



REPUBLIC OF KENYA



In re Estate of Maria Gatitu King'ori (Deceased) (Succession Cause E007 of 2024) [2024] KEHC 9872 (KLR) (8 August 2024) (Ruling)

Neutral citation: [2024] KEHC 9872 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE E007 OF 2024
EM MURIITHI, J
AUGUST 8, 2024**

ESTATE OF MARIA GATTITU KING'ORI (DECEASED)

BETWEEN

PENINAH KALAYU KUBAI APPLICANT

AND

ELIZABETH THAIRORA 1ST RESPONDENT

MAGDALINE KABUYA 2ND RESPONDENT

DOMINIC NTONGAI 3RD RESPONDENT

(ESTATE OF MARIA GATTITU KING'ORI (DECEASED))

RULING

1. By notice of motion dated 18/3/2024 the applicant seeks injunctive relief at the interlocutory stage as follows:

- “1. That this Honourable Court be pleased to certify his matter as extremely urgent, service of the application be dispensed with and matter be heard instantly.
2. That this Honourable Court be pleased to issue orders restraining the 3rd Respondent, Dominic Ntongai whether through himself his agents, servants, representatives or any other person claiming through him from evicting the tenant Paul Lobo, commencing any renovations and installing advertisements bill board on the property Plot No. 11/61 Meru Municipality pending the hearing and determination of this application inter partes.



3. That this Honourable Court be pleased of issue orders restraining the 3rd Respondent, Dominic Ntongai whether through himself his agents, servants, representatives or any other person claiming through him from evicting the tenant Paul Lobo, commencing any renovations and installing advertisements bill board on the property Plot No. 11/61 Meru Municipality pending the hearing and determination of this succession cause.
 4. That this Honourable Court be pleased to declare Paul Lobo an intermeddler in the estate of the deceased.
 5. That the said Dominic Ntongai be compelled by this Honourable Court to give an account of any money received from the advertising company that has commenced installing the Bill Board on Plot No. 11/61 which forms part of this estate and all moneys received by himself in that venture be deposited in Court and/ or on estate account in the joint names of the applicant and the respondent be opened to hold the said money pending the hearing and determination of this succession cause.
 6. That this Honourable Court be pleased to issue any other order in the interest of justice.
 7. That the costs of this application be provided for.”
2. The application is supported by facts set out in the Supporting Affidavit of the applicant sworn on 18/3/2024 principally as follows:

- “2. That I am the wife of Gabriel Kubai- (Deceased) one of the sons in the estate, who unfortunately died leaving me to solely fend for our children.
3. That before his death, Gabriel had been given the suit property Plot No. Block 11/61 Meru Municipality by the deceased herein, Maria Gatitu King’ori and had rented it out to one Paul Lobo who runs a hotel business by the name "Continental Hotel", therein.
4. That the said tenant had all along been paying rent to my husband as shown by the bundle of receipts marked 'PKK1'" prior to his death.
5. That when my husband died, I continued to collect the rent from Paul Lobo as shown by Receipts ef Kshs200,000/= which bear-my signature -marked "PKK2".
6. That while my husband was alive, he used to receive the rent together with my mother-in-law Maria Gatitu King’ori as seen in the letter dated 4.1.2007 marked as PKK3 and also from "PKK1" above.
7. That after his death, I continued to receive the rent and also shared half of the rent with my mother-in-law until she passed away.
8. That in the year 2018, Dominic Ntongai issued a Notice to terminate tenancy under section 4 (2) of Cap. 301 to my tenant Paul Lobo as shown by "PKK4".



9. The matter between themselves proceeded in the tribunal and was also heard on appeal before the environment and land court at Meru in ELC Appeal No. 10/2022 as shown by annexure marked "PKK5 & 6".
10. The tenant informed me which information I verily believe to be true and also as seen from paragraph 32 of the Judgment. That he was bound to be evicted by 15th May, 2024.
11. The tenant has up to date been paying rent to me and I use the same to pay school fees for my children, cater for their upkeep as well as ensure that they have been properly provided for.
12. That therefore if the tenant is evicted, it means that I shall no longer be able to provide for my children with the proceeds from the premises that my deceased husband was to inherit from his deceased father.
13. That further to the above and without any prejudice whatsoever, this property is only being held in trust in the names of Dominic Ntongai, my deceased husband is a direct beneficiary in this estate.
14. That since I am not employed, I entirely rely on the income from the tenant to wholly provide for my children.
15. That in any case the respondent Dominic Ntongai is not evicting the tenant for the benefit of preserving and collecting the estate but rather for his own selfish interests.
16. That Dominic has not consulted neither myself nor my children or the other children in the estate for any renovations of the property. He is only doing so for his selfish interest notwithstanding the fact that he is only registered in the title as a trustees for the benefits of the estate.
17. That his actions are not only detrimental to myself and my children but may also result in a complete wastage of the estate contrary to the provisions or the *Law of Succession Act* as advised by my Advocate on record.
18. That it is my considered view that the best way to deal with his issue is by restraining the respondent in accordance to the prayers sought in my application until this Honourable Court makes a determination of this Succession Cause.
19. That I urge this Honourable Court to grant the orders sought so that I can continue to sustain the children of the deceased beneficially Gabriel Kubai."

3. In response to the Respondent's affidavits, whose principal contents are set out below, the applicant reiterate her husband's entitlement to the suit property as follows:

- "2. That both the Replying affidavits by Dominic Ntongai and Magdalene Kabuya King'ori dated 2.4.2024 and 28.4.2024 respectively have been read over and explained to me by my advocates and make this affidavit further to my Affidavit dated 18.3.2024.



3. That vide Tigania PM Succession cause number 135 of 2021 I was appointed the administrator of the estate of my husband Briel Kubai King'ori as shown by Grant, Kenya Gazette and Order annexures marked "PKKL, 2 & 3 respectively",
4. That the late Gabriel Kubai King'ori was one of the sons of the deceased herein and therefore entitled to the estate and therefore it is not true that I am a stranger to the estate of the deceased.
5. That the Replying Affidavits dated 2.4.2024 and 28.4.2024 are full of falsehoods meant to mislead this Honorable court on the matters in contention.
6. That it is not true that I am holding brief for the tenant Paul Lobo in Meru ELCA No. 10 of 2022 as I was not a party in the said suit nor was I the Landlord or the tenant in the matters in contention.
7. That it is also not true that there was a consent in Nairobi ELC Case No.310 of 2010. When that case was filed in the year 2010, I was still married to Gabriel Kubai King'ori and he never mentioned to me about any case in Nairobi and being solely entitled to Meru Municipality Block II/61 there is no way that he would have agreed to share it with the respondents who have other properties. I have been advised by my counsel on record and which I believe to be true that the said case or consent could be a fabrication by the Respondents for the following reasons.
 - a) The deceased herein in my presence orally willed Meru Municipality Block II/61 to my husband Gabriel Kubai King'ori in the presence of DO I, Ntongai and the other respondents before he died on 25.5.2021 and they never as much as raised the issue of being entitled to two thirds or an other share of the same.
 - b) There would have been no justification of filing the suit in the High Court in Nairobi when the subject matter is situated in Meru.
 - c) The annexed order is not certified by the court.
 - d) The annexed order is interlocutory and the Respondents have not divulged the final outcome of the said case.
8. That my late husband has never mentioned to me about the said case or consent during his lifetime and actually Dominic Ntongai had to request my husband to allow him to deposit some workshop materials at the rear part of Meru Municipality Block II/61 where Dominic has refused to vacate.
9. That I have instructed my advocates to request this court to order for retrieval of the said Nairobi ELC Case No.310 of 2010 to establish the truth of the matter before rendering the determination herein.
10. That in any case I have been advised by my counsel on record and which I verily believe to be true that if Nairobi ELC Case No.310 of 2010 determined the matter all aforesaid then Dominic Ntongai should not be interfering with the entire property as is clearly manifest in Meru ELCA No. 10 of 2022 yet



the Respondents have stated on oath that he is only entitled to the rear undeveloped area.

11. That I reiterate that the entire of Municipality Block 11/61 belongs to my deceased husband and all the Respondents are strangers therein and are only taking advantage of me as a poor widow just because the deceased died before transferring the property to me.”

The applicant’s Case

4. The applicant’s case is, firstly, that of a beneficial owner of the suit property having been given the same by the deceased, and her irreparable injury being the anticipated loss of rental proceeds on which she derived maintenance for her children, and which accrued from a hotel operated by a tenant Paul Lobo on the suit property, that would follow termination of the tenancy and vacant possession order on the premises obtained by the 3rd respondent from the Business Premises Rent Tribunal (BPRT) and subsequently the Environment and Land Court; and, secondly, for rents which the 3rd respondent had wrongfully received for which she seeks an order for account.

Respondents’ case

5. The 3rd Respondent filed as replying Affidavit sworn on 2/4/2024 raising the issue that the suit property is not part of the deceased’s estate and that she merely a trustee for her daughters in a three-way sharing with the 3rd respondent and the applicant’s deceased husband, as follows:

- “2. That I have read the application dated 15 March 2024 and the accompanying affidavit and the same has been explained to me by my advocates on record and it is in response thereto that I make this affidavit.
3. That from the on set I am advised by my advocates on record that the application is vexatious, frivolous and an abuse of the court process.
4. That the land parcel no. Meru/Municipality Block II/61 does not form part of the deceased herein.
5. That now the Applicant is working in cahoots with the Paul Lobo to defeat the judgment of the No. E010 of 2022 (Paul Lobo VS Dominic Ntongai King’ori).
6. That the deceased was registered as a trustee (of her daughters) of a 1/3 of the property, I am registered as a proprietor of a 1/3 of the same and my brother Gabriel Kubaito take the other 1/3 and this done vide Nairobi ELC Civil Suit No. 310 of 2010 (Maria Gatitu Joseph and 3 others vs Dominic Ntongai Kingori). annexed and marked DNK 1 a & b respectively are copies of the court order in Nairobi ELC Civil Suit No. 310 of 2010 and copy of official search.
7. That from the above it is clear that the property land parcel no. Meru/Municipality Block II/61 does not form part of the of the estate late of the deceased herein.
8. That the recourse of the applicant does-not lie in this cause.”

6. The 2nd Respondent by a Replying Affidavit sworn on 28/4/2024 took issue with the applicant’s averments of gift of the suit premises by the deceased and the allegation of her collection of rent over



the same and reliance thereon for her children's support pointing out that the applicant has other properties, as follows:

3. "That the applicant is acting mischievously in bringing this application in that:-
 - i. The applicant is fully aware that the tenant, Paul Lobo, whose she seeks to protect was on the 6/10/2021 ordered by the Business Premises Tribunal, in Tribunal Case No. 79 of 2018, to vacate and render vacant possession of all that property known as Meru Municipality Block 11/16.
 - ii. That the tenant was granted by the Tribunal Court up to 31/12/2021 to vacate, failing which, he was to be evicted. A copy of the Tribunal's Judgment delivered on the 6/10/2021 annexed and marked MKK1.
 - iii. That the applicant is aware that the tenant appealed the judgment of the Tribunal, vide ELCA No. 10 of 2022 at Meru, which appeal was dismissed on 15/02/2024 and the decision of the Tribunal was upheld.
 - iv. That in the judgment of ELCA No. 10/2022, the tenant was ordered to vacate the premises by the 15/05/2024 failing which he will be evicted therefrom. A copy of the judgment is annexed and marked MK 11.
4. That from what I have deponed herein, it is clear that the applicant I holding brief for the tenant as the deadline for his tenancy fast approaches.
5. That I am advised by my advocate on record, which advice I verily believed to be sound, that granting the reliefs sought herein would be at cross purposes with the decision of the ELC in the appeal referred to herein and would be tantamount to overturning that decision through the back door.
6. That it is not true, as stated by the applicant, that her late husband was given the suit property by the deceased.
7. That the ownership of the property in issue was determined by the court in ELC SUIT NO. 310 at Nairobi, wherein the applicant's husband was one of the plaintiffs against Dominic Ntongai King'ori.
8. That in that case, the ownership of the property was determined, by consent of all the parties, to belong to Dominic Ntongai King'ori 1/3 Gabriel Kubai(Applicant's husband) 1/3 and Maria Gatitu King'ori 1/3 (to hold her share in Trust for her daughters Elizabeth Thairora, Margaret Kaembe, Magdalene Kabuya, Ann Kamathi, Lucy Kinya Mugambi, Martha King'ori and Agnes Rigiri). A copy of the consent order is annexed and Marked MK 111.

Dominic Ntongai King'ori's 1/3 is located behind the Continental building, he has his own tenants. Gabriel KubaiKing'ori's 1/3 and Maria Gatitu King'ori's 1/3 are together the front part of the building, that house restaurant, bar, and lodgings, rented by Paul Lobo at Kshs. 150,000/= a month, this rent is split into 2 between Gabriel Kubaiand Maria Gatitu at Kshs. 75,000/= each.
9. That it is clear that the applicant's interest in the suit property, through her husband, Gabriel Kubai, amount to 1/3 thereof and no more.
10. That there was no appeal or variation of this consent order and the same stands binding on the parties thereto.



11. That it is false for the applicant to swear that she has been solely receiving all the rents accruing from the property; and if she has been doing so, then she is liable to refund the daughters of the deceased the other ½ share of what Paul Lobo pays.
 12. That it is within my personal knowledge that the deceased herein used to collect and receive her share of the rent, and later, I and my sisters, the beneficiaries of the trust, took over the collection of rent due to our mother.
 13. That indeed the tenant has paid and deposited ½ share of the rent due to us, the daughters of the deceased, in a bank account and has paid up to January, 2024, but is now in arrears for the month of February, March and April, 2024. Copies of the deposit receipts annexed and marked MK IV (a), (b) and (c).
 14. That the Search Certificate in respect of the suit property clearly shows that the registered proprietors of the property are Maria Gatitu Joseph and Dominic Ntongai, jointly,
 15. That the applicant does not feature anywhere as the owner of any share in the property.
 16. That I am advised by my advocate on record, which advice I verily believe to be true, that the applicant lacks the legal capacity to seek the reliefs she seeks herein, being not owner and not being the Administrator of the estate of Gabriel Kubai.
 17. That as the Administratrix of the estate of the deceased herein and a beneficiary of the suit premises, I am in favour of the Tenant Paul Lobo vacating the premises by 15/5/2024 failing which we shall seek to have him evicted as directed by the court.
 18. That the building is very old, in need of serious repairs and renovations which cannot be done while the tenant is in occupation.
 19. That indeed it is the same tenant, who has wasted the building and is now in a dilapidated state and the beneficiaries are not reaping commercial value from the property.
 20. That the proceeds from the advertising bill board, should be treated as accruals from the property to be shared by Dominic Ntonga, the family of the late Gabriel Kubai, and the daughters of the deceased herein proportionally.
 21. That the applicant has been colluding with the Tenant to avoid paying rent and I do recall the sometime in the year 2022, I had to instruct M/S Bealine Auctioneers to levy distress for rent to recovered the arrears of Khs. 297,000/= . A copy of the proclamation of attachment by the said auctioneers it annexed and marked MK V.
 22. That it is not true as deponed by the applicant, that the suit property is the only property available; to her as her husband has received various properties which are available to her and her children.
 23. That granting the orders sought would occasion loss and injustice to the beneficiaries of the property and I am advised by my advocate on record, that it would be abuse of court process.”
7. The first respondent on behalf of herself and her sister Agnes Rigiri Baariu, and having read the affidavits of the 2nd and 3rd respondents, opposed the application by a Replying Affidavit of 17/7/2024



contending that the suit property was registered in the names of the deceased and the 3rd respondent, upon trust and income therefrom ought to be shared accordingly, as follows:

- “3. That I concur substantially with the averments by Dominic that the ownership of LR Plot No. 11161 determined in 2011 in ELC No. 310 of 2010 in terms of Consent Order attached as annexure DNK1 in Dominic Ntongai. affidavit and recorded in court on 24th May 2011.
4. That indeed the Title Deed is registered in the two (2) persons, Dominic and the late Maria in trust for all her daughters.
5. That in the circumstances therefore the application alleging that the said property belongs to one person, the late Gabriel, without setting aside the existing lawful and Consent Judgment that is thirteen years old is not only misconceived but an abuse of the Court process and a waste of Judicial time.
6. That similarly the allegation that the late Gabriel had given the applicant the entire parcel is irrelevant as clearly, he was not the owner of the entire parcel. He owned 1/3 of the property only. (Annexed hereto and marked a true copy of the search),
7. That the claim by the tenant Paul Lobo has run its course in in the relevant Courts (Business Tribunal and High Court) and failed. The Applicant cannot be heard in an attempt to revive the same failed claim through to this avenue.
8. That all income accruing from the premises should be shared threefold as per the ownership.”

Submissions

8. Counsel for the parties made oral submissions on the application as follows. For the applicant it was urged that-

“Ms. Gikundi:

Application of 18/3/2024 seeks an order of injunction to restrain the Respondents in terms of prayers numbers 3, 4, and 5 of the Summons.

Original property was under trusteeship. Applicant’s husband was added and is now deceased. The 3rd Respondent is interfering with the property.

I refer to Applicant’s further affidavit. Applicant receives rent from the rental premises and the 3rd Respondent is interfering with the income.

Order of the High Court directing rental income. I refer to section 45 of the [*Law of Succession Act*](#).

The applicant has been receiving rental in equal proportion with children of the 1st and 2nd respondents. The 3rd respondent has no stake in the subject property.

Deceased passed in 2021 and 3rd respondent sued the tenants in 2018 and did not inform the other parties. It is mischievous on the 3rd Respondent as he did not inform the other beneficiaries to the property. He is only entitled to 1/3 of the property.



The 1st and 2nd respondents have Letters of Administration on the estate of Maria Gatitu in 2022. I cite section 47 of the *Law of Succession Act* on power of court to any orders. I rely on *Giella v Cassman Brown and Mrao Ltd v. First American Bank*.

The 1st respondent may have misled the court that he had interest to protect the rights of all the parties. The applicant seeks protection of her interest in the property.

I refer to list of Authorities.

9. The 3rd Respondent, who is the principal respondent against whom the injunction and order for account is sought in the Summons as follows:

“Mr. Mutegi for 3rd Respondent

The Replying Affidavit of 2nd April, 2024. Prayers of the application invite the Court to sit as an appellate court against the decision in Meru High Court ELC No. 10 of 2022 (Yano, J.) dismissed the appeal by the tenant who was seeking to overturn Judgment of BPRT No. 79 of 2018.

The Court cannot sit on appeal from the ELC. The issue of the tenant who the applicant seeks to protect cannot be determined.

ELC No. 310 of 2010 (Nairobi) Consent on Plot Number Meru Municipality Block 11/61. The Consent was that:

1. Dominic Ntongai holds a 1/3;
2. Gabriel Kubaithe husband of the applicant holds a 1/3 of property;
3. Maria Gatitu – deceased herein holds 1/3 in trust for Elizabeth Thairora, Margaret Kaembe, Magdalene Kabuya, Anne Kamathi, Lucy Kinya Mugambi, Martha Kingori and Agnes Rigiri.

The consent was entered on 24th May, 2011 at the time the husband of the applicant was alive as per annexure PKK 2. He died on 13th May, 2015.

He was one of the Plaintiffs in No. 310 of 2010 (4th Plaintiff). Applicant cannot be heard to say that the husband was not aware of the suit. The property does not form part of the estate of Maria Gatitu. The applicant has not shown any document against the Consent in suit NO. 310 of 2010.

Prayers No. 3, 4 and 5 invite the court to sit an appeal on matters decided by court of equal status.

If the court holds to the contrary the 3rd respondent can give accounts in respect to the Advertisement Billboard. We pray that the application be dismissed with costs.

10. For the 2nd Respondent, was urged as follows:

“Mr. Murango Mwenda for 2nd respondent

We oppose application by affidavit of Magdaline Co-administrator.

Application is an abuse of court process as it serves purpose over the interest of justice. Applicant seeks to protect a tenant called Paul Lobo who is occupying the property.



Applicant is fully aware that the tenancy of Paul Lobo was terminated through BPRT Case No. 79 of 2018. Paul Lobo v. Maria Gatitu and Dominic Ntongai, respectively the deceased herein and 3rd Respondent, who had served him with notice of termination of tenancy. Reference was dismissed on 6th October, 2021. Tribunal gave the application upto 31st December, 2021 to vacate or face eviction by Landlords.

Appeal to ELC Court Meru No. 10 of 2022. The appeal was dismissed on 15th February, 2024 and decision of the Tribunal was upheld. The tenant was granted up to 15th May, 2024. I refer to annexure MKK1 and MKK2.

Before the expiring of the period tenant brought this application. There is no appeal before the Court of Appeal. The tenant is using the applicant to prolong his stay. The landlord/applicant is not fighting for herself but for the tenant, hence the prayer to stop evicting him from the premises.

The determination of the ELC has not been challenged.

The applicant's contention that she owns the property is not true. Certificate of Search shows proprietors as Maria Gatitu and Dominic Ntongai. She can only access property as a beneficiary of the estate of her husband if and when found to be available to be estate.

The distribution of property is what the parties should be interested in to determine what share the applicant should get for her husband.

The ELC case no. 310 of 2010. Applicant's husband was one of the plaintiffs in that suit against his brother 3rd respondent. With the judgment, it is untenable to argue that the whole property belongs to her.

Further Affidavit was made reference to her husband's succession cause in Tigania. We pray that the application be dismissed."

11. The 1st Respondent relied on the facts as asset out by the 2nd and 3rd Respondent and submitted that as follows:

"Ms. Kinyanjui for 1st Respondent

Responses have been field by 2nd and 3rd respondents. I have further response by Elizabeth 1st respondent. Our case is that the property is not part of the deceased's estate. I refer o the Consent of 24/5/2011.

The consent was filed in ELC No. 310 of 2010. The order in that court is by consent. It is the property brought in the case before the court.

The application can only be by way of appeal or review of the order. The allegation by applicant that she had been given the whole of the property by the husband is mischievous.

The husband of applicant only owned 1/3 not the whole parcel. It is an abuse of court process. The consent judgment is 13 years old. It is immaterial that that is where she gets her income. The judgment has not been set aside.

Attached in 3rd Respondent's Affidavit DNK1 – Certificate of search on the property dated 18th January, 2023 shows the ownership of the parcel of land Maria (deceased) and Dominic on joint proprietorship and in trust.



The question of ownership will have to be dealt with first if the applicant wishes to take the land for herself. The Application has no merit.”

12. The 1st respondent further presses that the Court should dismiss the present application for injunction and account to pave way for the hearing of the pending Summons dated 19/6/2024 for confirmation of Grant made on 24/10/2023.

13. In reply, Counsel for the applicant said:

“ Ms. Gikundi in reply:

Judgment of ELC No. 20 of 2022 consent in Civil Case No. 310 of 2010 (Nairobi) ownership of property was defined. The 1/3 property should be part of the estate. His 1/3 is part of the estate.

Why did the 3rd respondent say that he was the land lord of the said property? He told the ELC that he had right to evict tenant.

According to the consent, he is not the only owners of the property. The 3rd respondent was mischievous that he was the landlord.

In paragraph MKK2, Judgment where he is stated to be landlord.

The interest of the applicant has never been expressed in terms of property plot II/61. Certificate of search DNK 1 shows the owner as per register in 1988. It has never been corrected to adapt to consent.”

14. In support of the application for injunction and account, the applicant cited the High Court decisions In re Estate of Gideon Kibitok Tarus (Deceased) (2021) eKLR (H. A Omondi J as she then was); In re Estate of Kaleb Mwangi Hezekiah Muchoki (Deceased) [2021] eKLR (S. N. Mutuku, J.); In re Estate of Matayo Dawas (Deceased) [2022] eKLR (J N Njagi, J.) and all relying on the tests in *Giella v. Casman Brown* [1973] EA 358.

15. The ruling was reserved.

Issue for determination

16. From the pleadings, affidavits and submissions of the parties, the issue for determination is whether the court will grant the interlocutory injunction sought by the applicant on the evidence adduced before the court at this stage by the respective affidavits filed by the parties.

Determination

17. The application falls to be considered on the clear principles for the grant of interlocutory injunction set out in *Giella v. Casman Brown* (1973) EA 358 as follows:

“ Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

18. I should readily agree that section 45 of the [Law of Succession Act](#) gives the Succession Court jurisdiction to protect the estate of a deceased person and in so doing it may make such orders, in terms of section



47 of the Act, as may be necessary, including an order of injunction, permitted under Rule 63 of the Probate and Administration Rules, against an inter-meddler on known principles of Giella pending the trial of a prima facie case or serious issue to be tried, in the words of H. Omondi J (as she then was) In Re Estate of Gideon Kibitok Tarus, supra.

19. As noted by Mutuku, J. in re Estate of Kaleb Mwangi Hezekiah Muchoki (Deceased) [2021] eKLR, supra, the Court of Appeal has in decisions subsequent to Giella, of Mrao Ltd vs First American Bank of Kenya Ltd [2003] eKLR. and Nguruman Limited v Jan Bonde Nielsen & 2 others (2014) eKLR, elaborated on the meaning of prima facie case as “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 as to call for an explanation or rebuttal from the latter”, and the standard of proof of a prima facie case as a balance of probabilities without the need for a mini trial to arrive at a final decision on the parties’ cases by a close, minute examination of the merits.

Prima facie case

Ownership of suit property

20. The applicant’s case on the ownership of the suit property herein ranges from a claim of sole ownership of the property by her husband on account of gift thereof by the deceased to acceptance of an ownership only of 1/3 of the property as contended by the Respondents. Firstly, the determination of the question of ownership of land isa matter for the Environment and Land Court in terms of Articles 162 and 165(5) of *the Constitution*. The present Succession Court is the wrong forum for determination of dispute as to ownership of the property. Indeed, the question as to whether the suit property Meru Municipality Block II/61 is part of the estate of the deceased herein has been raised by the 3rd Respondent.
21. In the respectful view of this court, there can no valid injunction against a registered owner of property by a person claiming an interest in the property unless it can be demonstrated that the registered owner’s title is invalidated by illegality, fraud or encumbrance affecting title, or the claimant’s beneficial interest is shown to be an overriding interest. The official search certificate indicates the 3rd Respondent as a co-owner with the deceased herein of the suit parcel of land. In fact, it is the applicant’s husband under whom she claims who is not shown on the search certificate to have any interest in the suit property.
22. If one has no interest in a property, one cannot mount a challenge for injunction against the registered owner, unless there is a determination on the issue of ownership giving the applicant an interest either alone, or with the registered owner or other co-owners. The applicant has not demonstrated ownership of the suit property; she does not accept the validity of a consent court order giving her husband a 1/3 share of the suit property, and the issue of ownership is for determination by the Environment and Land Court and the High Court has under Article 165 (5) of *the Constitution*, no jurisdiction over issue of ownership to land.
23. Secondly, the applicant has not produced any title document to the suit property and the search certificate shows the deceased as co-owners with the 3rd respondent. How can the applicant dislodge the 3rd respondent as an owner of the suit property together with the deceased, as shown on search certificate, or with the deceased and the applicant’s husband as owners each of 1/3 share thereof, as shown in the Consent adopted in suit Nairobi HC Environment and Land Case No. 310 of 2010?

Consent order



24. By the Consent Order of the Court in Nairobi HC ELC CIVIL CASE NO. 310 of 2010, the ownership of the suit property is determined as follows:

“It is here ordered by consent:-

1. That Block 3/1 (A) Pumwani to be sold and proceeds shared equally between the nine beneficiaries. The beneficiaries to be given first priority to buy at a reserve price of Kshs. 8 Million same to be exercised within 30 days failing which any other be sought.
2. That in respect of the property known as Plot No. 11/61 Continental Hotel Meru be registered in the following shares Dominic Ntongai Kingori 1/3, Gabriel Kubai 1/3 and 1/3 to Maria Gatitu Joseph in trust for Elizabeth Thairora, Margaret Kaembe, Magdaline Kabuya, Ann Kamathi, Lucy Kinya Mugambi, Martha Kingori and Agnes Rigiri.
3. That the defendant do file his defence within 14 days for the matters in dispute.

Given under my Hand and the Seal of the Court of the seal of the Court at Nairobi this 30th day of November 2010.”

25. The applicant seeks to impugn the Consent Order as not being a final judgment of the Court in the case, which is shown to have been filed by her husband and his mother Maria Gatitu Joseph and his sisters, Elizabeth Thairora and Lucy Kinya against the 3rd Respondent herein. The Order is certified a true copy of the Original and the circumstances of this case where the search certificate shows only the 3rd respondent and the deceased as co-owners, there is no reason why the respondents would bring up a Consent which reduces their share in the property as shown in the certificate of search, unless it is true.
26. The applicant, on the other hand, upon whom the burden of proof falls in accordance with section 107, 108 and 109 of the *Evidence Act*, does not adduce any document of title or other evidence of ownership other than to allege that the deceased had given the suit property to her husband.
27. Whether by the search certificate on the property, which puts the owners as the deceased and the 3rd respondent, or by the Consent Order in Case NO. 310 of 2010, which gives the property to the 3rd respondent, the applicant’s husband and the deceased herein only as trustee for her daughters, the suit property is not wholly owned by deceased to enable her validly to give it to anyone whether by inter vivos gift or by will, and it would, therefore, appear not part of the deceased’s estate available for intestate succession. Save what is conceded by the respondents, the applicant’s right, if any, to the whole of the suit property, as she has claimed must be established by a determination by the Environment and Land Court, which has not been done.
28. As owner only of the conceded 1/3 of the suit property, the applicant does, however, have an interest to income accruing to the property in the ratio commensurate to her 1/3 shareholding. There is in the evidence of the 2nd respondent indication that the section of the suit property on which Continental Hotel is situate is owned by the applicant’s deceased husband and the Deceased herein in trust for the daughters so that the rental income should then be shared in two shares at 50% each.
29. The applicant’s interest in the 1/3 share of the suit property, which is conceded by the Respondents, and the applicable rental income thereon and threatened loss thereof, is such as to provide a foundation for her claim to injunctive relief to prevent such loss. But there is an issue whether the suit property is part of the Estate of Maria Gatitu Deceased herein, and therefore where the application is in the correct



proceedings. An application for protection orders on the property in the estate of Gabriel Kubai would appear to have been more appropriate.

30. However, in the circumstances of this case, intervening judicial process on the suit property affects the applicant's ability to a prima facie case for the grant of the orders of injunction.

The central dispute on tenancy has been decided by Judgment of ELC.

31. The Applicant did not, as she could have, seek to be joined as Interested Party in the reference to the Tribunal upon the Landlord's Notice the determination from which the appeal to the Environment and Land Court arose. As it stands now, there is a determination by the ELC affirming the decision of the tribunal and requiring the tenant to give vacant possession of the suit premises to the landlord, the 3rd respondent and the deceased herein. This Court may consider that there has not been a final determination as to the applicant's ownership of suit property, or of interest therein, but that is a matter for the Environment and Land Court, in any event.
32. On a balance of probabilities, this court must accept that the applicant's husband became an owner of 1/3 of the suit property by virtue of the Consent recorded before Muchelule J. (as he then was) in Nairobi HC (ELC) Case NO. 310 of 2010. As owner of 1/3 of the suit property, the applicant cannot resist the right by the other two shareholders to implement the order for vacant possession against the tenant under a tenancy terminated upon a judgment of the Business Premises Rent Tribunal (BPRT) in a reference filed by the tenant in response to a termination notice given by the landlords (the two co-owners), and which has been perfected by the judgment of the Environment and Land Court on appeal.
33. On a balance of probabilities, similarly, the court is unable to accept that the applicant who claims to have received rent from the tenant over time was unaware of the proceedings for the termination of tenancy filed by the tenant before the BPRT and subsequent appeal to the Environment and Land Court. She could properly have sought to be joined as a co-owner of the suit property. Additionally, it is not correct that it was the 3rd Respondent who filed the proceedings before the BPRT and failed to notify the applicant and other beneficiaries. It was the tenant who filed the reference upon receipt of the termination notice from the landlords, the deceased herein and the Respondent.
34. Instructively, an appeal to the Environment and Land Court from the decision of the Business Premises Tribunal (BPRT) is final in terms of section 15(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, cap. 301, providing as follows:

“ 15. Appeal to court

- (1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court:

Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

- (2) In hearing appeals under subsection (1) of this section the Court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law.
- (3) Deleted by *Act No. 2 of 1970*, s. 13.



- (4) The procedure in and relating to appeals in civil matters from subordinate courts to the Environment and Land Court shall govern appeals under this Act:

Provided that the decision of the Environment and Land Court on any appeal under this Act shall be final and shall not be subject to further appeal.

[[Act No. 2 of 1970](#), s. 13, [Act No. 25 of 2015](#), Sch.]”

35. Ultimately, bearing in mind the whole circumstances of this case, the Court does not find that the applicant has demonstrated a prima facie case for the grant of the reliefs sought in this suit to justify the grant of injunctive relief at this stage.

Damages as a remedy

36. By the applicant’s own showing, the rental of Ksh.150,000/- per month which she allegedly shared with the deceased herein gives her loss at only Ksh.75,000/- per month. If it is divided three-ways as provided by the Court order in Nairobi ELC No. 10 of 2010, her 1/3 share is much less at Ksh.50,000/- per month. Such a loss that is easily quantifiable in the number of months that the suit is pending hearing and determination and recoverable as damages.
37. To alleviate the loss, the Court may direct expeditious hearing of the suit in terms of sections 1A and 1B of the [Civil Procedure Act](#). But the Giella principle is clear that injunctions shall not normally be granted where the loss is capable of compensation by an award of damages.
38. No exceptional circumstances have been demonstrated here to warrant departure from the general principle, as the deposition in the 2nd Respondent’s reply affidavit that the applicant has other sources of income by way has not been rebutted. There is no irreparable injury that is incapable of remedy by an award of damages to warrant the grant of the interlocutory injunction.

Balance of convenience

39. The applicant’s further affidavit of 9/7/2024 bespeaks of at least one other asset in which she is in court proceedings before Tigania Senior Principal Magistrates Court Succ. Cause NO. 135 of 2021 Peninnah Kalayu Kubai v. Dominic Ntongai Kingóri, where it shown she has obtained injunctive relief against the 3rd respondent herein from entering into, interfering with or selling the parcel of Land Kianjai/Kianjai/6049. It may not be accurate that the applicant has no other property save the suit property.
40. The balance of convenience appears to lie with the Respondents in this case on two fronts, economic and jurisprudential. In economic terms its more profitable in the long run to allow the implementation of the termination of the tenancy on the suit property for purposes of renovations and or development which would enhance the market value of the rental enterprise to the benefit of the three owners, including the applicant. The loss of rental income in the short period of time to the hearing and determination of the suit is, of course, a loss which may be quantified and recovered.
41. From a jurisprudential standpoint, even if it is considered that the issue of the ownership of 1/3 of the suit plot by the applicant, and therefore his interest, was not up for determination before the Environment and Land Court in the appeal from the Business Premise Rent Tribunal, this Court should be slow to entertain an application that leads to frustrating the outcome in judgment of the Court of Equal Status with regard as here to the eviction of the tenant in the land matter of landlord and tenant.



42. To accede to the request to for injunction by the applicant will on result in competing orders of this court as against the court of equal status which is constitutionally ordained for the determination of land matters such as the question of tenancy before this court.
43. The interests of jurisprudential harmony obviously tilts the balance in favour of the respondents who have judgment in their favour on the question of the tenancy on he suit property, which has not been perfected by review before the Environment and Land Court, in the absence of right of further appeal.

Prayer for accounts

44. There are three circumstances that accounts may be ordered:
 - a. As an obligation of every personal representative to account to the beneficiaries under section 83, 92 and 94 of the *Law of Succession Act*.
 - b. As a penal statutory duty of an intermeddler to account to the duly appointed administrators under section 45 (2) (b) of the Act; and
 - c. As an order of the Court in appropriate circumstances where any person including a beneficiary has received or dealt with an estate asset. See powers of the Court under section 47 of the Act. (For instance, section 42 of the Act also requires property or previous benefits given to a beneficiary to be taken into account at distribution of the estate and it may call for an account from the beneficiary for all assets received in the life of the deceased.)
45. The Administrators of the Estate of the Deceased here are the 1st and 2nd respondents in this application and they have not sought any orders for account. The dispute as to whether the asset subject of this application is estate property makes it inappropriate to order an account before such determination is finally made. If the asset is not part of the estate of the Deceased herein, no issue of intermeddling arises.
46. No special circumstances have been shown to establish any fiduciary relationship as would call for an order for account against the 3rd respondent at this stage.

Conclusion

47. The Court finds that the applicant has not demonstrated a prima facie case with probability of success; that damages are adequate compensation in the event that the applicant succeeds at the trial; and that the balance of convenience lies with allowing the implementation of the termination notice on the premises, which has been perfected by an order of the Business Premises Rent Tribunal (BPRT) and unsuccessfully appealed to the Environment and Land Court (ELC), a court of equal status to this Court. The application for interlocutory injunction is declined.
48. The prayer for an order for account against the 3rd Respondent made in the Notice of Motion is in the nature of a final order which should await the determination of the question whether the asset is part of the Estate of the Deceased, the rights of the parties in the suit property and, consequently, ownership of rents accruing therefrom. For this reason, the prayer for account is deferred for consideration at the hearing of this suit.
49. The pending application for confirmation of Grant dated 19/6/2024 shall provide, through hearing of any Protests filed thereto, a basis for determination of the issue of the extent of the estate of the deceased and, consequently, the recoverability of any rental income received by the Respondents.



Orders

50. Accordingly, for the reasons set out above, the Court finds that the application for injunction dated 18/3/2024 has no merit and it is declined.
51. The matter shall proceed to the hearing of the Summons for Confirmation of Grant dated 19/6/2024 on a date to be fixed in consultation with the parties.
52. Costs in the Cause.
Order accordingly.

DATED AND DELIVERED THIS 8TH DAY OF AUGUST, 2024.

EDWARD M. MURIITHI

JUDGE

APPEARANCES

Ms. Gikundi for Mr. Atheru for the Applicant.

Ms. N. Kinyanjui for the 1st Respondent.

Mr. Murango Mwenda for 2nd Respondent.

Mr. Mutegi for 3rd Respondent.

