



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 99 OF 2022

**IN THE MATTER OF SECTION 7, 17 AND 38 OF LIMITATIONS
OF ACTIONS ACT, ORDER 37, RULE 7 AND 19 CIVIL
PROCEDURE RULES SECTION 3A OF THE CIVIL PROCEDURE
ACT AND ALL THE OTHER ENABLING PROVISION OF THE LAW**

LYDIA WANGUI

MWANGI.....PLAINTIFF/APPLICANT

VERSUS

LUCIA WANGARI KIMOTHO.....1ST

DEFENDANT/RESPONDENT

ISAAC THUKU KIMOTHO.....2ND

DEFENDANT/RESPONDENT

RULING

- 1) This Application is brought under Sections 1A, 1B, and 80 of the Civil Procedure Act, as well as Order 45 Rules 1 and 2, Order 24, and Order 51 Rule 1 of the Civil Procedure Rules, and the Applicant is seeking the review and setting aside of the Court's order dated 15/05/2025, the maintenance of the status quo regarding land parcel NDARUGO/GATHAITE/1526, and leave to substitute the deceased 1st Respondent.
- 2) The Applicant seeks the following orders:

- (1) Spent.
 - (2) **THAT** this Honorable Court be pleased to review, set aside, rescind, or vary its order of **15/05/2025** which allowed the Respondents' Preliminary Objection dated 12/09/2024 and consequently dismissed the Plaintiff's suit.
 - (3) **THAT** this Honorable Court be pleased to order the maintenance of status quo in respect of the suit land parcel measuring approximately 1 acre known as **NDARUGO/GATHAITE/1526** currently occupied by the Plaintiff/Applicant, pending the hearing and determination of this application.
 - (4) **THAT** upon the granting of prayer (2) above, this Honorable Court be pleased to allow or extend time for the substitution of the 1st Respondent, **LUCIA WANGARI KIMOTHO**, who passed away on 12/09/2023.
 - (5) **THAT** this Honorable Court be pleased to make such further orders as it may deem just and expedient in the circumstances.
 - (6) **THAT** the costs of this motion be in the cause.
- 3) The Application is premised on the following grounds and supported by the Affidavit of Lydia Wangui Mwangi deponed on 12/06/2025:

- (a) The suit land, **NDARUGO/GATHAITE/1526**, is the subject of a claim for adverse possession filed by the Plaintiff in 2022.
- (b) In its Ruling dated 15/05/2025, the Court proceeded on the erroneous impression that Lucia Wangari Kimotho died in 1995. In fact, she passed away on 12/09/2023, well after the proceedings had commenced.
- (c) The 1st Defendant did not die before the commencement of the suit, but during the proceedings. The Applicant stands to suffer irreparable damage by losing land she has utilized since 1989 unless the Court determines the matter on its merits.
- 4) The Applicant, Lydia Wangui Mwangi, brings this application against a backdrop of a long-standing land transaction dating back to 1989, when her late husband, Michael Mwangi Mbage, purchased one (1) acre of land to be excised from parcel NDARUGO/GATHAITE/1526 from the late John Kimotho Karanja for valuable consideration. Following the said purchase and full payment of the purchase price, the Applicant and her late husband moved into possession of the suit property, which the Applicant has continued to occupy, utilize, and possess exclusively to date.
- 5) The history of this matter is marked by the demise of the original transacting parties. The vendor, John Kimotho Karanja, passed away in 1995, while the Applicant's husband, Michael

Mwangi Mbage, died on 7/09/2001. The Applicant has annexed a copy of the Grant of Representation for her late husband's estate, marked as **"LWM 1"**, to confirm her standing and the timeline of these events. In the year 2022, the Applicant moved this Honorable Court by way of a suit for adverse possession to formalize her interest in the suit land. At the inception of the suit, the Applicant sued both the 1st and 2nd Respondents in their respective capacities as the legal administrators of the Estate of the late John Kimotho Karanja, both of whom were alive and properly served at the time of filing.

6) During the subsistence of these proceedings, the 1st Respondent, Lucia Wangari Kimotho, who was a joint administratrix of the said estate, met her demise on 12/09/2023. The Applicant, being a resident of the same village and personally acquainted with the Respondents' family, has provided photographic evidence of the deceased's grave and headstone, marked as **"LWM 2"**, which clearly depicts the date of death as being well after the commencement of the suit. Notwithstanding these facts, the 2nd Respondent moved the Court by way of a Preliminary Objection dated 12/09/2024 annexed as **"LWM 3"**, seeking the dismissal of the suit on the grounds of *res judicata* and the purported death of the 1st Defendant prior to filing.

7) On 15/05/2025, this Honorable Court delivered a Ruling annexed as **"LWM 4"** upholding the said Preliminary

Objection and dismissing the Plaintiff's suit in its entirety. It is the Applicant's primary contention that the said Ruling is grounded on a fundamental error apparent on the face of the record. Specifically, the Court proceeded under the erroneous impression and factual misapprehension that the 1st Respondent had died in 1995 prior to the filing of the suit whereas she had in fact died in 2023 while the proceedings were ongoing.

- 8) The Applicant further deposes that since the delivery of the impugned Ruling, the Respondent and his agents have taken advantage of the dismissal to create havoc and threaten the Applicant's peaceful possession of the suit land. Consequently, the Applicant beseeches this Honorable Court to exercise its inherent powers to review and set aside the dismissal, thereby preventing a miscarriage of justice and protecting the Applicant from the irreparable loss of land she has possessed for over thirty-five years.
- 9) The Application is opposed. Vide the Replying Affidavit deponed on 7/06/2025, **by Isaac Thuku Kimotho**, the 2nd Defendant and legal administrator of the Estate of the late John Kimotho Karanja, he vehemently opposes the Applicant's application for review dated 12/6/2025. The Deponent clarifies that the deceased, John Kimotho Karanja, passed away intestate on 25/01/1995, and categorically denies that any land was ever sold to the Applicant or her late husband prior to his demise. He further deposes that the Applicant has never

utilized any portion of the suit property, asserting that her historical attempts to trespass have been consistently thwarted by the family.

- 10) The Deponent raises a fundamental challenge to the Applicant's standing and the legality of the suit, asserting that the proceedings are *void ab initio* because the Applicant purportedly sued a deceased person, Lucia Wangari Kimotho (the 1st Defendant), who he maintains was already deceased at the time of the inception of the instant suit.
- 11) Crucially, the Deponent disputes the authenticity of the Applicant's evidence, stating that the exhibit marked "**LWK 2**" (the photograph of the grave) does not relate to his mother. Beyond the issue of the deceased party, the Deponent argues that the matter is strictly *res judicata*, as the Applicant has spent over fifteen years litigating the same claim across various forums of competent jurisdiction without success.
- 12) According to the Affidavit, the Applicant previously raised an objection to the mode of distribution of the estate in **Thika Chief Magistrate's Court Succession Cause No. 311B of 2008**, which objection was dismissed, leading to the issuance of a Certificate of Confirmation of Grant which is annexed as "**TK 2**". Aggrieved by that outcome, the Applicant preferred an appeal to the **High Court at Kiambu in Appeal Case No. 10 of 2017**, seeking the revocation of the said grant. The Deponent highlights that the High Court subsequently dismissed the application for revocation with costs which

decision is annexed as ("**TK 3**"), yet the Applicant has failed to settle those costs and has instead continued to pursue a wild goose chase through fresh litigation.

- 13) The Deponent characterizes the current Originating Summons and the subsequent application for review as a gross abuse of the Court process, designed solely to frustrate the beneficiaries from enjoying the fruits of their Judgment. He maintains that since the Applicant chose not to appeal the High Court's decision to the Court of Appeal, the matter attained finality and cannot be reopened under the guise of an Environment and Land Court claim.
- 14) Consequently, the 2nd Defendant beseeches the Honorable Court to buttress its Ruling of 15/05/2025 by confirming the suit's dismissal with costs, emphasizing the legal maxim that litigation must come to an end and that he who seeks equity must come with clean hands.
- 15) In response to the Replying Affidavit the Applicant filed a Supplementary Affidavit sworn on 25/09/2025, which was a rebuttal to the 2nd Respondent's Replying Affidavit, primarily aimed at dismantling the factual assertion that the 1st Respondent died in 1995.
- 16) The Applicant deposes with clarity that the Respondent has willfully misrepresented the date of death of Lucia Wangari Kimotho to mislead the Court. She clarifies that while the patriarch, John Kimotho Karanja, indeed passed away on 28/01/1995, his widow, the 1st Respondent, was very much

alive and active in legal proceedings for decades thereafter, only meeting her demise in September 2023.

17) To substantiate this position, the Applicant has produced a trail of documentary evidence spanning several years. Annexed as **“LWM 1”** are pleadings from **Thika P&A No. 311B of 2008**, where the 1st Respondent herself was the Petitioner and explicitly named the Applicant as a purchaser of the suit land, **NDARUGO/GATHAITE/1526**. Furthermore, the Applicant points to the Grant of Letters of Administration issued to both Respondents on 14/08/2015 and annexed as **“LWM 2”** and a subsequent Ruling from the **Kiambu High Court (P&A 10 of 2017)** delivered as recently as 6/02/2020. The Applicant argues that it is a physical and legal impossibility for the 1st Respondent to have died in 1995 while simultaneously petitioning for grants in 2008 and swearing affidavits in 2020.

18) The Applicant further challenges the Respondent’s integrity by revealing an unfiled draft affidavit for the rectification of a grant, marked as **“LWM 3”**, where the 2nd Respondent and another kin sought to strike out the 1st Respondent’s name specifically because she had died in September 2023. She argues that the evidential burden has now shifted to the 2nd Respondent to produce a Death Certificate if he maintains that the grave site photographed on the suit land where the Applicant continues to farm tea as

shown in photographs marked “**LWM 4**” is not that of his mother.

- 19) Addressing the legal hurdle of *res judicata*, the Applicant deposes that her claim for adverse possession has never been adjudicated upon by a Court of competent jurisdiction. She asserts that the previous succession proceedings were strictly limited to the revocation of a grant under Section 76 of the Law of Succession Act and that a probate Court lacks the jurisdiction to determine a claim for adverse possession. Consequently, she maintains that there is a glaring error on the face of the record regarding the date of death which led to the erroneous dismissal of her suit. She beseeches the Court to prioritize the interests of substantive justice over technicalities, praying that the matter be reinstated to be heard and determined on its merits.
- 20) The Application was canvassed by way of written submissions. The Applicant filed their submissions dated 29/09/2025 and the 2nd Defendant filed their submissions dated 24/10/2025, which I will briefly summarize.
- 21) The Plaintiff submits that while the original vendor, John Kimotho Karanja, passed away in 1995, his widow and joint administratrix, the 1st Respondent, remained an active legal protagonist for nearly three decades thereafter. Evidence from **Thika P&A No. 311B of 2008 and Kiambu High Court Case No. 10 of 2017** confirms that she was the primary Petitioner and deponent in those matters, swearing affidavits

as recently as 2020. That the 1st Respondent actually met her demise on 12/09/2023, well after the suit for adverse possession had been properly instituted.

22) The Applicant cites the case of **Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited [2020] eKLR**, and submit that an error is apparent when it is prima facie visible and without a long-drawn process of reasoning. The Court's reliance on an incorrect date of death is a patent mistake that warrants an immediate review to prevent a gross miscarriage of justice.

23) Furthermore, the Plaintiff contends that the application is eminently merited because the suit is not, and cannot be, *res judicata*. While the Respondents rely on previous succession proceedings, it is a settled principle of law that a Probate Court lacks the jurisdiction to determine matters of adverse possession. The issues previously litigated in the High Court at Kiambu pertained strictly to the revocation of a grant under Section 76 of the Law of Succession Act. Since the Environment and Land Court is the only forum with the requisite jurisdiction to determine prescriptive rights over land, the Plaintiff's claim for the one-acre portion of NDARUGO/GATHAITE/1526 has never been heard or finally decided on its merits as required by Section 7 of the Civil Procedure Act.

24) Accordingly, the Applicant submit that she has acted with commendable celerity, filing this application within less than a

month of the impugned Ruling after obtaining the necessary records to clarify the timeline of the 1st Respondent's death. The interests of substantive justice, as protected under Sections 1A and 1B of the Civil Procedure Act, demand that a party should not be driven from the seat of justice based on a factual misapprehension or the Respondents' attempts to deny the obvious date of their own mother's passing. We therefore beseech Your Ladyship to find that this is a proper case for review, to set aside the dismissal, and to order the maintenance of the status quo so that this long-standing dispute may finally be determined on its actual merits.

25) The 2nd Defendant/Respondent in his submissions continues to vehemently oppose the application for review dated 12/06/2025, maintaining that the dismissal of the suit on 15/05/2025 was legally sound and consistent with the principles of finality in litigation. The Respondent submits that the Originating Summons dated 29/08/2022 was fundamentally flawed from its inception, as it was instituted against the 1st Defendant, Lucia Wangari Kimotho, who was already deceased. It is a settled position of law that a suit filed against a dead person is a nullity *ab initio*, and the Respondent contends that the Applicant's attempt to sue a non-existent party constitutes a gross irregularity and an abuse of the Court process. Furthermore, the Respondent asserts that the suit is strictly barred by the doctrine of *res judicata* as provided under Section 7 of the Civil Procedure Act.

- 26) He submits that the issues regarding the claim to the Estate of John Kimotho Karanja and the alleged purchase of one acre from land parcel NDARUGU/GATHAITE/1526 have already been heard and determined by two Courts of competent jurisdiction, specifically in **Thika Chief Magistrate's Court Succession Cause No. 311B of 2008** and subsequently in the **High Court of Kenya at Kiambu Succession Cause No. 10 of 2017.**
- 27) The 2nd Respondent deposes that the Plaintiff participated fully in these prior proceedings, first as an Objector in the lower Court and later as an Applicant in the High Court seeking the revocation of the Certificate of Confirmation of Grant dated 17/06/2013. In dismissing that application, the High Court in its Ruling dated 6/02/2020 categorically found at paragraph 14 that there was no prima facie evidence of any transaction between the Applicant's late husband and the deceased vendor.
- 28) The Court further noted that the mere inclusion of the Applicant's name in the initial Petition did not confer any property rights, especially in light of the Respondents' consistent rejection of such claims. The Respondent submits that having lost in both the Magistrate's Court and the High Court, the Applicant is now attempting to use an Originating Summons for adverse possession as a back-door mechanism to circumvent active Court orders and the confirmed Grant of Letters of Administration.

- 29) It is the Respondent's further submission that the doctrine of adverse possession cannot be invoked to claim land belonging to a deceased person in the manner attempted by the Applicant, as the legal framework for succession governs such estates. The Respondent contends that the current application is a vexatious attempt to mislead the Court and frustrate the beneficiaries of the Estate of John Kimotho Karanja from enjoying the fruits of their Judgment.
- 30) Citing the principle that litigation must come to an end, the Respondent argues that the Applicant's hands are tainted with indolence and a bad-faith attempt to create a comedy of justice through parallel and conflicting Court orders. Consequently, the Respondent beseeches this Honorable Court to uphold the dismissal of the suit, as the Ruling of 15/05/2025 correctly identified that the matter had reached its legal terminus, and any further proceedings would result in a legal absurdity. The Respondent therefore prays that the application for review be dismissed with costs.

Analysis and Determination

- 31) Upon a careful appraisal of the Motion, the Supporting, Replying, and Supplementary Affidavits, as well as the rival Written Submissions, the Court identifies the following four salient issues for determination:
- i. Whether there exists an error apparent on the face of the record regarding the factual status of the 1st*

Respondent at the time of filing to warrant a review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

ii. Whether the suit is barred by the doctrine of res judicata under Section 7 of the Civil Procedure Act by virtue of previous succession proceedings.

iii. Whether the Applicant is entitled to the orders of substitution of the deceased 1st Respondent and the preservation of the status quo.

iv. Who shall bear the costs of this Application?

32) The Application before me is a plea for the Court to exercise its restorative jurisdiction to correct what the Applicant terms a fundamental factual fallacy that led to the dismissal of her suit. The Applicant moves the Court under the Oxygen Principle enshrined in Sections 1A and 1B of the Civil Procedure Act, which mandates the Court to facilitate the just and expeditious determination of disputes.

33) The first issue for determination is the existence of an error apparent on the face of the record. Black's Law Dictionary defines an error of fact as a mistake about a fact that is material to the transaction or proceeding. In this case, the Court's Ruling of 15/05/2025 was predicated on the belief that the 1st Respondent died in 1995, rendering the suit a nullity. However, the Applicant has presented a trail of documentary evidence including pleadings from **Thika P&A No. 311B of 2008** and a **2020 High Court Ruling** proving

the 1st Respondent was alive and legally active for nearly thirty years after 1995.

- 34) The 2nd Respondent who contests this fact did not present any evidence to prove that indeed unlike what the Applicant claims there is concrete evidence that the 1st Respondent died in 1995. This claim was not rebutted through presentation of alternative evidence. Infact the 2nd Respondent was not able to explain to Court how the 1st Respondent was litigating in 2008 and as late as 2020 if she had died in 1995.
- 35) The Court in **Kariuki & 26,248 Others v Attorney General & 4 Others (Petition 90 of 2015, updated 2025)** reiterated that the Court may review its Judgment where there is a self-evident error or newly discovered evidence. Further, in **Republic v District Land Registrar Uasin Gishu District [2025] KEHC 3999**, the Court emphasized that the error must be *prima facie* visible without detailed examination.
- 36) So, it is clear that Kenyan Courts apply a strict standard for review, requiring errors to be obvious and not merely a disagreement with the Judge's reasoning.
- 37) The Court of Appeal in **Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited [supra]** clarified that:
"An apparent error on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning."

38) Thus, if the 1st Respondent deponed an Affidavit in 2020, her death in 1995 is an obvious factual impossibility that stares this Court in the face. To allow a dismissal based on such a phantom timeline would be to allow a grave injustice to persist.

39) On the second issue of *res judicata*, the Respondent argues that the High Court at Kiambu already determined the Applicant's claim. However, the law distinguishes between the jurisdiction of a Probate Court and the Environment and Land Court. Under Section 7 of the Civil Procedure Act, for a matter to be *res judicata*, it must have been heard and finally decided by a Court of competent jurisdiction. A Probate Court, acting under the Law of Succession Act, determines the administration of an estate; it lacks the mandate to adjudicate a claim for Adverse Possession a prescriptive right arising under the Limitation of Actions Act. As was noted in the Indian case of **S. Nagaraj And Ors. vs State Of Karnataka And Anr. on 26 August, [1993]:**

"Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way ... If the Court finds that it has committed an error which has caused injustice, it is not only its power but its duty to correct it."

40) The High Court's previous refusal to revoke a grant does not equate to a final determination on whether the Applicant

has acquired title through thirty-five years of exclusive possession.

- 41) Regarding the substitution and status quo, once the Court finds that the 1st Respondent was alive when the suit was filed but passed away on 12/09/2023 during the proceedings, the suit does not abate. Under Order 24 of the Civil Procedure Rules, the cause of action survives, and the Court has the discretion to allow substitution to ensure the proper parties are before it. Given the Applicant's long-standing occupation since 1989, the preservation of the status quo is essential to prevent the legal absurdity of the Applicant being evicted before her prescriptive rights are weighed on their merits.
- 42) Ultimately, a Court of law must not be a hostage to its own inadvertent errors. Substantive justice, as protected by Article 159(2)(d) of the Constitution, overrides procedural technicalities. The Respondent's attempt to shield a Confirmed Grant through a misrepresentation of his mother's death date cannot be countenanced by a Court of equity.
- 43) In the final analysis the Court issues the following orders:
- i) The Application dated 12/06/2025 is hereby allowed.***
 - ii) The Order of this Court dated 15/05/2025 is hereby reviewed and set aside; the Plaintiff's suit is reinstated for hearing on its merits.***

- iii) The Applicant is granted leave to substitute the 1st Respondent with the legal representatives of her estate within 14 days.**
- iv) An order of status quo is hereby issued maintaining the current possession of land parcel NDARUGO/GATHAITE/1526 pending the final determination of the suit.**
- v) Costs of this Application shall be in the cause.**

Orders accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT THIKA VIA VIDEOLINK THIS 11TH DAY OF MAY, 2026.

.....
MOGENI J
JUDGE

In the presence of:

..... **for the Plaintiff/Applicant**

..... **for 1st**

Defendants/Respondent

..... **for 2nd**

Defendants/Respondent

Mr. Melita - Court Assistant

MOGENI J
JUDGE

ORIGINAL