



REPUBLIC OF KENYA



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In re Estate of Grace Gathure Githinji (Deceased) (Succession Cause 52 of 2009) [2025] KEHC 10712 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10712 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 52 OF 2009
MA ODERO, J
JULY 18, 2025**

IN THE MATTER OF THE ESTATE OF GRACE GATHURE GITHINJI (DECEASED)

BETWEEN

HARRISON MAINA MWANGI OBJECTOR

AND

DANIEL NDERITO GATHENJI RESPONDENT

JUDGMENT

1. Before this Court is the Summons for Revocation of Grant dated 18th April 2024 filed by Harrison Maina Mwangi (hereinafter ‘the Objector’)
2. The Administrator of the estate Daniel Nderito Gathenji opposed the Summons through the Replying Affidavit dated 23rd May 2024. The Summons was canvassed by way of oral evidence.

Background

3. This matter relates to the estate of the late Grace Kagure Githinji who died on 4th June 1997. A copy of the Death Certificate Serial Number 505536 is annexed to the Petition for letters of Administration Intestate dated 28th July 2004. The Deceased was survived by six (6) children as follows:-
 - a. Mwangi Githinji
 - b. Daniel Nderito Githinji
 - c. Moses Karatu Githinji
 - d. Lawrence Ndirangu Gathengi
 - e. Jacinta Wanjiku Kariuki



- f. Teresia Gathoni Nyaga
4. The estate of the Deceased comprised the following assets:
 - i. Plot No. Mahiga/Rokera/220
 - ii. KBL Shares A/C No. 0023130
 - iii. Plot No. 9B BIRTHUA Market
5. On 16th March 2007 Grant of letters of Administration Intestate were issued to the Respondent Daniel Nderitu Gathenji. The Grant was duly confirmed on 14th November 2007.
6. The Certificate of confirmed Grant provided that the parcel of land known as LR Mahiga/Rokera/220 (hereinafter the 'Suit Land') would be divided into four (4) portions to be allocated to the four sons of the Deceased namely Mwangi Gathengi, Daniel Nderitu, Moses Kariuki and Lawrence Ndirangu. A copy of the certificate of confirmed Grant is annexed to the objector's supporting affidavit dated 18th April 2024 (Annexure "HMM3b")
7. The objector avers that he was raised and educated by the Deceased. That the Deceased left a will bequeathing a portion of the Suit land to himself. The objector therefore prays that the confirmed grant be revoked a fresh grant be issued and the suit land be divided into five
(5) portions to be distributed to the four (4) sons of the Deceased and the objector.
8. As stated earlier the summons was opposed.

The Evidence

9. The Objector in his evidence stated that he was the grandson of the Deceased being the eldest son of one Mwangi Gathenji who is the eldest son of the Deceased. The Objector stated that his biological mother one Mukuhi abandoned him with her mother when he was barely two (2) years old. The Deceased then took him in and raised him and paid his school fees. The Objector states that he even cared for the Deceased during her illness.
10. The Objector confirms that the Deceased fell ill sometime in the year 1998. He states that while the Deceased was in the hospital she called the objector and his uncle Lawrence Ndirangu to her bedside at the Nakuru Nursing Home. The Deceased then told the two that she wished that the suit land being LR Mahiga/Rokero/220 be divided into five (5) portions to be allocated to her four (4) sons and the Objector.
11. The Objector stated that 'Lawrence' wrote down these wishes of the Deceased in a notebook. However later when this succession cause was filed the Objector was surprised to learn that he was not included as one of the beneficiaries of the estate.
12. The Objector states that he currently lives in the compound where the Deceased resided with his family. He is apprehensive that if the grant is not revoked and re-issued as prayed then he is likely to be evicted therefrom by the children of the Deceased.
13. PW2 Mwangi Gathenji is one of the sons of the Deceased and is the father of the Objector. He states that the suit land was initially registered in his name but that he later transferred the same to his mother.
14. PW2 confirmed that the Objector is his son. He states that he and the child's mother separated when the Objector was very young. That the Deceased then took in the objector from the age of about two (2) years and raised him to adulthood.



15. According to PW2 his mothers left a will indicating that the Suit land be distributed to her four (4) sons and her grandson (the objector). That the said wishes were reduced into writing by his brother Lawrence. PW2 states that he has already taken possession of his share of the suit land.
16. PW3 Simon Njuguna Waiganjo is a nephew to the Deceased but was also the Ex-chief of Mahiga Location where the Deceased resided. He states that one year after the demise of the Deceased the family met to discuss the distribution of her estate. PW3 confirms that the Deceased raised the objector from childhood and states that the objector even got married under the care of the Deceased.
17. PW3 states that the will of the Deceased was read out in which the Deceased indicated that the suit land was to be divided into four (4) portions to be allocated to her four sons. That the Deceased further instructed that her sons Lawrence and Nderitu should excise five (5) acres each out of their allocation to be given to the objector for him to live on.
18. Later PW3 heard that the suit land had been divided amongst the four (4) brothers only leaving out the objector. He claims that this is contrary to what the Deceased had stated in her will.
19. PW4 Joseph Mwangi Waiganjo, told the court that he knew the Deceased as his in-law. This witness was an elderly man who appeared unsure of the facts. He stated that upon subdivision of the suit land the objector was given 3/4 of an acre. He stated that he did not know why the Deceased gave the objector land.
20. The Respondent Daniel Nderito told the court that he was a son of the Deceased and the administrator of her estate. He confirmed that a Grant of letters of Administration was issued to him on 16th March 2007 which Grant was duly confirmed on 14th November 2007. The Respondent confirms that the Objector is the son of his elder brother and is therefore a grandson to the Deceased.
21. With respect to LR Mahiga/Rokero/220, the Respondent states that this parcel of land was distributed equally to the four (4) sons of the Deceased. He states that at the time of confirmation of the Grant no objection was raised. The Administrator tells the court that the distribution of the estate has been concluded. That the suit land was sub-divided into four (4) portions, new titles have been issued for the said subdivisions that and each beneficiary has already taken possession of the portion allocated to them.
22. The Respondent states that this summons for revocation is 'Res Judicata' as a similar summons dated 26th August 2008 was filed by the Objectors father Mwangi Gathenji.
23. The Respondents states that the Objector has been fully aware of the existence of this succession cause and questions why it has taken over fifteen (15) years for the Objector to file any protest/objection. The Respondent maintains that the objector is not a beneficiary to the estate of the Deceased and has no entitlement to benefit therefrom. He prays that the summons be dismissed with costs.
24. DW2 Lawrence Ndirangu Githinji is a son to the Deceased. He stated that the Objector was his nephew and was a grandson to the Deceased. DW2 categorically denies that the Deceased left a written will. He further denies that the Deceased ever gave him instructions on how the suit land was to be distributed.
25. DW2 stated that although the objector lived with the Deceased it was Daniel Nderito (the Respondent) who educated the Objector, took him to driving school, lived with the Objector in Nairobi and finally secured a job for the objector in Industrial Area.
26. According to DW2 the decision of the family meeting was that the suit land would be subdivided into four (4) portions to be allocated to the four (4) sons of the Deceased. That the portion allocated to



- Mwangi Gathenji, the father of the objector would be further subdivided to accommodate the objector and the other four (4) sons of 'Mwangi'.
27. DW2 states that the subdivision has already been done, titles issued and each beneficiary has already taken up possession of their allocated portion. He asserts that the Objector is not a beneficiary to the estate of the Deceased and urges that the Objector ought to inherit from his own father not from his grandmother. DW2 urges the court to dismiss the summons entirely.
 28. DW3 Anne Wanjiku Kariuki is a daughter of the Deceased. She confirms that the objector is her nephew being the son of her eldest brother Mwangi Gathenji.
 29. DW3 told the court that the mother of the Objector left the home when the Objector was a small child. That the mother went with the Objector to her own parents home. Later the objector's maternal grandmother brought the child back to their home saying that he was being neglected by the mother. According DW2 the objector's father rejected the boy in so his grandmother (the Deceased) took in the child and raised him to adulthood. DW3 confirms that she was present when the objector was brought to their home and confirms they lived with the child in their home.
 30. DW3 testified that 'Daniel' the respondent paid the school fees for the objector, took the objector to Polytechnic and to Driving School. She states that after his schooling the Objector went to live with the Respondent in Nairobi and that the Respondent eventually secured employment for the objector.
 31. DW3 denies that the Deceased left a written will and states that she fully supports the manner in which the estate was distributed as per the certificate of confirmed Grant.
 32. Upon closure of oral evidence the parties were invited to file written submissions. The Objector filed the written submissions dated 8th May 2025, whilst the Respondent relied upon his written submissions dated 26th May 2025.

Analysis and Determination

33. I have carefully considered the Summons before this court, the reply filed thereto, the evidence on record as well as the written submissions filed by both parties.
34. It is pertinent to note that this succession cause was filed in the year 2004. The Grant was confirmed in November 2007. The property was sub-divided sometimes in the year 2022. The Objector has all along been residing with his family on the suit land yet he cannot explain why it has taken him close to twenty (20) years to raise objection. In my view this is delay which is beyond inordinate.
35. I do not buy the objector's claim that he had no knowledge of the existence of this cause. As a family member who was living in the home of Deceased, the objector would definitely have noticed surveyors coming to the property. In my view the objector is guilty of laches. He has taken far too long to file his objection.
36. The Respondent has submitted that this current application for revocation is 'Res Judicata'. That this court is 'functus officio' as a similar application seeking revocation of Grant had been filed by 'Mwangi Gathenji' who is the objectors father.
37. Whilst it is true that the said Mwangi Gathenji did file in the High Court a summons dated 28th August 2008 seeking revocation of the Grant, that summons was never actually heard by the court. The record indicates that on 28th November 2018 before Hon. Lady Justice Mshilla 'Mwangi' applied to withdraw his application seeking to revoke the Grant.



38. The principle of ‘Res Judicata’ is only applicable where a matter has been previously “heard and determined’. The application filed by Mwangi was neither heard nor determined and therefore the principle of Res Judicata cannot apply. Therefore I find that the instant application is properly before this court for consideration.
39. I will now proceed to consider whether this summons has any merit. The Objector has prayed that the Grant issued and confirmed in favour of the Respondent be revoked.
40. The Grounds upon which a Grant may be revoked are clearly set out in Section 76 of the *Law of Succession Act* Cap 160 Laws of Kenya as follows:-

“A grant of representation whether or not confirmed may at time be revoked or annulled if the court decides either on application by any interested party of its own motion –

- i. that the proceedings to obtain the grant were defective in substance;
 - ii. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
 - iii. that the grant was obtained by means of untrue allegation of a fact essential in point in law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
 - iv. that the person to whom the grant was made has failed, after due notice and without reasonable cause either -
 - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - ii. to proceed diligently with the administration of the estate; or
 - iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or
 - iv. that the grant has become useless and inoperative through subsequent circumstances.
41. In the case of Albert Imbuga Kisigwa vs Recho Kawai Kisigwa Succession Cause No. 158 of 2000 Mwita J stated as follows:-

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.” [Own emphasis]



42. The Objector alleges that the Grant was obtained fraudulently by concealing a material facts to wit the existence of himself. The objector asserts that he is a beneficiary of the estate of the Deceased.
43. This dispute revolves around the distribution of the parcel of land known as Mahiga/Rokera/220 which property belonged to the Deceased – this fact is not in any dispute. The objector claims that the Deceased left a written will in which she bequeathed a portion of the suit land to the objector.
44. It is trite law that he who alleges must prove. In law the burden of proof lies upon the party who asserts the existence of a fact or set of facts. Section 107 of the Evidence Act CAP 80 Laws of Kenya provide as follows:-

“Burden of proof

- 107 whoever desires any court to give judgment as to any legal right or liability
- (1) dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

45. In the case of Evans Nyakwana -vs- Cleophas Bwana Ongaro [2015] eKLR, it was held that:-

“As a general preposition the legal burden of proof lies upon the party who invokes the aid of law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the Evidence Act Chapter 80, Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of the law of proof of that fact shall lie on any particular person.....” [Own emphasis]

46. Firstly this document (will) was not produced in court by the Objector or by any other party. In his evidence the Objector told the court that the Deceased called himself and his uncle Lawrence Ndirangu (Deceased’s son) to her bedside in hospital and narrated to them her wishes regarding the distribution of the suit land. The Objector claims that ‘Lawrence Ndirangu’ wrote in an exercise book what the Deceased had told him which written account is what the Objector refers to as ‘will’.
47. The said Lawrence Ndirangu testified as DW2. He confirmed that the Deceased was his mother. However DW2 denied having received any instructions from the Deceased regarding the suit land. He categorically denies that the Deceased left a written will. When being cross-examined by counsel for the Objector DW2 stated as follows:-

“.....The Deceased left instructions regarding her burial and disposal of a few movable items. I am not aware of any instructions left by Deceased regarding her land Mahiga/Rokera/220. I never sat with family when Deceased was instructing how her land was to be divided....” [Own emphasis]

48. This witness therefore dismisses the objector’s claim that he received any instructions from the Deceased regarding her wishes in respect of her land. He also made no mention of having written in a notebook the alleged instructions of the Deceased. As stated earlier this written narration of the Deceased’s wishes was never seen by the court – I can only conclude that no such document exists.
49. Secondly the ingredients/elements of a valid written will are provided for in Section 11 of the Law of Succession Act, Cap 160 Laws of Kenya. There is no evidence that the Deceased executed any documents



containing her wishes. There was no evidence that the document referred to by the objector was witnessed by two persons. Finally I note that this cause was filed and heard as an intestate cause. At no time did any of the beneficiaries raise the issue that there existed a written will. Therefore I find that there is no evidence to show that the Deceased left a written will in which she bequeathed any property to the objector. I find and hold that the Deceased died intestate.

50. The court having dismissed the existence of a written will, the objector in the alternative claims to be a beneficiary entitled to a share of the estate of the Deceased on grounds that was ‘a dependant’ of the Deceased immediately prior to her death.
51. Section 29 of the [Law of Succession Act](#) provides as follows;-
- “For the purpose of this part, ‘dependent’ means -
- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - b. such of the deceased’s parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters as were being maintained by the deceased immediately prior to his death.” [own emphasis]
52. The Objector testified that the Deceased took him into her home from the age of about 2-3 years old. That the Deceased raised him and educated him to adulthood. This is not disputed by any of the other witnesses. Indeed DW3 gave a very touching narration of how the objector was brought to their home after being abandoned by his biological mother.
53. That is all very well and good but the objector is required to satisfy the court that he was in fact dependant on and was being maintained by the Deceased ‘immediately prior to her death.’ The Objector told the court that the Deceased paid all his school fees and provided for all his needs making him a dependant of the Deceased.
54. However the Respondent states that it was he who provided the finances to enable the Deceased pay fees for the Objector. The Respondent states that he took the objector to polytechnic and to driving school and eventually helped the objector in employment. This evidence of the Respondent is corroborated by DW2 and DW3. Under cross- examination the objector admits that the Respondent did secure him employment in Industrial Area.
55. The situation was that the Objector came into the home and was rejected by his father. The Deceased who was his grandmother took him in (as most grandmothers would) and raised him. The Objector has not provided any documentary evidence i.e receipts invoices etc to prove that it was the Deceased who paid his school fees. In normal cases once a child is accepted into the family then all the siblings will contribute in one way or another to meet the needs of such a child.
56. In any event this is all now moot. In his evidence the objector told the court that he is now about Sixty (60) years old. The Deceased died in the year 1997 i.e about thirty years ago. Therefore at the time of her demise the Objector would have been aged about thirty (30) years old. He was a mature adult who was working. He was an adult who was taking care of his own affairs and managing his own life. There is no way the Objector can be said in those circumstances to have been dependant on the Deceased immediately prior to her death.



57. In the case of Beatrice Ciamutua Rugamba -vs- Fredrick Nkari Mutegei -vs- 5 others [2016] eKLR, the Court stated that
- “ A dependant under Section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts” [Own emphasis]
58. The Objector has not demonstrated how the Deceased was ‘maintaining’ him immediately prior to her death – was she paying his rent, buying him food, educating his children?
59. I find that the Objector was a mature adult man when the Deceased left this earth. As such I find and hold that he cannot have been a dependant in terms of Section 29 of the [Law of Succession Act](#) and cannot be considered as a direct beneficiary of the estate.
60. The status of the Objector is therefore that of a grandson to the Deceased. The Objector does not rank in equality nor in priority to the biological children of the Deceased. As a grandchild the objector does not have a right to inherit directly from the estate of the Deceased. The Objector would only be entitled to claim the share that would be due to his father who is a son to the Deceased.
61. The objector being a ‘grandson’ of the Deceased can only step in to replace his parent. Therefore the Respondents being biological children of the Deceased ranks in the 1st degree and ranks in priority over the objector who is a grandchild of the Deceased.
62. That is not to say that grandchildren can never inherit from the estate of their grandparents. Where the child of a deceased person passes away then the grandchild of that Deceased may step in and inherit the share of the estate due to their deceased parent.
63. In RE Estate of Wahome Njoki Wakagoto (2013) eKLR it was held:
- “Under Part V, grandchildren have no right to inherit their grandparents who died intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.” [Own emphasis]
64. In the case of Cleopa Amutala Nanyi v Judith Were Succession Cause 457 of 2005 [2015] eKLR Hon. Mrima, J. observed that:-
- “Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents..... The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit from their own parents.....The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren inherit from their grandparents is when the grandchildren’s own parents are dead..... [Own emphasis]
65. The objector cannot claim a right in priority over the estate of the Deceased for as long as any one of the biological children of the Deceased remains alive.



66. The objector could only stake a claim to the estate if he was a 'dependant' of the Deceased in terms of Section 29 of the Law of Succession Act. The Applicant has not proved that he was dependent on the Deceased immediately prior to his death.
67. I find and hold that in the circumstances the Applicant has no locus standi in this matter. Even if the Grant were to be revoked the other children of the Deceased rank in priority over the objector to be issued with the Grant.
68. The Objectors father 'Mwangi; is still alive and he did testify before the Court. Mwangi confirmed to the court that he was allocated a share of the suit property and that he has taken up possession of the share. In supporting his sons claim to a share of the estate 'Mwangi' is in effect seeking to benefit from a double share of the estate - one share to himself and another to his son. This cannot be fair. The only option open to the objector is to approach his father and seek to be given a share of his father's inheritance.
69. I find that the obvious direct beneficiaries to the estate of the Deceased would be her six (6) biological children ONLY. The Objector being a grandson is not a direct beneficiary to the estate of the Deceased. The Objector can only claim his inheritance from the share allocated to his father Mwangi.
70. The beneficiaries did consent to the Respondent's proposed mode of distribution of the estate. A consent dated 8th July 2007 was annexed to the summons for confirmation of Grant which consent was duly signed by all the beneficiaries.
71. The Respondent who is the Administrator of the estate informed the court that the estate has been fully distributed. Given that the Grant had been confirmed way back in the year 2007 I would not have expected otherwise. The Administrator told the court that the suit land was subdivided into four (4) portions and each beneficiary was issued with a Title Deed for his portion. Annexed to the Summons for Revocation of a Grant are the sub-divided titles in the names of the four sons of the Deceased. The four (4) sub-divisions have been distributed as follows:-
- i. Mahiga/Rokera/1322 comprising 0.794 Hectares to Mwangi Gathenji (the Objector's father)
 - ii. Mahiga/Rokera/1323 comprising of 0.794 Hectares to Daniel Nderito Gathenji.
 - iii. Mahiga/Rokera/1324 comprising 0.794 Hectares to Moses Kiratu Gathenji.
 - iv. Mahiga/Rogera/1325 comprising 0.794 Hectares to Lawrence Ndirangu Githinji. Therefore it is clear that the estate has been fully distributed in accordance with the confirmed grant.
72. The parcel of Land known as LR Mahiga/Rokera/220 no longer exists. If the Objector still wishes to pursue a claim to this land or the subdivisions thereto, then his remedy would be in the Environment and Land Court (ELC) which is the only court mandated by Article 162 2 (b) of the Constitution of Kenya 2010 to determine disputes relating to the Ownership, use and occupation of land.
73. The Objector prayed that the court cancel the registration of the four
4. subdivided titles at the land registry. Even if the Objection had succeeded, this court has no jurisdiction to make such an order. In re Estate of Andashe Munyeti (Deceased) 2021 eKLR Justice Musyoka stated that:-
 5. After a grant is confirmed, and a certificate of confirmation of grant is processed and issued, the next step would be transmissions of the property in accordance with the distribution in the certificate of confirmation of grant. Transmissions is not a process under the Law of Succession Act, Cap 160, Laws of Kenya. The Law of Succession Act does not provide for it. Indeed, the



term transmission is not even mentioned in the Act. It is a process which is provided for in the Land Registration Act, No. 3 of 2012, and the Land Act No. 6 of 2012. The process has nothing to do with the succession process. The effect of it is that once the court confirms a grant, and issues a certificate of confirmation of grant, its work would be over. The parties ought to move to the next step, of execution of the confirmation orders, which happens at the land registries and at the offices of other land authorities. The application that has been placed before me dwells on matters that have nothing to do with succession, but registration of land, and the parties are better of addressing the issues to the relevant land bodies.

The promulgation of the Constitution, 2010, on 27th August 2010, had one critical consequence, the taking away of jurisdiction from the High Court, with respect to matters relating to land. That comes out very clearly from Articles 162 (2) and 165(5) of the Constitution. Parliament passed a law that established the Environment and Land Court. The Land Registration Act and the Land Act, which govern transmission and land registration, carry provisions that make it clear that where disputes or questions or the need for certain actions arise, with respect to issues that are regulated or governed by the two statutes, such as transmission and land registration, then the court to address them is the Environment and Land Court and any subordinate court vested with jurisdiction. These provisions are in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act. [Own emphasis]

74. The sub-division of Mahiga/Rokera/220 into four (4) equal portions and the issuance and registration of new titles was not done by the Probate Court under the Law of Succession Act. These actions were undertaken by the Lands Registry under the relevant statutes. This court sitting as a Probate Court cannot purport to step in and revoke titles which it did not in the first place issue to the beneficiaries. Only the ELC can revoke such Title Deeds.
75. Finally I find no merit in this summons for revocation of Grant. The same is dismissed in its entirety. This being a family matter each party will meet their own costs.

DATED IN NYERI THIS 18TH DAY OF JULY 2025.

.....

MAUREEN A. ODERO

JUDGE

