actions Act* the cause of action having arisen on 1<sup>st</sup> December 2004; that the Replying Affidavit clearly demonstrates that it is the Applicants who have impeded and frustrated the conclusion of the Arbitration by filing different proceedings in various courts for the last 19 years; that the documents allegedly given to the 3<sup>rd</sup> Respondent are non-existent and that there is no evidence availed to demonstrate that such titles or documents existed and were submitted to the 3<sup>rd</sup> Respondent.
23. The 3<sup>rd</sup> Respondent briefly submitted that the Applicants have not proved the allegations they have made against him; that the application is sub-judice because similar applications have been filed in various courts and have been determined and that there is no proof that the Applicants deposited with the 3<sup>rd</sup> Respondent the documents stated in paragraph 4 of the application.

### **Analysis and determination**

24. To my mind, the issues that arise for determination are the following:
  - i. Whether this court has jurisdiction to determine this matter by virtue of the matter being res judicata?
  - ii. Whether the suit is time-barred by virtue of section 4(a) of the *Limitation of Actions Act*?
  - iii. Whether the suit has abated by virtue of Order 24 Rules 3 and 7 CPR?
  - iv. Whether the Applicant has locus standi to bring this application?
  - v. Whether the 3<sup>rd</sup> Respondent has failed to return the title to NRB/Block 144/1382 and other related documents?
25. The issue of jurisdiction of this court is a pertinent issue that ought to be determined first. This is because if the court lacks the authority to proceed with a matter, it has not business doing so (see Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR)
26. The reason why the Respondent raised a PO on the issue of jurisdiction of this court is because they allege that the case for the late Nancy Wangui Njuguna abated for failure to substitute the deceased with the Plaintiff within 12 months.
27. Order 24, rule 3 of the CPR provides that:
  - (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
  - (2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may



award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

28. I have seen a grant of letters of administration dated 28<sup>th</sup> June 2021 were issued to James Njuguna Kagwima, the Applicant, appointing him as personal representative of the deceased. I have not seen an order appointing, upon an application, the Applicant as the legal representative of the deceased on the strength of that Grant.
29. Further, that Grant was issued on 28<sup>th</sup> June 2021. It shows that the deceased died on 7<sup>th</sup> October 2020. By the time the instant application was filed on 3<sup>rd</sup> August 2023, it was almost three years after the death of the deceased. The legal requirement is to substitute the deceased plaintiff, under Order 24 Rule 3 (1) CPR, within one year.
30. The situation pertaining in this matter is, the Applicant has not provided an order of the court substituting him as the personal representative of the deceased, and secondly, this application was filed outside the one year contemplated under order 24 Rule 3(1) CPR. The current suit has, without a doubt in my considered view, abated.
31. A suit that has abated strips a court the jurisdiction to determine it for there is no suit, in the first place, to be tried, the same having abated.
32. Even if this court were to find that the suit did not abate, it is clear to me that the Applicant was not a party to the MOU entered between the deceased and the 1<sup>st</sup> Respondent. He cannot therefore carry himself as such.
33. In my considered view, having found that this court lacks jurisdiction to handle this matter, the main suit having abated, it resultantly leads to the conclusion that it would be an exercise in futility to determine the remaining issues raised by the parties. Consequently, this application fails in its entirety and is hereby dismissed with costs to the Respondents.
34. It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 28<sup>TH</sup> MAY 2025.**

**S. N. MUTUKU**

**JUDGE**

In the presence of:

Mr. Kuria for the Applicant

Mr Isindu for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents

Mr. Itonga – 3<sup>rd</sup> Respondent in person

