



**Gathithi [The Legal Representative of the Estate of Fredrick Gathithi Kabue] v Njuki  
(Environment and Land Case E536 of 2024) [2026] KEELC 2049 (KLR) (10 April 2026) (Ruling)**

Neutral citation: [2026] KEELC 2049 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE E536 OF 2024**

**JG KEMEI, J**

**APRIL 10, 2026**

**BETWEEN**

**EUNICE WANJIRU GATHITHI [THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF FREDRICK GATHITHI KABUE] ..... PLAINTIFF**

**AND**

**GEORGE KIMANI NJUKI ..... DEFENDANT**

**RULING**

1. Vide a Complaint dated 20/12/2024, the Plaintiff initiated legal proceedings against the Defendant, seeking inter alia; a declaration that the suit land is owned by the Plaintiff and held in trust by the Plaintiff for the estate of the deceased.
2. In denying the Plaintiff's claim, the Defendant filed a defence dated 7/3/2025 and urged the Court to, inter alia, dismiss the Plaintiff's case with costs.
3. On 26/11/25, when the matter came up for hearing of the main suit, Counsel for the Plaintiff informed the Court that he had substituted the Plaintiff, who was the main witness, with Douglas Kahara Gathithi, her son, on the grounds that the main Plaintiff was old, sickly, and unable to testify.
4. Counsel for the Defendant strongly opposed the application, at which point the Court directed the parties to address the Court on the issue and file written submissions.
5. Counsel for the Defendant filed submissions dated 20/1/26. It was submitted that the suit, having been filed by the Plaintiff as an administrator of the estate of the deceased, cannot delegate her core decision-making duties and powers, and that any attempt to do so in favour of her son is ineffective and should not be permitted. The power to defend suits is given to the administrator under Section 82 of the *Law of Succession Act* and therefore cannot be delegated. In the event that the said administrator is unable to perform these duties, she must seek the Court's permission for a new grant rather than delegating without authority. If the Plaintiff faces any disability in fulfilling her duties, her recourse is to seek the



removal or replacement of someone capable of undertaking the administrative responsibilities, which include the prosecution of this suit.

6. Counsel for the Plaintiff, on the other hand, has argued that the Defendant's objection is mala fides and a tactical attempt to delay the expedient prosecution of the matter. They contend that the position taken by the Defendant is legally flawed because substituting the witness to testify to facts regarding encroachment does not amount to the transfer of grant of administration or the legal authority to manage the estate of the deceased. The substituted witness is a competent witness, as his evidence will be based on facts and his knowledge of those facts, and he is merely a vehicle to convey the evidence to the Court.
7. Furthermore, it was submitted that the Plaintiff is 83 years old and has failing health, which necessitates substituting the witness. The witness statement of the new witness is a replica of that of the Plaintiff, and therefore, there will be no prejudice.
8. The key issue for determination is whether the Plaintiff is entitled to the orders sought.
9. The right to be heard is protected under Article 50 (1) of *the Constitution* of Kenya, 2010, which provides that every party is guaranteed the right to a fair hearing. The Court, in determining an application for the substitution of a witness, is guided by certain factors: whether the evidence of the substitute is similar to that of the main witness; whether the witness is conversant with the matters in question; and whether the evidence should not materially differ from the original witness's testimony. Additionally, the Court considers whether there is any prejudice to the opposing party and if the opposing party will have the opportunity to cross-examine and test the evidence to avoid trial by ambush and prevent surprises. Lastly, it examines whether there are compelling reasons to enable the Court to order the substitution in the interest of justice, for example, in cases where the original witness cannot attend Court due to unavoidable circumstances such as illness, retirement, or relocation to a foreign Country.
10. In this case, I have reviewed the witness statement of Douglas Gathithi dated 18/11/25 and compared it with that of the Plaintiff dated 20/12/2024, and I find that they do not differ materially. The Defendant has urged the Court that substitution is tantamount to the Plaintiff admitting inability to administer the estate of the deceased. I respectfully differ with this position, and in my view, the new witness is stepping into the shoes of the Plaintiff to offer testimony that she would have presented herself at the trial. The Plaintiff is said to be elderly, aged 83 years, and ill. I have no evidence to doubt this position, save to state that the circumstances provide the Court with compelling reasons to allow the substitute to give testimony on her behalf. I say so because of two reasons: firstly, there is no prejudice that is likely to be suffered by the Defendant if the substitute is permitted to testify [at least none was adduced]. In any event, the Defendant will have the opportunity to test the evidence in cross-examination, thereby eliminating any trial by ambush and unfairness. Secondly, the substitute has stated that he has personal knowledge of the facts he intends to present before the Court in respect of the suit. The Court is therefore satisfied that, by allowing the substitution, the character of the current suit will not be altered.
11. Final Orders for disposal
  - a. To serve the interest of justice, I allow the substitution of the Plaintiff with her son, Douglas Gathithi, to testify in her stead.
  - b. The costs shall be borne by the Defendant.
12. Orders accordingly.



**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF APRIL 2026 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

Delivered Online in the Presence of:

Mr. Nadio for the Plaintiff

Mr. Gakeria for the Defendant

CA- Mr Duncan Muusya

