



REPUBLIC OF KENYA



**KENYA LAW**

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**Kubai (Suing as the legal administrator of the Estate of Gabriel Kubai King'ori - Deceased) v Kingori & 2 others (Environment & Land Case E019 of 2024) [2024] KEELC 6897 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6897 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**  
**ENVIRONMENT & LAND CASE E019 OF 2024**

**CK NZILI, J**

**OCTOBER 16, 2024**

**BETWEEN**

**PENINAH KALAYU KUBAI (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF GABRIEL KUBAI KING'ORI - DECEASED) ..... PLAINTIFF**

**AND**

**DOMINIC NTONGAI KINGORI ..... 1<sup>ST</sup> DEFENDANT**

**MAGDALENE KABUYA KINGORI (SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF MARIA GATITU KINGORI) ..... 2<sup>ND</sup> DEFENDANT**

**ELIZABETH THARORA KARIUKI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Through an application dated 19.8.2024, the plaintiff seeks a temporary injunction barring and restraining the respondents, particularly the 1<sup>st</sup> respondent, whether by himself or through his agents, servants, representatives, or any other person claiming through him from selling, transferring, evicting the tenant Paul Lobo commencing any renovation instituting commercial advertisements or billboard on the property Meru Municipality Block No. 11/61 and occupation of the suit property or in any other way adversely affecting the peaceful enjoyment, user and occupation of the suit property pending the hearing and determination of this suit.
2. The second prayer is for the Executive Officer High Court station retrieve and make available to the court and the parties probate and administration Case No. 325 of 1977 and ELC Case No. 310 of 2010, which had been filed in Milimani family division and Nairobi Environment and Land Court to establish and affirm the ownership of Meru Municipality Block No. 11/61 as belonging to Gabriel Kubai King'ori.



3. The application is based on the grounds on the face of it and in a supporting affidavit of Peninah Kalayu Kubai sworn on 19.8.2024. The applicant avers that she is the wife of Gabriel Kubai (deceased) and the legal representative of the estate as per a gazette notice marked PKK "1," whose administration case No. 325 of 1977 was concluded and property Meru Municipality Block 11/61 registered in the name of Maria Gatitu (deceased) and Dominic Ntongai 1<sup>st</sup> respondent as trustees to hold in trust of her deceased husband as per an official search marked as PKK "2".
4. The applicant avers that upon receiving the property as his inheritance, her late husband leased the same to Paul Lobo, who has run a hotel business since 1985 to date paying rent of Kshs.150,000/=, which is shared with her mother in law who is very elderly for her sustenance as per receipts marked PKK "3".
5. Moreso, the applicant avers that the 1<sup>st</sup> respondent has been harassing her and the tenant for a long time, having tried to evict her from her matrimonial home as per orders marked PKK "4".
6. The applicant avers that she applied for an injunction in Meru H.C Succession Cause No. E007 of 2022 to stop the interference pending the hearing and determination of the succession case.
7. The applicant avers that during the hearing of her application, the 1<sup>st</sup> respondent adduced evidence of an alleged consent order in which the property was subdivided among the family members, a concept that was unknown to her as per the replying affidavit and the order marked PKK "5" (a) & (b)".
8. Similarly, the applicant avers that the tenant has up to date been paying rent to her and uses the same to pay school fees for her children, cater for their upkeep and that of their mother-in-law. Therefore, the applicant avers that if the tenant is evicted, she is likely to suffer a lot, for she will not be able to cater for her children as alluded above with the proceeds from the suit premises, which is an inheritance from her deceased husband as part of ancestral land and more so when she is not employed and relies entirely on this rental income.
9. Further, the applicant avers that the property was held in trust in the name of Dominic Ntongai, her deceased husband being a direct beneficiary in this estate. The applicant avers that the 1<sup>st</sup> respondent is not evicting the tenant for the benefit of preserving and collecting the estate, but rather for his selfish interest; otherwise, he had consulted neither herself nor her children or the other children in the estate for the renovation of the property.
10. The applicant avers that the 1<sup>st</sup> respondent was merely a trustee for the benefit of the estate; otherwise, his selfish actions were going to be detrimental to herself and the children as he wishes to interfere with their livelihood. The applicant avers that the best way to deal with the issue was restraining the respondents as per the prayers sought in the application until this suit is determined so as to enable her to sustain the children of the deceased and the beneficiary to the estate.
11. The 1<sup>st</sup> respondent opposes the application through the grounds of opposition dated 4.9.2024 and a replying affidavit that was sworn by Dominic Ntongai Kingori on 4.9.2024. The 1<sup>st</sup> respondent terms the notice of motion as misconceived, an abuse of the court process, res-judicata there was a consent dated 24.5.2011 that cannot be revisited or relitigated except before the court that issued it, that the tenancy sought to be protected by this application has been terminated, a similar application as dismissed on 8.8.2024 in Meru Succession Case No. E007 of 2024 and that the applicant was a vexatious litigant who is guilty of concealing material facts before this court.
12. By way of a replying affidavit, the 1<sup>st</sup> respondent depones that there has been a multiplicity of suits by the applicant seeking to protect the tenancy in Meru Municipality Block/11/61, yet she lacks capacity to handle any dispute relating to the tenants on the said plot and cannot restrain the respondents from



- evicting the tenant whose tenancy has become terminated as per judgment in Meru Business Premises Rent Tribunal Case No. 79 of 2018 Meru on 6.10.2021 as per annexure marked D.N. "1".
13. The 1<sup>st</sup> respondent avers that the tenant filed an appeal Meru ELC No. 10 of 2022, which was dismissed on 15.2.2024 as per annexure marked D.N. "2". The 1<sup>st</sup> respondent avers that upon the dismissal of the appeal with the tenant's approval and or collusion, filed a notice of motion dated 18.3.2024 in Succession Case No. E007 of 2024 seeking the same orders as in the current application, which was dismissed on 8.8.2024 as per annexure marked D.N. "3".
  14. Again, the 1<sup>st</sup> respondent avers that this court has no jurisdiction to entertain the issue of ownership of Meru Municipality Block 11/61, the same having been conclusively dealt with by consent of the parties in the presence of the applicant's deceased husband and his brother Gabriel Kubai Kingori as per annexure marked PKK "5".
  15. The 1<sup>st</sup> also respondent avers that the applicant will be a beneficiary of the proposed renovation of the suit premises because the premises will attract a higher market rent, which will be shared among the proprietors; otherwise, the applicant was at the behest of the tenant, who was frustrating the interest of the landlord and the judgment in BPRT. Further, the 1<sup>st</sup> respondent avers that the applicant was concealing material facts before the court and was coming to court with unclean hands.
  16. When the application dated 19.8.2024 came up on 19.9.2024, Miss Gikunda, Mr. Kinyua, and M/s Kinyanjui appeared for the plaintiff, 1<sup>st</sup> respondent, and 2<sup>nd</sup> respondent, respectively. The 3<sup>rd</sup> defendant did not make an appearance. Learned counsel for the 1<sup>st</sup> defendant told the court that his client had filed grounds of opposition, raising the issue of res-judicata, which he urged the court to determine first.
  17. Learned counsel for the 2<sup>nd</sup> respondent sought time to put in a response to the application while Miss Gikundi sought leave to put in a supplementary affidavit. Learned counsel for the applicant conceded that the issue of jurisdiction or res-judicata could be determined first. The court gave directions that the 2<sup>nd</sup> & 3<sup>rd</sup> respondents file a response to the notice of motion dated 19.8.2024, within 14 days and that both the preliminary objection and the notice of motion be heard or canvassed together by way of written submissions.
  18. It is trite law that pleadings bind parties, and issues for determination flow from the pleadings, including whether the jurisdiction of the court to hear and determine the issues is properly invoked. The primary pleading by the plaintiff and the 1<sup>st</sup> defendants are the plaint dated 19.8.2024 and the statement of defense dated 4.9.2024. In the plaint, the plaintiff avers that in 1988, upon conclusion of the estate of the late Josephat Kingori in Succession Case No. 325 of 1977 and ELC Case No. Meru Municipality Block II/61 was registered in the name of Maria Gatitu, now deceased and Dominic Ntongai as trustees.
  19. The plaintiff avers that her husband, Gabriel Kubai Kingori (deceased), was a son of the late Josephat Kingori and Maria Gatitu, who had leased the property to a tenant for a business known as Continental Hotel from 1985 to date.
  20. Additionally, the plaintiff avers that her late husband had enjoyed quiet and peaceful occupation of the plot until his demise in 2015 when she took over and continued receiving rent directly from the tenant, which rent she shares equally with her mother-in-law for her basic needs as well as the County Government of Meru land rents and rates.
  21. The plaintiff avers that though there was a BPRT case pending, following a notice to terminate the tenancy in which she was not involved or affected, for the 1<sup>st</sup> defendant did not interfere with the rental



- income due to her until the completion of the case and the issuance of vacation orders to the tenant, she applied in the succession case to stop the execution of the eviction notice.
22. The plaintiff avers that it was during the hearing of that application, that the 1<sup>st</sup> defendant disclosed for the first time that there was consent entered to divide the suit premises into three shares in Milimani ELC Case 310 of 2010; otherwise, in her view, that case only related to Pumwani Block No. 3/1 (A) And not the suit land.
  23. Consequently, the plaintiff avers that the defendants are aware that the suitland belongs to her late husband, and their actions were illegal, unprecedented, null, and contrary to the law.
  24. The plaintiff avers that she was in full use and occupation of the suit premises, and the defendant's actions amounted to unjust enrichment since they received their inheritance from her father's estate and the only remaining land for her husband was the suit land.
  25. The plaintiff avers that the 1<sup>st</sup> defendant had breached his fiduciary duty to her and her family in relation to Meru Municipality Block/II/61. She sought for a declaration that she was the rightful owner of the suit land, that the defendants held the suit land in trust for the estate of her late husband and for a permanent injunction restraining the defendants from interfering with her quiet possession of the suit premises.
  26. In a statement of defense, the 1<sup>st</sup> defendant admits paragraphs 2 & 3 of the plaint but denies that Gabriel Kubai Kingori had the capacity to own the suit premises or was a registered owner of the suit premises.
  27. The 1<sup>st</sup> defendant avers that Paul Lobo had been a tenant of the trustees to the estate of Joseph Kingori; namely Maria Gatitu Joseph, now deceased and at the 1<sup>st</sup> defendant, as per a certificate of official search.
  28. Again, the 1<sup>st</sup> defendant denied the contents of paragraphs 6-8 of the plaint and further admitted that he served a termination notice of the tenancy an order Landlord & Tenant (shops, hotels & catering establishments) (Cap 301), which led to the BPRT Case No. 77 of 2018 and Meru ELC No. 10 of 2022 ordering the tenant to vacate the plot. The 1<sup>st</sup> defendant averred that the eviction would not prejudice the plaintiff as the landlord was seeking to renovate the suit premises to generate more income.
  29. The 1<sup>st</sup> defendant avers that the court had no jurisdiction to hear and determine the dispute in view of the status of the tenant and in view of the cited decision of the BPRT and the ELC Cases on 6.10.2021 and 15.2.2024.
  30. Further, the 1<sup>st</sup> defendant avers that the court has no jurisdiction to hear and determine any dispute in respect of ownership of the suit premises, the same having been dealt with conclusively in ELC No. 310 of 2010 at Nairobi by all the stakeholders, including the plaintiff's late husband, otherwise the suit was an abuse of the court process, a disguised appeal against the consent order issued on 24.5.2021 and was res-judicata.
  31. It is trite law that parties are bound by their pleadings and issues for a court's determination flow therefrom. In determining whether a court has jurisdiction or not, a court has to look at the pleadings and the issues raised.
  32. The 1<sup>st</sup> respondent has raised the issue of res-judicata in view of the previous litigation over the subject matter and between the parties. For res-judicata to be correctly invoked, a party must show that there is a former judgment or order; the judgment or order was on merit, the judgment or order was rendered by a court having jurisdiction over the subject matter, and the parties and there must be between the first and the second action identical parties, subject matter and cause of action.



33. In *John Florence Maritime Services Ltd & Another vs C.S for Transport & Infrastructure & others* (2021) eKLR Supreme Court of Kenya held that res-judicata is based on the principle of finality, which was a matter of public policy to avoid multiplicity of suits to clog the courts, occasion unnecessary costs to the parties and to vex parties on re-opening of already litigated issues, while seeking to get a favorable verdict.
34. The applicant has pleaded that she is a widow and beneficiary of the estate of the late Gabriel Kubai, who derives income from the estate through monthly rental income for her upkeep, the children of the deceased, and a mother-in-law. She has averred that she has a life interest and that there is continuous trust. The applicant has averred that the respondents are mere trustees of the estate and have breached the fiduciary trust by trying to evict a tenant who is her only source of income and without the consultation or concurrence of the beneficiaries to the trust.
35. The 1<sup>st</sup> respondent has admitted that the respondents are trustees to the estate. He has not pleaded that the issue of trust, breach of in relation to the trust income and the stop-gap measures taken to ensure that there is flow of income for the applicant and her children and the mother-in-law have been determined before.
36. In *Justa Thiora Kiungu & 4 others vs Joyce Nkath Kungu and another* (2015) eKLR, the Court of Appeal held that where the children of the deceased and his widow did not agree or consent to the mode of distribution of the deceased estate, then the court has no choice but to adhere to Section 35 of the *Law of Succession Act* Cap 160 that a surviving spouse shall be entitled to personal and household effects of the deceased absolutely and a life interest in the whole of the residue of the net interstate estate.
37. The 1<sup>st</sup> respondent does not deny the existence of the life interest in favor of the plaintiff as regards the suit property as per Section 35 (1) (b) (2) of the *Law of Succession Act*. See *In Re Estate of Walter Kiplagat Arap Chamdany (deceased)* (2021) and *Jao Katungi vs Margrethe thorning Katunge & another* (2014) eKLR.
38. In the *Re-estate of Jolly Jimmy Githieya (deceased)* 2013), the court said that life interest was not a matter of choice by the surviving spouse but was an imposition of the law to safeguard both the children and the surviving spouse.
39. In *Tao Katungi vs Margrethe Katungi* (supra), the court observed that a surviving spouse was entitled to exclusive rights over the net estate and that if the net estate were generating income, she would be the person entitled exclusively to the income to be generated. The court said that the surviving spouse cannot, during the life interest, dispose of any property subject to life interest, without the consent of all adult children and co-trustees and that life interest operates as a trust over the property held for the benefit of the surviving children.
40. In *Twalib Hatayan Twalib Hatayan & another vs Said Saggar Ahmed Alheidy & others* (2015) eKLR, trust was defined as a right enforceable in equity to the benefit of trustees who must act in good faith and in the best interest of the beneficiaries to trust property as held in in the matter of *G.W. & another (minors)* (2016) eKLR, that a trustee must adhere to the terms of the trust, loyalty to the beneficiaries, ensure efficient management of trust property, personally act in the management and consideration of the interests of the beneficiaries and be accountable to the beneficiaries.
41. In *Kazungu Fondo Shutu & another vs Japhet Noti Charo & another* (2021) eKLR, the half-brother holding the suit land in trust for the family was alleged to have been breaching the trust bestowed upon him. An application was filed to restrain the breach and for declaratory orders of the trust. The court observed that trust was a question of evidence, the onus being on the party alleging to prove it through evidence.



42. In *Isaac Kinyua & others vs Hellen Kaigongi* (2018) eKLR, the court observed that succession matters do not fall under the ambit of the jurisdiction of ELC. In the *Re-estate of Julius Ndubi Javan (deceased)* (2018) eKLR, the court said that the primary duty of the probate court is to distribute the estate of the deceased to the rightful beneficiary and where issues of ownership of property in the estate are raised in the succession cause, they must be resolved before such property is distributed.
43. In the *Estate of Mbai Wainaina (deceased)* (2015) eKLR, the court observed that the mandate of probate court under Cap 160 was limited and did not extend to determining the issue of ownership, trusts and that a party who wishes to have such matters resolved ought to file a substantive suit to be determined by the ELC. In *Re-estate of Alice Mumbua Mutua (deceased)* (2017) eKLR, the court said that claims by and against parties who are neither survivors or beneficiaries of the estate are to be resolved outside of the framework set out in the *Law of Succession Act* under the *Civil Procedure Act*, which has structures on suits by and against administrators and that where they arise before the distribution of the estate or the confirmation of grant, then they ought to be strictly determined outside of the probate court for the probate suit is most probably functus officio and that not every dispute over the property of a deceased ought, to be pushed to the probate court.
44. In *Waweru vs Njuguna* (2024) KEELC 5818 (KLR) (31<sup>st</sup> July 2024) (Judgment), the court cited *Mbula Mwoki Ndolo & another vs KPLC* (2017) eKLR and in *Kaberia Kaberia Kumari vs Tony Mwenda Muthaura* (2021) eKLR that issues appertaining to use occupation and title to land and environment, were the domain of an ELC and even when such issues arise in relation to the estate of a deceased person they remain in the domain of the ELC not the probate court.
45. Guided by the cases cited, the court has looked at the BPRT case and Meru High Court Succession Case No. E007 of 2024. In the latter, on pages 16-17, the court held that the question of ownership falls under the ELC court. The court observed that the question of whether the plaintiff's late husband was entitled to 1/3 share of the suit property falls under this court.
46. As to the consent in NRB H.C ELC No. 310 of 2010, the pleadings and the judgment have not been availed. Other than the consent on item number (1), item 3 shows that the matter was to proceed for a hearing. The court has not been supplied with a final order or judgment where the issues raised herein were determined with finality. In any event, the consent shows that the late husband of the applicant shares the land. As to Meru ELC appeal no. 10 of 2022, the issues of trust, breach thereof, life interest were not raised, heard, and determined to finality.
47. A preliminary objection is a pure point of law that is likely to determine the suit based on the assumption that what is pleaded by the other side is admitted. A preliminary objection should not be raised where there is contestation as to facts and if it is based on evidence. See *Oraro vs Mbaja* (2005) eKLR.
48. Courts have emphasized that the best way to raise a plea of res judicata is through a notice of motion. In this suit, other than the judgments and rulings, the pleadings in the former suits have not been placed before the court.
49. A cause of action refers to acts by the defendant that give rise to a cause of complaint by the plaintiff. See *D.T Dobie vs Muchina* (1982) KLR. The applicant's complaint is a breach of trust by the defendants for dealings with the trust property contrary to her rights and those of other beneficiaries to the estate of her deceased husband in particular and that of Joseph Kingori (deceased) in general. The 1<sup>st</sup> defendant has not demonstrated showing that the issues herein have been litigated to finality by a court of competent jurisdiction.



50. The upshot is that I find the plea of res-judicata and, by extension, jurisdiction lacking merits. It is dismissed.
51. Coming to whether the applicant is entitled to orders of injunction, a party seeking temporary orders of injunction has to establish a prima facie case with a probability of success showing that he stands to suffer irreparable loss and damage if the orders sought are not granted and lastly; that the balance of convenience tilts in favor of granting the orders sought. A prima facie case is established if, looking at the material before the court, a right has been infringed so as to call for a rebuttal from the opposite side. See *Mrao Ltd vs First American Bank of Kenya & 2 others* (2003) eKLR.
52. In this suit, there is no dispute that the suit property is trust property, held in the name of the 1<sup>st</sup> respondent for the benefit of the applicant, her children and the mother-in-law, among other beneficiaries. Going by the consent order attached, her late husband holds 1/3 of the share, which she says was only disclosed to her recently.
53. One of the issues raised in the plaint is that the respondents are in breach of fiduciary duty by ordering the tenant, who is her only source of income from the trust property, to vacate the suit property, which will deny her regular rent income, she has collected since 2015 after the demise of her husband.
54. The 1<sup>st</sup> respondent has not denied that she has a life interest in the suit property under the law, which will be cut short if the tenant is evicted. The applicant says that she was not involved in the previous suits, and her right to be notified or involved in the management of the suit property has been curtailed. There is no doubt that the eviction of the tenant is imminent. According to the applicant, it is only fair that the court intervenes to preserve the suit property in its current status until her rights in the suit are determined.
55. The 1<sup>st</sup> respondent, on the other hand, says that the purpose of the termination of tenancy is to ensure that the suit property is renovated to attract better income for the benefit of the applicant. The 1<sup>st</sup> respondent has not indicated why the applicant was not involved in the whole process, yet he owes her a duty to disclose loyalty and account as per the *Trustee Act*.
56. Whereas the 1<sup>st</sup> respondent has alleged that the applicant is acting at the behest of the tenant, the rights of the applicant are independent of those of the tenant. I find that her rights have been infringed to call for rebuttal from the respondents. The applicant has expressed fear, which is apparent if the tenant is evicted and her regular rental income is brought to a close without an alternative source. She says that her children, who are in school, and the elderly mother-in-law stand to be deprived of their livelihood. The rights of the child and elderly are enshrined in *the Constitution*.
57. The court always safeguards and act in the best interest of the child. The 1<sup>st</sup> respondent has not told this court what alternative means, the respondents have put in place to cushion the applicant and her children as well as the elderly mother. The law is that a trustee must always act in the best interest of the beneficiary. The 1<sup>st</sup> respondent has not told the court how long the revocation is likely to take place and if the applicant has been involved in the process. I find there will be irreparable loss and damage. See *Pius K Kogo vs Frank Kimeli Tenai* (2018) eKLR.
58. As to balance of convenience, it means that if the injunction is not granted and the suit is ultimately decided in favor of the plaintiff, the inconvenience caused to the plaintiff would be more significant than that which would be caused to the defendants, if an injunction is granted but the suit is ultimately dismissed. See *Pius Kogo (supra) and Paul Gitonga Wanjau vs Gathuthi Tea Factory Co. Ltd and another* (2016) eKLR. In this suit, the 1<sup>st</sup> respondent has not denied that the applicant is the one who



has been collecting the rental income from the tenant. It is not denied that she is not working and so is the mother-in-law.

59. There is no doubt that the applicant has a right. However, the 1st respondent denies its violation. In Paul Gitonga Wanjau (supra) the court held that in determining whether an interlocutory injunction should be granted, the court takes into consideration the balance of convenience to the parties, the nature of the injury and who will suffer most with the outcome of the motion. The court said it would seek to maintain the status quo in determining where the balance of convenience lies.
60. In Amir Suleiman vs Amboseli Resort Ltd (2004) eKLR, it was held that in determining whether to grant prayers of interlocutory injunctive reliefs, the court should always opt for the lower rather than the higher risk of injustice.
61. In this suit the respondents have not shown if they gave the statutory notice of eviction and that the tenant has vacated. I find the balance of convenience favoring the maintenance of the status quo. The upshot is that I find the application with merits. The orders shall subsist for one year only. The applicant shall file an undertaking as to damages for Kshs.1,000,000/= within three days from the date hereof otherwise the orders shall lapse.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 16<sup>TH</sup> DAY OF OCTOBER, 2024**

**HON. C K NZILI**

**JUDGE**

In presence of

C.A Kananu

Miss Gikundi for ATheru for the plaintiff

Applicant

Mwenda for 3<sup>rd</sup> defendant

Kirera for 1<sup>st</sup> defendant

Kinyanjui for 2<sup>nd</sup> defendant

