



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**  
**ELC 139'B' OF 2021 (OS)**  
**(FORMERLY ELC NO. 735 NAIROBI)**

**SERAH WAMBUI KIBIKU (SUING AS THE ADMINISTRATOR  
AND LEGAL REPRESENTATIVE OF THE ESTATE OF GIBSON  
KIBIKU - DECEASED).....**  
**.....PLAINTIFF**

**VERSUS**

**DEACONS ENTERPRISES LIMITED.....1<sup>ST</sup>**  
**DEFENDANT**

**NYOKABI KAMOTHO**  
**(Guardian Ad Litem of J Kamotho).....2<sup>ND</sup>**  
**DEFENDANT**

**AND**

**ANNE ZIPPORAH NYAWIRA.....1<sup>ST</sup>**  
**INTERESTED PARTY**

**MARGARET WAMUYU MUTHEE.....2<sup>ND</sup>**  
**INTERESTED PARTY**

**CHARLES GITHUI KIGOTHO.....3<sup>RD</sup>**  
**INTERESTED PARTY**

**BLUE VENTURES LIMITED.....4<sup>TH</sup>**  
**INTERESTED PARTY**

**JANE WAMBUI MUNGAI.....5<sup>TH</sup> INTERESTED**  
**PARTY**

<b>STEPHEN MUCHIRI MUNGAI.....</b>	<b>6<sup>TH</sup></b>
<b>INTERESTED PARTY</b>	
<b>JAMES NJAGI WAHOME.....</b>	<b>7<sup>TH</sup></b>
<b>PARTY</b>	<b>INTERESTED</b>
<b>JALIWA INVESTMENTS LTD.....</b>	<b>8<sup>TH</sup></b>
<b>INTERESTED PARTY</b>	
<b>MILKAH WANGUI KIMANI.....</b>	<b>9<sup>TH</sup></b>
<b>PARTY</b>	<b>INTERESTED</b>
<b>CECILIA WANGUI MUNGAI.....</b>	<b>10<sup>TH</sup></b>
<b>INTERESTED PARTY</b>	
<b>DAVID MAINA KAHANDO.....</b>	<b>11<sup>TH</sup></b>
<b>INTERESTED PARTY</b>	
<b>JACINTA NDUTA MWAURA.....</b>	<b>12<sup>TH</sup></b>
<b>PARTY</b>	<b>INTERESTED</b>
<b>JOHN MACHARIA MAINA.....</b>	<b>13<sup>TH</sup></b>
<b>PARTY</b>	<b>INTERESTED</b>
<b>ANTHONY KIMANI MURAGAMI.....</b>	<b>14<sup>TH</sup></b>
<b>INTERESTED PARTY</b>	
<b>CATHERINE NJERI WANGOMBE.....</b>	<b>15<sup>TH</sup></b>
<b>INTERESTED PARTY</b>	
<b>JOSPHAT NDIRANGU THUO.....</b>	<b>16<sup>TH</sup></b>
<b>INTERESTED PARTY</b>	
<b>DOMINIC MBURU GACHERU.....</b>	<b>17<sup>TH</sup></b>
<b>INTERESTED PARTY</b>	
<b>JAMES KIMANI KIMANI.....</b>	<b>18<sup>TH</sup></b>
<b>INTERESTED PARTY</b>	
<b>ALUBRETA NYANGENDO GATHUMBI.....</b>	<b>19<sup>TH</sup></b>
<b>INTERESTED PARTY</b>	
<b>AGATHA MUTHONI MUNGAI.....</b>	<b>20<sup>TH</sup></b>
<b>PARTY</b>	<b>INTERESTED</b>

<b>STEPHEN MUCHAI KIMANI.....</b>	<b>21<sup>ST</sup></b>
<b>INTERESTED PARTY</b>	
<b>MACHARIA KARIUKI.....</b>	<b>22<sup>ND</sup></b>
<b>PARTY</b>	<b>INTERESTED</b>
<b>NILIPHER EVA WANJIRU MWANGI.....</b>	<b>23<sup>RD</sup></b>
<b>INTERESTED PARTY</b>	
<b>MOSES KAMAU GATONYE.....</b>	<b>24<sup>TH</sup></b>
<b>INTERESTED PARTY</b>	
<b>LUCY WANJIRU GATONYE.....</b>	<b>25<sup>TH</sup></b>
<b>PARTY</b>	<b>INTERESTED</b>
<b>GATEKE HOLDINGS LIMITED.....</b>	<b>26<sup>TH</sup></b>
<b>INTERESTED PARTY</b>	
<b>JOHN NJOROGE IKONYA.....</b>	<b>27<sup>TH</sup></b>
<b>PARTY</b>	<b>INTERESTED</b>
<b>FRANCIS GICHUKI WAHOME.....</b>	<b>28<sup>TH</sup></b>
<b>INTERESTED PARTY</b>	
<b>ANN KIBUNJA.....</b>	<b>29<sup>TH</sup></b>
<b>PARTY</b>	<b>INTERESTED</b>
<b>GEOFREY WACHIRA KIMANI.....</b>	<b>30<sup>TH</sup></b>
<b>INTERESTED PARTY</b>	
<b>MARGARET GICHUKI.....</b>	<b>31<sup>ST</sup></b>
<b>INTERESTED PARTY</b>	
<b>SAMUEL NJONGORO NJIHIA.....</b>	<b>32<sup>ND</sup></b>
<b>INTERESTED PARTY</b>	

### **RULING**

1. I have three applications before the Court which are as diverse as the parties represented herein. The first application is dated 04/08/2025 seeking stay orders for the Judgment issued by this Court dated 31/07/2025. The second

application is dated 5/12/2025 seeking a temporary injunction against a Plaintiff in whose favour the Judgment was issued. Now the last application is the one that I find to be very interesting or rather curious. It is dated 2/02/2026 and has been brought by litigants who were not parties to the suit but are seeking orders from the Court for Review.

2. For good order I will handle each application singularly and reserve the final disposal orders jointly.

3. The Application dated 04/08/2025 is brought under Order 42 Rule 6 among others and seeks the following Orders:

1) **Spent.**

2) **Spent.**

3) **THAT** this Honourable Court be pleased to issue an order for stay of execution against the Judgment delivered on 31/07/2025 and all consequential orders therefrom pending hearing and determination of this Application.

4) **THAT** this Honourable Court be pleased to issue an order for stay of execution against the Judgment delivered on 31/07/2025 and all subsequent orders thereof pending hearing and determination of the intended appeal.

5) **THAT** this Honourable Court do hereby be pleased to issue an order for status quo to be maintained pending hearing and determination of the intended appeal.

6) **THAT** the costs be provided for.

4. The application is premised on thirteen (13) grounds on its face, and supported by the Affidavit of **CHARLES GITHUI KIGOTHO** sworn on 4/08/2025. He is the 3<sup>rd</sup> Interested Party and has sworn the Affidavit with the consent of all the Interested Parties/Applicants. In which he among others deposed that Judgement was entered against them on 31/07/2025 in terms of prayer (1), (2) & (3) of the Originating Summons; that they were granted a temporary stay of execution and they have lodged an Appeal at the Court of Appeal; that they filed a Notice of Appeal and prepared the Record of Appeal without delay; that they believe their Appeal is meritorious, with a high chance of success, and urged the Court to allow for a stay of execution pending the Appeal's determination; that if the stay of execution is not granted, they will suffer substantial loss.
5. Should the Plaintiff execute the said Judgment delivered on 31/07/2025 the Appeal shall be rendered nugatory as titles to their respective parcels shall have been cancelled and the Land Registrar effected registration of the Plaintiff as the owner of all that suit Parcel of land in which the Interested Parties have a claim against thus making the chances of recovering their Title and securing registration back in their names difficult and hence the Interested Parties shall suffer substantial loss.

6. He further avers that the Plaintiff/Respondent is determined and minded to execute the Judgment and Orders issued on 31/07/2025 and may proceed to effect registration of the suit Parcel of Land to her name at any time after 31/07/2025.
7. The application is opposed by the Plaintiff/Respondent through the Replying Affidavit of SERAH WAMBUI KIBIKU, the Respondent, sworn on the 29/09/2025 in which she inter alia deposed that the application was a non-starter, bad in law, misconceived, lacked merits, made in bad faith and an abuse of the Court process and should be dismissed with costs; that the present suit was commenced by way of Originating Summons filed on 22/10/2012 and at Judgment the Court declared her late husband was entitled by adverse possession to all that twenty-five acres portion of Land Reference LR No. 20695 Thika Municipality (a subdivision of plot No. 4670 Thika Municipality).
8. According to the Plaintiff/Respondent it is undisputed that parties had a chance to avail their witnesses and adduce their pieces of evidence at the trial Court, wherein each was tested through the rigors of trial and the Court thereafter had ample time to look at the evidence placed before it and make a just and final decision on merit, which decision recognized her as the lawful owner of the suit property.
9. It is her averment that from the reading of the application

before Court, no substantial grounds or exceptional circumstances have been placed before Court to warrant the staying of the execution of the Judgment and Decree of this Honourable Court.

10. Further that the Applicants other than merely stating a likelihood of cancellation of their Titles, which Titles were not adduced at trial by most of them and neither did those ones who adduced explain to the Court how they obtained them. They according to the 1<sup>st</sup> Respondent do not raise any arguable appeal.
11. As a condition for stay of execution, the law under Order 42 Rule 6 of the Civil Procedure Rules appreciates the provisions of security as a condition for stay, the same has not been provided. Neither have the Applicants indicated the loss they stand to suffer should the orders of stay fail to be granted failing to provide for a vital limb of Order 42 Rule 6.
12. The learned Counsel for the Defendants/Applicants and Plaintiff/Respondent filed their submissions dated the 15/11/2025 and 3/02/2026 respectively, which the Court has considered.

### **Analysis and Determination**

13. The Applicants (Interested Parties) seek to halt the execution of a Judgment that declared the Respondent (Plaintiff) the owner of 25 acres of land in Thika by way of adverse possession. The core of the dispute is whether the

Court should preserve the status quo of the subdivided titles held by the Applicants or allow the Respondent to consolidate and register the land in her name immediately.

14. Applications for stay of execution are governed by **Order 42 Rule 6** of the Civil Procedure Rules. The Court's discretion is guided by a three-pronged test:

- i. Substantial loss must be shown to result unless the order is made.*
- ii. The application must be made without unreasonable delay.*
- iii. Security as the Court orders for the due performance of such Decree or order as may ultimately be binding on him must be given.*

15. The Respondent argues, citing **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, that execution is a lawful process and since the land is vacant, no loss occurs.

16. However, this Court finds that in land matters, substantial loss is not limited to physical eviction. As held in **Kenya Shell Limited v Kibiru [1986] KLR**, substantial loss is the cornerstone of a stay application. If the 25-acre portion is consolidated and the Applicants' titles are cancelled, a successful Appeal would be rendered nugatory. The process of unscrambling the egg so to speak, re-subdividing and re-registering multiple titles constitutes a significant administrative and legal burden that fits the

definition of substantial loss.

17. The Judgment was delivered on 31/07/2025. The Application was filed on 04/08/2025. The Court finds that the Applicants acted with commendable speed, satisfying the requirement of timeous filing.
18. While the Respondent contends the Appeal is unmeritorious, the Applicants rely on **Transouth Conveyors Ltd v Kenya Revenue Authority [2007] eKLR**, which posits that a solitary arguable issue is sufficient. The transition of land from registered owners to an adverse possessor after 13 years of litigation is a weighty matter of law that deserves the attention of the Court of Appeal.
19. The Respondent's strongest objection is the lack of security. In **Arun C. Sharma v Ashis Kumar Sen [2012]**, it was emphasized that a stay is a clog on the successful party's rights and must be balanced by security. The Applicants have expressed readiness and willingness to comply with conditions for security in their submissions.
20. The Court must balance the overlapping interests mentioned in **Nicholas Stephen Okaka v Alfred Waga Wesonga [2022] KEHC 1123 (KLR)**. To deny a stay would risk making the Appeal an academic exercise; however, to grant an unconditional stay would unfairly prejudice a Respondent who has litigated since 2012. Therefore I am of the view that in the interest of justice a conditional stay is

the best award to be given which will balance the interest of the Plaintiff/Respondent and the Defendant/Respondents.

21. It is not in dispute that an Appeal has been filed at the Court of Appeal being **Nairobi Civil Appeal No. E790 of 2025**.

22. The second application is dated 5/12/2025 filed by the Interested Parties seeking the following:

**1) Spent.**

**2) Spent.**

**3) THAT this Honorable Court be pleased to issue a temporary injunction order prohibiting the Plaintiff and/or her agents, representative, servants, employees from dealing, interfering, constructing, utilizing and/or trespassing on the suit parcel of land pending determination of the Application dated 4/08/2025 and the instant application.**

**4) THAT this Honorable Court be pleased to grant Orders 3, 4 and 5 sought in the Application dated 4<sup>th</sup> August 2025.**

**5) THAT in the alternative, this Honorable Court be pleased to grant an order compelling the Plaintiff to remove forthwith the perimeter wall erected around the suit property between 1<sup>st</sup> and 14<sup>th</sup> December 2025.**

**6) THAT the costs be provided for.**

23. The application is supported by the annexed Affidavit of

CHARLES GITHUI KIGOTHO and is based on the grounds on the face of it.

24. There was no response filed by the Plaintiff/Respondent to this application. Further the parties filed their submissions to the application and which I have considered in writing this Ruling.

### **Analysis and Determination**

25. The issue for determination is whether an injunction to preserve the suit property is merited.

26. This application is governed by Order 40 Rules 1 and 2 of the Civil Procedure Rules and the principles in **Giella v. Cassman Brown & Co. Ltd [1973] EA 358.**

27. The Plaintiff/Respondent argued that the Court cannot, at this juncture, exercise jurisdiction to grant a temporary injunction under Order 40 since it has already determined the parties' rights through the Judgment. That given her advanced age she should be spared from incessant litigation.

28. If a Court does not have jurisdiction, it must put down its tools. **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR) (17 November 1989) (Judgment).**

29. The Court's power to grant an injunction pending Appeal is distinctive or *sui generis*. It falls under Section 3A of the Civil Procedure Act.

30. In **James Juma Muchemi & Partners Ltd v Barclays**

**Bank of Kenya Ltd [2011] KEHC 4277 (KLR, Mabeya J**  
observed that:-

***“I have seen the Notice of Appeal filed in this Court on 8th September, 2011. While I cannot delve into any of the issues which the Plaintiff seeks to agitate in the Court of Appeal as set out in the draft Memorandum of Appeal exhibited in the application before the Court of Appeal, I am of the view that the Provisions of Order 42 Rule 6 (2) may not be applicable in its strict sense to the application before me. That Rule is for stay of execution pending appeal. If I understood Mr. King’ara well, the application has been brought under the principles of the Erinford Properties case. In that case, the issue that was considered and decided upon was whether a judge who has dismissed an injunction application can at the same time grant one pending an appeal to the Court of Appeal. Clearly, it was not an issue of a stay of any execution pending appeal. Although granting the prayer sought may amount to the same thing as stay of execution as Megarry J found, the considerations applicable in the Erinford Principle may not be the same to those under Order 42 Rule 6(2). There is no provision to grant an injunction pending appeal to the Court***

***of Appeal under Order 42 Rule 6. My understanding is that Order 42 rule 6 (2) in its strict sense applies in a situation where a stay of execution of an order or decree is being sought whilst under the Erinford Principle, it applies where an injunction is being sought pending appeal. An examination of the application before me will show that the prayers sought are not for stay of execution pending appeal, but grant of the declined injunction pending the hearing and determination of an application under Rule 5 (2) (b) of the Court of Appeal Rules. In my view therefore, when a Court in Kenya is applying the Erinford Properties Principles, it does so under its inherent jurisdiction.”***

31. In my view, in determining whether to grant an injunction pending Appeal, the overarching principle is to exercise discretion so as to prevent an Appeal from being rendered nugatory. **Butt v Rent Restriction Tribunal [1982] KLR 417.**

32. The Court of Appeal in the case of **Madhu Paper International Ltd v Kerr [1985] KLR 840** the Court stated that the test is *“whether or not the Company has made out its claim for an injunction to preserve its property until the appeal is heard? Or is it an application which ought to fail because the Appeal is frivolous or it would be worse for the*

*Company if the injunction went forth or for any other reason?”*

33.The prevailing circumstances are that the Applicants have filed Nairobi Court of Appeal being **Nairobi Civil Appeal No. E790 of 2025**. However, the parties are yet to take directions for the hearing. The Applicants submitted that they have an arguable Appeal with serious questions to be tried.

34.On the other hand, the Respondent urged that, although the Applicants have stated that they have strong grounds of Appeal with high chances of success, it is only the Court of Appeal that can return such findings as this Court has made its findings when it dismissed the Applicants' claim in the Judgment delivered on 31/07/2025.

35.An arguable Appeal is one with serious questions to be tried or one that is not frivolous. I do not agree that only the Court of Appeal can determine if an Appeal is arguable. See **Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] Eklr.**

36.However, I am cognizant that in determining whether the Appeal has serious questions to be tried, the trial Court ought not to go to great lengths. See **Julius Musili Kyunga v Kenya Commercial Bank Limited & Another [2012] KEHC 342 [KLR]**.

37.I have considered the Grounds of Appeal and I am of the considered view that the Appeal raises serious questions to

be tried.

38. In line with the **Giella Case (supra)** I will examine the three principles. Whereas the Applicants have a Judgment against them, but they have a Notice of Appeal. Their prima facie case here is not on the ownership, but on the right to have the status quo preserved until the Court determines the stay application. It is their contention therefore that they have Prima Facie Case with Probability of Success.

39. What constitutes a “prima facie” case was discussed in the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, where the Court of Appeal held as follows:

***“It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence ... The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put***

***forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two ... In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."***

40. On the second principle on irreparable harm in **Giella Case** (**supra**), the construction of a perimeter wall is a permanent alteration. If the wall is built and titles are later protected on Appeal, the cost of removal and the interference with the Applicants' access constitutes injury that cannot be compensated by damages.

41. On the third principle, this Court must decide who suffers more. If the injunction is granted, the Respondent will have to wait until the Appeal is heard and determined. Yet we cannot ignore the fact that the Applicants are still technically

holding titles but are locked out of the suit property.

42. See Paul **Gitonga Wanjau vs. Gathithis Tea Factory Company Ltd & Others [2016] eKLR**, per Mativo, J (as he then was). The practical guideline to employ in weighing a balance of convenience is to address your judicial mind to a situation where the injunction is not granted and the suit is ultimately decided in favour of the Plaintiff, in which case the inconvenience which would be occasioned to the Plaintiff would be greater than that which would be caused to the Defendant if an injunction is granted but the suit is ultimately dismissed. See **Pius Kipchirchir Kogo vs. Frank Kimeli Tenai (2018) eKLR**, per Ombwayo, J. In this regard, the Court should thus opt for the lower risk of injustice rather than the higher risk of injustice option. See **Amir Suleiman vs. Amboseli Resort Limited [2004] eKLR**, per Ojwang, Ag. J (as he then was); and the English case of **Films Rover International Ltd vs. Cannon Film Sales Ltd [1987] 1 WLR 670**, per Hoffman, J. where his Lordship took a view that in considering to grant injunctive relief on a balance of convenience: ***“A fundamental principle of ... is that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’...”***

43. The Applicants are also seeking a Mandatory Injunction compelling the Respondent to remove the wall. In Kenyan Law, mandatory injunctions are granted only in exceptional

circumstances where the Court is almost certain the Applicant will succeed at trial **A.M. Amboka & 186 v. Kenyatta University (2014)eKLR**. It is also settled that in interim applications, such as in this case, the Court should avoid making final determinations on matters of fact made on the basis of the conflicting Affidavit evidence. In connection thereto, in **Mbuthia vs Jimba Credit Finance Corporation & Another [1988] KLR 1**, the Court of Appeal guided as follows:

***“... the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions.”***

44. On the question of whether the Appeal shall be rendered nugatory if the injunction is not granted. The Court of Appeal in **Gulf Timber & Hardware Supplies Limited v Ngaruiya & 5 Others (Civil Appeal E203 of 2021) [2022]KECA87 (KLR)(4 February 2022)(Ruling)(with dissent- S oleKantai, JA)** observed that: -

***“As regards an appeal being rendered nugatory, this Court has held in the case of Reliance Bank Limited v Norlake Investment Limited [2002]1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case, and in so doing the***

***Court is bound to consider the conflicting claims of both sides. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or restrained, if allowed to happen is reversible, or if not reversible, whether damages will reasonably compensate the party aggrieved.”***

45.The Applicants argued that their Appeal would be rendered nugatory if the injunction is not granted because the Plaintiff has already put up a perimeter wall and they cannot access the suit property anymore. They aver that she may dispose of the same. The transfer of title may result in irreversible prejudice to the Applicants, as the suit property, which is central to the Appeal, would no longer be in existence. It also argued that it is not enough to say that the loss can be compensated by damages.

46.The Applicants allege that the Respondent/Plaintiff is engaging in self-help execution. Specifically, as already stated at paragraph 40 they claim that between December 1<sup>st</sup> and 4<sup>th</sup>, 2025, the Respondent erected a perimeter wall around the 25-acre suit property.

47.The Applicants contend that the Respondent is taking advantage of the limbo period while waiting for the Ruling on the stay of execution scheduled for February 2026 to physically secure the land.

48.It is my considered position that if the injunction is not

granted and the Applicants succeed in their Appeal, they stand to suffer greater loss than the Respondent, who retains and is at liberty to alienate the suit property in any way in the event that the Appeal does not succeed.

49. However, when the Applicants made this application, they also made an application for stay and prayer 4 of the Application of injunction states;

***“This Honorable Court be pleased to grant Orders 3, 4 and 5 sought in the Application dated 4<sup>th</sup> August 2025.”***

50. My reading of this prayer is that if the Court grants the stay as prayed in the application dated 04/08/2025 then the injunction sought will be as good as settled. This being the case then the injunctive prayer is overtaken with event following the finding of the Court in the application dated 04/08/2025.

51. The last application is the one for Review filed by parties who were not part of the initial matter, it is dated 2/02/2026. In the said application the Interested Parties/Applicants seek the following orders:

**1) THAT the Court be pleased to Review its Judgment dated 31/07/2025.**

**2) THAT the Honorable Court hereby Reviews the Judgment dated 31/07/2025 and nullifies the entitlement of the 1<sup>st</sup> Respondent’s adverse possession in respect of the Applicants’ plots**

**Thika Mun/Block 32/157, Mun/Block 32/142, Mun/Block 32/41, Mun/Block 32/42, Mun/Block 32/40, Mun/Block 32/48, Mun/Block 32/52, Mun/Block 32/61, Mun/Block 32/62 and Mun/Block 32/30 within the subdivided Thika Municipality/Block 32.**

**3) THAT the Honorable Court declares the Applicants the lawful registered owners of the respective title deeds Thika Mun/Block 32/157, Mun/Block 32/142, Mun/Block 32/41, Mun/Block 32/42, Mun/Block 32/40, Mun/Block 32/48, Mun/Block 32/52, Mun/Block 32/61, Mun/Block 32/62 and Mun/Block 32/30 within the subdivided Thika Municipality/Block 32.**

**4) THAT the Honorable Court hereby orders the Land Registrar, Thika to regularize the official records to reflect the Applicants are the respective registered owners of respective plots Thika Mun/Block 32/157, Mun/Block 32/142, Mun/Block 32/41, Mun/Block 32/42, Mun/Block 32/40, Mun/Block 32/48, Mun/Block 32/52, Mun/Block 32/61, Mun/Block 32/62 and Mun/Block 32/30 within the subdivided Thika Municipality/Block 32.**

**5) THAT the Honorable Court hereby Reviews the Judgment dated 31/07/2025, set it aside in its**

**entirety and order for a retrial of the suit with the Applicants joined as Defendants.**

**6) THAT the costs of this application be borne by the Respondents.**

52. Which Application is based on the five grounds on the face of the Application and the Supporting Affidavit sworn on even date by Mwai Mathenge an Advocate and Director of the 1<sup>st</sup> Respondent.

**Analysis and Determination**

53. This is a complex land dispute involving a clash between adverse possession and the indefeasibility of title. Below is a summary of the application, followed by a reasoned legal decision based on Kenyan Law and relevant precedents.

54. A brief summary of the application is that the Applicants (Mwai Mathenge and Others) seek a Review of a Judgment dated 31/07/2025, which granted the 1<sup>st</sup> Respondent ownership of a 25-acre parcel of land Thika Mun/Block 32 via adverse possession.

55. The Applicants' core arguments are that the 1<sup>st</sup> Respondent sued the wrong party being the 2<sup>nd</sup> Respondent/original owner. That the Applicants had already purchased and subdivided the land into 155 plots as early as 2001.

56. In their documentation they present title deeds and land rate receipts showing they are the registered owners. They argue that because the land was government leasehold land starting March 1, 2001, the 12-year period for adverse

possession could only have matured in 2013 after they had already acquired their titles.

57.They claim they were never served or made aware of the suit until January 2026, violating their right to a fair hearing under Article 50 and Right to Property under Article 40 of the Constitution.

58.They admit that the Land Registrar failed to fully update some records such as the Green Cards, which may have misled the Court or the 1<sup>st</sup> Respondent.

59.Now, while the Applicants have raised substantive issues regarding ownership, the specific legal vehicle used being Order 45 for Review faces a significant procedural hurdle which is that the Applicants were not parties to the original suit.

60.Under Order 45, Rule 1 of the Civil Procedure Rules, a Review is typically reserved for any person considering himself aggrieved who, from the discovery of new and important matter or evidence or on account of some mistake or error apparent on the face of the record desires to obtain a Review of the Decree.

61.Kenyan Courts have traditionally held that a person aggrieved for the purpose of Review must generally be a party to the suit. If you were not a party, you cannot Review a Judgment; you must instead apply to set aside the Judgment as an Interested Party or Appeal the decision.

62.The instant Application for Review is in a difficult terrain.

Even if I was to turn to the Constitution under Article 50, I cannot overlook the fact that these are parties coming on record seeking a Review under Order 45.

63. The law on Review is provided for under Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya provides as follows: -

***“Any person who considers himself aggrieved-***  
***a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***  
***b. by a decree or order from which no appeal is allowed by this Act, may apply for a Review of Judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”***

64. The procedure and regulations for the Review are provided for under Order 45 Rule 1 of the Civil Procedure Rules, 2010 as follows: -

***“(1) Any person considering himself aggrieved-***  
***a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***  
***b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which,***

***after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a Review of the decree or order, may apply for a Review of Judgment to the Court which passed the decree or made the order without unreasonable delay.”***

65. Order 45 of the Civil Procedure Rules is designed to facilitate the exercise of the Court's inherent powers and to protect the rights of persons directly affected by decisions.

66. In the Court of Appeal decision in **Accredo Ag & 3 Others Vs. Steffano Uccelli & Another (2017) eKLR** it was held that;

***“The aggrieved person instituting a Review must satisfy the Court that:***

***a) There has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or***

- b) There is some mistake or error apparent on the face of the record, or***
- c) There exists sufficient reason to Review the decree/order.”***

67. In **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018** John M. Mativo Judge (as he then was) culled out the following principles from a number of authorities: -

- i. A Court can Review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression "any other sufficient reason "appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by along process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of Review.
- v. A decision/order cannot be Reviewed under Section 80 on the basis of subsequent decision/ Judgment of a coordinate or larger Bench of the tribunal or of a superior Court.
- vi. While considering an Application for Review, the Court

must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

- vii. Mere discovery of new or important matter or evidence is not sufficient ground for Review. The party seeking Review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the Court/ tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of Review by a civil Court and consequently by the appellate Courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of

the Court, but such limitations have been provided for in Order 45 Rule 1.

- x. The power of a civil Court to Review its Judgment/decision is traceable in Section 80 CPC. The grounds on which Review can be sought are enumerated in Order 45 Rule 1.

68. The Applicants' strongest point is that they were necessary parties. Under Order 1 Rule 10(2) of the Civil Procedure Rules, the Court is allowed to join any party whose presence is necessary to adjudicate the matter. In **Central Kenya Ltd v Trust Bank Ltd & Others [2000] eKLR**, the Court held that a Judgment obtained in the absence of a necessary party is a "nullity" and can be set aside *ex debito justitiae*. The Applicants argue the 12-year clock could not start until 2001 because the land was previously government-owned and that Section 7 of the Limitation of Actions Act prevents adverse possession against Government land.

69. In **Wanje v Saikwa (No. 2) [1984] KLR 284**, the Court emphasized that the 12-year period must be continuous and as of right. If the land changed from Government to private leasehold in 2001, the 12 years began then.

70. Now, whereas in **Gurtner v Circuit [1968] 2 QB 587**, the Court of Appeal held that if a person's legal rights will be directly affected by a Judgment, that person is entitled to be joined as a party, and if a Judgment was reached in their absence, it must be set aside to allow for a fair trial.

However, in India Order 47, which mirrors Kenya's Order 45 and in the case of **Union of India v Nareshkumar Badrikumar Jagad (2011)**, the Supreme Court of India clarified that while a non-party can be an aggrieved person, the proper remedy for a stranger to the suit is usually a separate suit or a specific application to set aside, rather than a Review of the internal merits of a case they did not participate in.

71. In the instant case, the Defendants have already preferred an Appeal in the Court of Appeal. Therefore, where are new parties going to seek a Review of a Judgment under Order 45 Rule 1 if they are aggrieved or prejudicially affected? The matter is already in the Court of Appeal and therefore it cannot be Review in the lower Court. A Review application is generally not maintainable if an Appeal against the same decision has already been filed, particularly if the issues are on Appeal. Review is limited to apparent errors, new evidence or other sufficient reasons, and is not a substitute for an Appeal.

72. It is a matter of law that once an Appeal is filed, it is difficult to maintain a Review Petition in the lower Court. The Appellate Court is usually deemed the proper venue for correcting errors.

73. Also as already stated a Review must be based on a mistake or error that is self-evident, such as a clerical error, not a debate on the merits of the case as is in the matter at hand.

74. In conclusion, at the risk of sounding tautological, while the Applicants in this matter have filed for Review, the existence of a pending Appeal in the Court of Appeal has restricted this Court's jurisdiction to Review its own decision, as the case is now within the purview of the Appellate Court.

75. In the circumstances, I am not persuaded to find for the Applicants seeking Review. Their recourse lies in the Court of Appeal.

**Disposal Orders:-**

76. Accordingly, I make the following Orders in relation to the three applications :

***i) A conditional stay of execution of the Judgment and Decree dated 31/07/2025 is hereby granted pending the hearing and determination of the Appeal Nairobi Civil Appeal No. E790 of 2025.***

***ii) The Applicants shall, within sixty (60) days of this Ruling, deposit a sum of Kesh 5,000,000 in the joint names of the Lawyers of the Applicants and the Respondents as security for the due performance of the Decree.***

***iii) In default of the deposit of the said security within the stipulated time, the stay of execution shall automatically stand vacated, and the Respondent shall be at liberty to proceed with execution.***

- iv) The Status Quo regarding the registration and occupation of Land Reference No. 20695 Thika Municipality shall be maintained until the security is deposited or the timeline expires.*
- v) The Application dated 5/12/2025 is overtaken by events.*
- vi) The Application for Review dated 02/02/2026 is dismissed with costs to be borne by the Applicants.*

**DATED SIGNED AND DELIVERED VIRTUALLY AT THIKA VIA VIDEOLINK THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2026.**

.....  
**MOGENI J**  
**JUDGE**

**In the presence of: -**

- .....for the Defendant Applicants
- .....for the Plaintiff/1<sup>st</sup> Respondent
- .....for the 1<sup>st</sup> to 35<sup>th</sup> Interested Parties
- Melita.....Court Assistant

.....  
**MOGENI J**  
**JUDGE**