

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**SUCCESSION CAUSE NO. 398 OF 2011**

**IN THE MATTER OF THE ESTATE OF ERASTUS**  
**NJAUIMWE GACHINGA (DECEASED)**

**MARIE-JOSEE GACHECHEH**

[Suing in her capacity as the Administrator of the estate of  
ROBERT TIMOTHY GACHECHEH] .....

**APPLICANT**

**VERSUS**

**PETERSON MWIHU NJAUIMWE** .....

**RESPONDENT**

**RULING**

1. The matter came up for directions for fixing a judgment date. The court discovered that a protest had been filed in 2024 by the applicants. They sought directions on hearing of their protest. Upon perusing the protest I noted the claim is over a stale debt given in the 1967/1968. The claim was set out as follows:
  - i. That the late Njauimwe acquired the land parcel, namely, Irimukuyu/Gachuiro 535 (herein after referred to as the subject property), on 9th March 1959. The title deed was

- issued in his favour on 2nd May 1960, as can be ascertained from the annexed copy of the title deed marked as Exhibit 2.
- ii. That on 6th July 1960, barely 3 months after acquiring the property, a charge was registered against it to secure a sum of Ksh 3,200/=. The said security was discharged on 11th October 1965 as can be ascertained from the annexed copy of the green card dated 30th December 1996 and marked as Exhibit 3.
  - iii. That on 11th July 1967, the Late Njauimwe took a loan of Ksh 5,000/=: which he secured using the subject property; a charge was registered against the title deed to secure the said amount. The said charge was later discharged on 16th February 1972 as can be ascertained from Exhibit 3 above.
  - iv. That on 13th March 1977, the late Njauimwe Gachinga got into yet another debt with Kenya Commercial Bank, having taken up yet another loan of Ksh 15,000/= with the said bank, which he secured with the subject property. The same was later discharged as can be ascertained from Exhibit 3 above.
  - v. That on 25th February 1976, the late Njauimwe was at it again, he took yet another loan of Ksh 14,900/= from

- Agricultural Finance Corporation and secured the same with the title deed through a charge registered on even date.
- vi. That in distress, the deceased and his clan, approached my late husband in 1968. The late Erastus Njauimwe Gachinga borrowed Kshs 14,150/= from my late husband to clear his debts and avoid the statutory sale of land by the said Agricultural Finance Corporation, which my husband obliged. My husband paid the said amount of Ksh 14,900/=, which included the loan but excluded interest and the auctioneers' fees at the time.
  - vii. That the clan met on 7.11.1989, where it was agreed that the said parcel will be forfeited to offset my late husband's debt.
2. The court requested the applicant's advocate to address it on the provisions of Section 4(1)(a) and 7 of the Limitation of Actions Act. The applicant was at sea on the same. I directed that I was to peruse the protest and revert shortly, which, I now do.
3. The claim herein is claim in land allegedly not bought but arising from a fictitious debt that became stale in 1974. The main matter is the succession of the estate of Erastus Njauimwe Gachinga (Deceased) under Section 4. Succession

as I understand it, relates to a very specific area of law and is succinctly set out in section 2(1) of the Law of Succession Act as follows:

**(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.**

4. The questions raised are not about the dependents of the deceased person. It relates to a debt alleged to have been given to the deceased in 1967/8 for a sum of Ksh 14,000/=, which the protestor now says has ballooned to Ksh 4,000,000/=. A succession court is singularly unqualified to carry out debt recovery. However, the alleged debt was incurred 50 years ago. The deceased did not refund the same. The deceased died on 29.01.2010, and this case started in 2011. The claim has been lodged 13 years after the succession was started. This offends Section 4(1)(a) of the Limitation of Actions Act, which provides as follows:

*(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-*

*(a) actions founded on contract;*

*(b) actions to enforce a recognizance;*

*(*

5. Consequently, the recovery of the alleged debt should have been done in the 1970s in a civil claim.

6. On the other hand, there is an indication that the deceased was to give the applicant's estate some land. That land was not ascertained. It is therefore not a claim against any of the estate's property. There was no occupation of the estate property. Section 7 of the Limitation of Actions Act provides as follows:

**An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.**

7. The applicant sought to be given land that arose from an oral agreement allegedly made with the deceased way back in the 1960s. He sought either Ksh 14,000/= or the entire parcel of land. It is based on a non-existent stale claim. The advocate indicated that such an amount has now arisen to over 4,000,000/=. Whether the claim is due or not, the applicant

did not enforce his claim. In any case, this is a claim for land or Kshs. 14,000/=, which is alleged to have been growing exponentially to 4,000,000/=.

8. There is an indication of alleged discussions. They are irrelevant for purposes of stale claims. While discussing the question of adverse possession and the place of proceedings including succession, in the case of **Isaac Cypriano Shingore v Kipketer Togom [2016] KECA 656 (KLR)**, the court of appeal [Maraga, Gatembu & Murgor, JJ.A] held as follows:

By the time the respondent filed the originating summons in November 2006, he had been in possession of the property for about 24 years. Even by the time the appellant became registered as proprietor by transmission on 28th April 2000, the appellant had been in occupation of the property for about 18 years. No attempts were made by the appellant over all those years to assert title. There is no merit in the argument by the appellant that the objection proceedings in the succession cause by the respondent and the complaint by the respondent before the Land Disputes Tribunal had the effect of interrupting the respondent's possession of the property. We are unable to appreciate how steps taken by the respondent to assert his claim to the property can be construed as steps by the appellant to assert his right to ownership of the property.

9. In this case, the applicant is not in possession, does not have a decree for land, and is laying a land matter for this court to

determine. In any case, article 162(2)(b), read with article 165(5) of the constitution, bars this court from hearing the claim. Article 162(2)(b) of the constitution provides as follows:

*Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-*

*(a) ....*

*(b) The environment and the use and occupation of, and title to, land.*

10. The injunction given to this court under article 165(5) of the Constitution provides as follows:

*The High Court shall not have jurisdiction in respect of matters—*

*(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or*

*(b) falling within the jurisdiction of the courts contemplated in Article 162(2).*

11. Then what should the court do with the case herein? The claim is not a claim of trust or possessory rights but a stale, unsubstantiated claim. The claim for repayment of a promise from 1968 cannot be entertained at this late stage. Such claims have clogged the courts and kept this matter in court for a long time.

12. The protest is unmerited and cannot be entertained. The court will give directions on the existing parties. Consequently, the entire gambit of involvement of Marie-Josee Gachecheh [Suing in her capacity as the Administrator of the estate of Robert Timothy Gachecheh and all documents filed herein are expunged from the record. The applicant must learn to live with the consequences of their laches. The effect of stale claims was addressed in the case of **Kahindi Ngala Mwagandi v Mtana Lewa [2014] KEELC 284 (KLR)** by O. A. Angote J, where he held as follows:

25. On the hand in Adnam Vs Earl of Sandwich (1877) 2 QBD 485, the court held as follows;-

The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

26. Closer home, the East Africa Court of Justice (E.A.C.J) in the case of Attorney General of Uganda vs Omar Awadh & 6 Others(2013) eKLR held as follows;-

“Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overriding rationale for statutes of limitations, such as the time limit of Article 30(2) of the EAC Treaty is to protect the system from the prejudice of stale claims and their statutory effect on the twin principles of legal certainty and of response.”

27. The Supreme Court of India also had an occasion to express its views on the law of limitation in the case of Rajender Sigh & Others Vs Santa Sigh & Others(1973) INSC 141, AIR 1973 SC 2537, 1974(1) SCR 381 as follows:

“The Policy underlying statutes of limitation, spoken of “response” or of “peace”, has been thus stated in Halsbury`s Laws of England Vol.24, P.181 (Paragraph 130). The courts have expressed at least three differing reasons supporting the existence of statutes namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to dispose a stale claim and (3) that persons with good causes of actions should pursue them with reasonable diligence. The object of the law of limitation is to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party`s own inaction, negligence or laches”

13. The above authority was confirmed in the case of **Lewa v Mwangandi [2015] KECA 532 (KLR)**, where the court of

appeal [ **W Ouko, MS Asike-Makhandia & K M'Inoti, JJA**] **PER MS Asike-Makhandia, JA**, held as follows:

It is in the public interest and indeed in the interest of justice that an absentee landlord should not be allowed to hang the sword of Damocles over the heads of landless squatters in such times when the commodity is so scarce. Limitation of time for land claims as with claims of any other nature exist for three main reasons which are: A plaintiff with a good cause of action ought to pursue it with reasonable diligence (equity does not aid the indolent); A defendant might have lost evidence over time to disprove a stale claim; and Long dormant claims have more cruelty than justice in them (Halsbury's Laws of England, 4th Edition.) Every limitation of actions, including adverse possession, does come with certain exceptions and extensions to ensure justice and fairness as far as possible. Opening the litigation door on this principle would be akin to opening Pandora's Box. Section 38 of the Limitation of Actions Act cannot be read in isolation. Declaring it unconstitutional in the manner suggested by the appellant in this case would not only be lacking in good reason, but would pose the danger of exposing the entire statute and principle of limitations to challenge with undesirable effects and consequences. For instance, what will stop a litigant from challenging defences of limitation in cases of torts and contracts as being unconstitutional for the reason that they are an impediment to his constitutional right to access justice? It may be admitted that adverse possession in its present

form in Kenyan law may occasion unsavory results for land owners, but such is the position in law even within the new constitutional dispensation. The proper recourse would be for the statutes to be carefully researched and developed to cover the mischief of unscrupulous squatters in the current state of affairs.

14. A party cannot wake up 50 years later and start laying claim that has been in limbo at best and nonexistence at worst, and then clog the court. There is always an end to stale claims. This one has reached its end. In the circumstances, the ship must be steered back to the family and the matters the court was dealing with.
15. Consequently, the entire gambit of involvement of Marie - Josee Gacheche suing in the capacity of the administrator of the estate of Robert Timothy Gacheche is expunged from the record. The protest is hereby struck out. The existing parties will take directions after this ruling.
16. This leaves the issue of costs, which are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

*It is our finding that the position in law is that costs are at the discretion of the court seized up*

*of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.*

17. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR)**, as follows:

18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs

do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

18. The applicant is in pursuit of a stale claim. There is no need to have the party in the estate. Therefore, each party will bear its costs.

#### Determination

19. The court now makes the following orders:
- a) Consequently, the involvement of Marie-Josée Gacheche, suing in the capacity of the administrator of the estate of Robert Timothy Gacheche, is expunged from the record. The protest is hereby struck out.
  - b) The existing parties will take directions after this ruling.
  - c) Each party will bear its costs.

**DELIVERED, DATED and SIGNED at NYERI on this 26<sup>th</sup> day of February, 2026.** Ruling delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**  
**JUDGE**

**In the presence of:-**

Ms. Mwangi for the Protestor

Ms. Njiraini for 2 Administrators

Court Assistant - Michael

ORIGINAL