

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MERU**

**ELC CASE NO E019 OF 2024**

**PENINAH KALAYU KUBAI** [*Suing as the Legal Administrator of the Estate of GABRIEL KUBAI KING'ORI*]..... **PLAINTIFF**

**VERSUS**

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

**ELIZABETH THAIRORA KARIUKI** .....**2<sup>ND</sup> DEFENDANT**

**MAGDALENE KABUYA KING'ORI** ..... **3<sup>RD</sup> DEFENDANT** [*2<sup>nd</sup> & 3<sup>rd</sup> Defendants sued as the Legal Administrators/Representatives of the Estate of Maria Gatitu King'ori*]

**JUDGMENT**

1. The Plaintiff herein [*who is the legal administratix of the estate of Gabriel Kubai King'ori-deceased*] approached the court *vide* *Plaint* dated **19<sup>th</sup> August 2024**; and wherein same sought various reliefs. Subsequently, the *Plaint* was amended resting with the amended *Plaint* dated **10<sup>th</sup> February 2025**. The reliefs sought at the foot of the amended *Plaint* are as hereunder:

- i. A declaration that the Plaintiff as the legal administrator of the Estate of Gabriel Kubai King'ori is the rightful owner of Meru Municipality Block 11/61.*
- ii. A declaration that the 1<sup>st</sup> Defendant holds parcel No. Meru Municipality Block 11/61 in trust for the estate of Gabriel Kubai King'ori (now deceased).*

*iii. A permanent injunction restraining the Defendants from evicting or interfering with the Plaintiff's quiet possession of the suit premises.*

*iv. Costs and interest of the suit.*

2. The 1<sup>st</sup> Defendant duly entered appearance and filed a statement of defense to the original plaint dated **4<sup>th</sup> September 2024**. The 1<sup>st</sup> Defendant denied that the suit property lawfully belongs to the estate of Gabriel Kubai King'ori- deceased. Furthermore, the 1<sup>st</sup> Defendant contended that the suit property was lawfully registered in the names of Gabriel Kubai [1/3], Dominic Ntongai Kingori [1/3] and Maria Gatitu Kingori – now deceased [1/3]. In addition, it was contended that the 3<sup>rd</sup> portion owned by Maria Gatitu Kingori was to be held on trust for the daughters of Maria Gatitu Kingori, who was the 1<sup>st</sup> Wife of Josep Kingori- deceased.
3. Additionally, the 1<sup>st</sup> Defendant contended that the dispute pertaining to ownership of the suit property was dealt with and addressed *vide* Milimani ELC Civil Case No. 310 of 2010 and wherein the parties, including Gabriel Kubai, entered a consent as pertains to ownership. Moreover, it was posited that the consent under reference has neither been challenged nor set aside.
4. The 2<sup>nd</sup> Defendant duly entered appearance and filed a statement of defense to the original plaint dated **7<sup>th</sup> November 2024**. Similarly, the 2<sup>nd</sup> Defendant denied the claims by and on behalf of the Plaintiff pertaining to ownership of the suit property. In addition, the 2<sup>nd</sup> Defendant posited that the ownership of the suit property [otherwise referred to as continental hotel Meru] was dealt with *vide* Milimani ELC No. 310 of

2010. Moreover, the 2<sup>nd</sup> Defendant has contended that the subject suit is res judicata and hence same ought to be dismissed.

5. The 3<sup>rd</sup> Defendant duly entered appearance and filed a statement of defense dated **27<sup>th</sup> September 2024** and wherein same has denied the claims mounted on behalf of the plaintiff. In addition, the 3<sup>rd</sup> Defendant has contended that the suit property was previously registered in the names of Maria Gatitu Kingori [now deceased] and Dominic Ntongai Kingori as trustees of the family of Maria Gatitu, who was the 1<sup>st</sup> Wife of Joseph Kingori now deceased.
6. Furthermore, the 3<sup>rd</sup> Defendant has averred that the suit property was subsequently dealt with *vide* Milimani ELC No. 310 of 2010 and wherein a consent order was entered into pertaining to ownership thereon. Moreover, it has been averred that the suit property is currently owned by Gabriel Kubai [1/3]; Dominic Ntongai [1/3], and Maria Gatitu Kingori [1/3].
7. The subject suit was thereafter subjected to the usual pretrial directions, whereupon the parties confirmed that same had filed and exchanged all the requisite list and bundle of documents; and the witness statements. To this end, the court ventured forward and confirmed the matter as being ready for hearing.
8. The Plaintiff's case is premised on the evidence of two [2] witnesses, namely; Peninah Kalayu Kubai and Josphat Kirimi. Same testified as PW1 and PW2, respectively.
9. It was the testimony of PW1 [Peninah Kalayu Kubai] that same is the legal administratrix of the estate of Gabriel Kubai Kingori- now deceased.

Furthermore, the witness averred that same is also the Plaintiff in respect of the subject matter. To this end, the witness posited that same is thus conversant with the facts of the case.

10. Additionally, the witness averred that same has since recorded and filed a witness statement dated **27<sup>th</sup> January 2025** and which witness statement the witness sought to adopt and rely on as her evidence in chief. Suffice it to state that the witness statement was adopted and constituted as the evidence in chief of the witness.
11. Furthermore, the witness referenced a list and bundle of documents dated **27<sup>th</sup> January 2025** and thereafter sought to tender and produce the documents as exhibits. There being no objection, the documents at the foot of the list dated **27<sup>th</sup> January 2025** were tendered and produced as exhibits P1 to P14, respectively.
12. It was the further testimony of the witness that same has filed an amended plaint dated **10<sup>th</sup> February 2025**, together with a verifying affidavit, whose contents the witness sought to adopt and rely on. In addition, the witness invited the court to grant the reliefs sought at the foot of the amended plaint.
13. On cross-examination by learned counsel for the 1<sup>st</sup> Defendant, the witness testified that same has tendered and produced before the court a certificate of official search in respect of the suit property. Moreover, the witness averred that the certificate of official search shows that the suit property was registered in the names of Dominic Ntongai and Maria Gatitu Kingori as trustees.

14. It was the further testimony of the witness that Dominic Ntongai [the 1<sup>st</sup> Defendant] has been troubling the tenant who is in occupation of the suit property. Besides, the witness averred that because of the acts of the 1<sup>st</sup> Defendant, same [witness] was constrained to lodge a complaint with police as against the 1<sup>st</sup> Defendant. In addition, the witness averred that same also lodged a complaint with Njuri Ncheke against the 1<sup>st</sup> Defendant.
  
15. While still under cross-examination, the witness testified that Njuri Ncheke thereafter summoned the 1<sup>st</sup> Defendant. To this end, the witness averred that Njuri Ncheke issued summons to the 1<sup>st</sup> Defendant. However, the witness admitted that same has neither tendered nor produced a copy of the said summons before the court.
  
16. It was the further testimony of the witness that same has also filed before the court a copy of the consent order which was issued *vide* Milimani ELC No. 310 of 2020. In particular, the witness testified that the consent under reference relates to ownership of the suit property. Moreover, the witness averred that the consent stipulates that the suit property was to be sub-divided into three equal portions.
  
17. On further cross-examination, the witness confirmed that the consent which was issued *vide* Milimani ELC No. 310 of 2010 is still in place. Instructively, the witness conceded that the consent has never been varied and or set aside. Furthermore, the witness confirmed that Gabriel Kubai [now deceased] was a party in the Milimani case. Besides, the witness averred that Gabriel Kubai was privy to and aware of the contents of the consent.

18. Additionally, the witness testified that despite the terms of the consent, same has filed the instant suit claiming ownership. Moreover, the witness has contended that the suit property belongs to Gabriel Kubai [now deceased]. The witness has further stated that same has brought before the court various documents to confirm that the suit property belongs to Gabriel Kubai-now deceased.
19. While still under cross-examination, the witness averred that the search certificate before the court shows that the suit property is registered in the names of three people. The witness thereafter enumerated the names of the three people as Dominic Ntongai Kingori; Gabriel Kubai Kingori; and Maria Gatitu Kingori.
20. On the other hand, the witness testified that same is aware that the suit property previously belonged to Joseph Kingori- Deceased. In addition, the witness testified that the estate of Joseph Kingori was distributed according to the two houses of the deceased. To this end, the witness referenced the minutes of the meeting that was attended by various people.
21. On cross-examination by learned counsel for the 2<sup>nd</sup> Defendant, the witness testified that the Plot in question is developed. The witness added that the Plot has a hotel build thereon. Moreover, the witness clarified that the hotel in question is known as Continental Hotel.
22. It was the further testimony of the witness that the hotel on the suit property is rented out to a tenant. Besides, the witness averred that the tenant pays monthly rent of Kshs.150,000/= only. In addition, the witness admitted that the rents are collected by herself.

23. While still under cross-examination by learned counsel for the 2<sup>nd</sup> Defendant, the witness testified that her mother-in-law [Maria Gatitu Kingori- Deceased] used to collect rents in respect of a portion of the property. In particular, the witness averred that her mother-in-law used to collect Kes. 75,000 only per month being half of the monthly rents derivable from Continental hotel.
24. It was the further testimony of the witness that other than Continental Hotel, there are other structures erected on the rear side of the property. The witness averred that the said structures were erected by Dominic Ntongai Kingori [1<sup>st</sup> Defendant]. Additionally, the witness testified that it is the 1<sup>st</sup> Defendant who collects the rent[s] from the structures built on the reverse side of the suit property.
25. Regarding the scheme/schedule pertaining to collection of rents from the suit property, the witness contended that the scheme does not accord with the consent order issued in respect of Milimani ELC No. 310 of 2010. Moreover, the witness averred that same only got to know of the consent order in August 2024. Nevertheless, the witness testified that same has since taken steps to challenge the consent. In particular, the witness stated that same has filed an application before the court.
26. As pertains to the payment of rents arising from continental hotel, the witness contended that the tenant has been paying the rents. Moreover, the witness testified that same is not aware of whether rents have been in arrears for more than three months.

27. On cross-examination by learned counsel for 3<sup>rd</sup> Defendant, the witness averred that same has mounted the suit on behalf of the estate of Gabriel Kubai Kingori – deceased. Furthermore, the witness conceded that Gabriel Kubai was a brother of the Defendants. Besides, the witness testified that Gabriel Kubai and the Defendants herein are all the children of Joseph Kingori [deceased].
28. It was the further testimony of the witness that the estate of Joseph Kingori- deceased was the subject of the succession proceedings. To this end, the witness averred that the suit property was distributed to the house of Maria Gatitu [the 1<sup>st</sup> wife of the deceased].
29. Regarding exhibit P8, the witness testified that the said document confirms that the suit property was distributed to the house of Maria Gatitu. Moreover, the witness admitted that Maria Gatitu was the mother of Gabriel Kubai; as well as the Defendants.
30. While still under cross-examination by learned counsel for the 3<sup>rd</sup> Defendant the witness testified that exhibit P8 shows that Gabriel Kubai was present during the meeting that birthed the said minutes. Besides, the witness testified that Gabriel Kubai signed the minutes.
31. It was the further testimony of the witness that the suit property was previously registered in the names of Dominic Ntongai Kingori [1<sup>st</sup> Defendant] and Maria Gatitu Kingori as trustees on behalf of the Children of Maria Gatitu. For good measure, the witness confirmed that the Green card shows that the suit property was being held for and on behalf of the children of Maria Gatitu.

32. Additionally, the witness admitted that the Green card does not show that the suit property was being held in trust for Gabriel Kubai. Besides, the witness conceded that the suit property was one of the properties which was captured at the foot of the matter before the Milimani court. Moreover, the witness averred that same has brought before the court the consent order emanating from Milimani ELC No. 310 of 2010. Furthermore, the witness averred that the court should consider and rely on the documents that same has brought before the court including the consent.

33. On further cross-examination by the learned counsel for the 3<sup>rd</sup> Defendant, the witness testified that the consent was entered into in the presence of Gabriel Kubai. Besides, the witness conceded that the consent order has neither been challenged nor set aside. In addition, the witness conceded that the consent shows that Gabriel Kubai was only entitled to a third of the property.

34. It was the further testimony of the witness that Continental Hotel is leased out to one Paul Lobo. Moreover, the witness testified that there was a case before the Business Premises Rent Tribunal pertaining to termination of the tenancy. In addition, the witness admitted that the case was heard and determined and an eviction order was issued. Furthermore, the witness testified that same is aware that the tenant [Paul Lobo] was aggrieved and thereafter filed an appeal before the Environment and Land Court at Meru.

35. It was the further testimony of the witness that the appeal which was filed by the tenant [Paul Lobo] was dismissed. For good measure, the witness confirmed that ELC affirmed the decision of the Business

Premises Rent Tribunal and decreed that the tenant be evicted from the suit property.

36. Be that as it may, the witness testified that same filed the subject suit and thereafter sought and obtained an order of temporary injunction barring the eviction of the tenant from the Continental Hotel. In this regard, the witness averred that because of the injunction the tenant is still in occupation of the suit premises.

37. Other than the foregoing, the witness testified that same also filed an application before the succession court as pertains to ownership of the suit property. Nevertheless, the witness acknowledged that the application before the succession court [High Court] was dismissed].

38. The 2<sup>nd</sup> witness who testified on behalf of the plaintiff was Josphat Kiriimi. Same testified as PW2.

39. It was the testimony of the witness that same is a farmer and the secretary of Njuri Ncheke Supreme Council of the Ameru elders. Furthermore, the witness averred that same is privy to the facts of the subject matter. In particular, the witness testified that the dispute pertaining to the ownership of the suit property was lodged with Njuri Ncheke and thereafter the dispute was heard. In this regard, the witness referenced minutes of the Njuri Ncheke council of elders.

40. Additionally, the witness averred that same has also recorded a witness statement dated **27<sup>th</sup> January 2025** and which witness statement the witness sought to adopt and rely on. The witness statement under

reference was thereafter adopted and constituted as the evidence in chief of the witness.

41. On cross-examination by learned counsel for the 1<sup>st</sup> Defendant, the witness averred that he is the Secretary General of Njuri Ncheke. However, the witness admitted that same has neither brought before the court nor produced any minutes to confirm his election as the secretary general of Njuri Ncheke.

42. It was the further testimony of the witness that the complaint pertaining to the subject dispute was lodged with Njuri Ncheke. Moreover, the witness averred that Njuri Ncheke were investigating the complaint that was lodged by the plaintiff. In addition, the witness testified that Njuri Ncheke thereafter prepared minutes and which minutes have been tendered before the court. Moreover, the witness averred that Njuri Ncheke thereafter made recommendations to the Director of Public Prosecutions as against 1<sup>st</sup> Defendant.

43. On cross examination by learned counsel for the First Defendant, the witness testified that the dispute beforehand touched on and concerned a matter which involved various family members. However, the witness testified that the other family members were neither involved nor informed of the proceedings.

44. It was the further testimony of the witness that Njuri Ncheke proceeded to and made decisions. Moreover, the witness testified that Njuri Ncheke considered the effects of its decision on the other family members.

45. On further cross-examination, the witness testified that same is aware that rents from the suit property [Continental Hotel] are being shared between the Plaintiff and the rest of the family members.
46. On cross-examination by learned counsel for the 3<sup>rd</sup> Defendant, the witness averred that same would want the decision of the public trustees to be implemented. However, the witness conceded that same does not have the decision of the public trustees which he [witness] has referenced in his statement.
47. Upon being shown exhibit P8, the witness admitted that same is the decision of the public trustees which he had referenced. Moreover, the witness admitted that according to the decision of the public trustees, the estate of Joseph Kingori- deceased, was distributed according to the two houses. In addition, the witness testified that the suit property where Continental Hotel is located was distributed to the house of Maria Gatitu Kingori.
48. While still under cross-examination, the witness averred that Exhibit P8 confirms that the suit property was to go to the house of Maria Gatitu. Furthermore, the witness testified that Gabriel Kubai is indicated to have signed the minutes- exhibit P8.
49. Regarding exhibit P9, the witness testified that same also confirms that the suit property was willed to the house of Maria Gatitu. Nevertheless, the witness maintained that despite the contents of exhibit P8 and P9; same still maintains that the suit property belongs to Gabriel Kubai.

50. It was the further testimony of the witness that the suit property is comprised of the building known as Continental hotel and additional structures on the reverse. Furthermore, the witness testified that the structures on the rear side were constructed by the 1<sup>st</sup> Defendant. However, the witness clarified that the said structures were constructed by the 1<sup>st</sup> Defendant after being permitted by Gabriel Kubai.

51. With the foregoing testimony, the plaintiff's case was closed.

52. The 1<sup>st</sup> Defendant's case is premised on the evidence of one witness, namely; Dominic Ntongai Kingori. Same testified as DW3.

53. It was the testimony of the witness [DW3] that same is the 1<sup>st</sup> Defendant in respect of the instant matter. Moreover, the witness averred that by virtue of being the 1<sup>st</sup> Defendant, same is therefore conversant with the facts of the case. In addition, the witness testified that same has since recorded a witness statement dated **26<sup>th</sup> February 2025** and which witness statement the witness sought to adopt and rely on as his evidence in chief. To this end, the witness statement was duly adopted and constituted as the evidence in chief of the witness.

54. Additionally, the witness referenced the list and bundle of documents dated **26<sup>th</sup> February 2025** and thereafter sought to produce the documents as exhibits before the court. There being no objection to the production of the documents, same were produced and admitted as exhibits D1-D6 on behalf of the 1<sup>st</sup> Defendant.

55. Furthermore, the witness averred that same has also filed a statement of defense dated **4<sup>th</sup> September 2024** and which statement of defense the witness sought to adopt and rely on.

56. On cross-examination by learned counsel for the 2<sup>nd</sup> Defendant the witness averred that same has since tendered and produced a copy of certificate of official search confirming that the suit property is registered in the names of three persons. The witness averred that the property is registered in the names of Gabriel Kubai [1/3]; Dominic Ntongai [1/3] and Maria Gatitu Kingori [1/3]. Furthermore, the witness testified that the 1/3 portion registered in the name of Maria Gatitu Kingori- deceased was held on trust for the daughters of Maria Gatitu Kingori including the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
57. It was the further testimony of the witness that the plot in question is developed with two sets of buildings. The witness referenced the building comprising of Continental Hotel; and various structures constructed on the reverse of the suit property. In addition, the witness testified that the structures on the reverse were constructed by himself.
58. While still under cross-examination, the witness averred that even though same constructed the structures on the reverse of the suit property, same does not have documents to show that he is the one who constructed the structures.
59. On cross-examination by the learned counsel for the 3<sup>rd</sup> Defendant, the witness testified that the Plaintiff herein is his sister-in-law. Moreover, the witness averred that the suit property which comprise of the Continental Hotel was distributed to the house of Maria Gatitu Kingori- now deceased.

60. Additionally, it was the testimony of the witness that the suit property was the subject of Milimani ELC No. 310 of 2010 and wherein a consent was entered into confirming ownership thereof. In particular, the witness testified that the Plaintiff's husband [Gabriel Kubai] is entitled to 1/3 of the suit property.

61. On cross-examination by learned counsel for the Plaintiff, the witness testified that same has tendered and produced before the court a copy of the certificate of official search. Moreover, the witness averred that the certificate of official search confirms that the suit property is registered in the names of three persons, each holding a third share. Furthermore, the witness averred that the lease in respect of the suit property has since been renewed. Nevertheless, the witness added that same has not tendered before the court evidence pertaining to the renewal of the lease.

62. While still under cross-examination by learned counsel for the Plaintiff, the witness averred that the renewal of the lease was applied for by himself. However, the witness conceded that same has equally not produced evidence of the application for renewal of the lease.

63. Regarding the proceedings *vide* Milimani ELC No. 310 of 2010, the witness averred that Gabriel Kubai was one of the Plaintiffs in the said case. Moreover, the witness testified that the parties to the said case, including Gabriel Kubai entered a consent pertaining to ownership of the suit property. In addition, the witness averred that the consent in question has never been set aside or reviewed.

64. With the foregoing testimony, the 1<sup>st</sup> Defendant's case was closed.

65. The 2<sup>nd</sup> Defendant's case is premised on the evidence of one witness, namely; Elizabeth Thairora Kariuki. Same testified as DW4.
66. It was the testimony of the witness [DW4] that same is the 2<sup>nd</sup> Defendant. In this regard, the witness posited that same is conversant with the facts of the case. Moreover, the witness averred that same has since recorded a witness statement dated **27<sup>th</sup> January 2025** and which witness statement the witness sought to adopt and rely on as her evidence in chief. Instructively, the witness statement was duly adopted and constituted as the evidence in chief of the witness.
67. Additionally, the witness referenced the list and bundle of documents dated **7<sup>th</sup> November 2024** and thereafter sought to produce and rely on same as exhibit before the court. There being no objection, the documents under reference were produced and marked as exhibits D1-D5 on behalf of the 2<sup>nd</sup> Defendant.
68. On the other hand, the witness referenced the statement of defense dated **7<sup>th</sup> November 2024** and which statement of defense the witness sought to adopt and to rely on. Furthermore, the witness invited the court to dismiss the Plaintiff's suit.
69. On cross-examination by learned counsel for the 1<sup>st</sup> Defendant, the witness averred that same is privy to and knowledgeable to the terms of the consent which was recorded *vide* Milimani ELC No. 310 of 2010. Moreover, the witness testified that the consent in question has never been set aside or varied.

70. It was the further testimony of the witness that the suit property belongs to and is registered in the names of three people, including Gabriel Kubai; Dominic Ntongai Kingori; and Maria Gatitu Kingori- now deceased.
71. On cross-examination by learned counsel for the 3<sup>rd</sup> Defendant, the witness testified that the suit property previously belonged to Joseph Kingori- deceased. Moreover, the witness averred that following the death of Joseph Kingori, the suit property was transmitted to and registered in the names of Maria Gatitu Kingori and Dominic Ntongai. Nevertheless, the witness clarified that the two were to hold the suit property on behalf of the children of Maria Gatitu.
72. It was the further testimony of the witness that the suit property was never given to Gabriel Kubai alone.
73. While still under cross-examination, the witness testified that the suit property is owned by three persons, each holding a third share. In addition, the witness testified that the rents from Continental Hotel are shared equally between the Plaintiff on one hand and the daughters of Maria Gatitu on the other hand. Furthermore, the witness clarified that Dominic Ntongai receives rent from structures that were constructed at the rear of the building.
74. On cross-examination by learned counsel for the Plaintiff, the witness testified that same was a party to the Nairobi case. Moreover, the witness averred that same was sued as the 2<sup>nd</sup> Defendant in Milimani ELC No. 310 of 2010.
75. It was the further testimony of the witness that the parties to the said case, namely; Milimani ELC No. 310 of 2010 entered into a consent as

pertains to ownership of the suit property. In addition, it was averred that the consent has never been reviewed.

76. While still under cross-examination, the witness testified that Gabriel Kubai- now deceased, was a party in the said case. In particular, the witness clarified that Gabriel Kubai was the 4<sup>th</sup> Plaintiff.

77. While still under cross-examination, the witness testified that Gabriel Kubai was present when parties in respect of Milimani ELC No. 310 of 2010 met the advocate and thereafter entered the consent. In this regard, the witness affirmed that Gabriel Kubai was privy to and knowledgeable of the terms of the consent order.

78. With the foregoing testimony, the 2<sup>nd</sup> Defendant's case was closed.

79. The 3<sup>rd</sup> Defendant's case is premised on the evidence of two witnesses, namely; Mary Kingori and Magdaline Kabuya Kingori. Same testified as DW1 and DW2 respectively. It was the testimony of DW1 [Mary Kingori] that same is the widow of one Joseph Kingori- deceased. Furthermore, the witness averred that the Plaintiff is her daughter-in-law. In addition, the witness added that the defendants are her stepchildren.

80. It was the further testimony of the witness that Joseph Kingori [now deceased] was married to two wives, namely; Maria Gatitu Kingori [1<sup>st</sup> Wife] and Mary Kingori [herself- as the 2<sup>nd</sup> Wife]. Moreover, the witness averred that the estate of Joseph Kingori- deceased was distributed according to the houses of the deceased.

81. It was the further testimony of the witness that same has since recorded a witness statement dated **20<sup>th</sup> February 2025** and which witness statement the witness sought to adopt and rely on as her evidence in chief. To this end, the witness statement was duly adopted and constituted as the evidence in chief of the witness.
82. On cross-examination by learned counsel for the 1<sup>st</sup> Defendant, the witness averred that same is aware that the suit property was previously registered in the name of Dominic Ntongai Kingori [1<sup>st</sup> Defendant] and Maria Gatitu Kingori- now deceased. Moreover, the witness averred that the two were registered as trustees for the children of Maria Gatitu.
83. While under further cross-examination by learned counsel for the 1<sup>st</sup> Defendant, the witness testified that the suit property was never given to Gabriel Kubai to be the sole owner.
84. On cross-examination by learned counsel for the Plaintiff, the witness testified that the suit property was previously registered in the name of Maria Gatitu Kingori and Dominic Ntongai. However, the witness clarified that the two were trustees for all the children of Maria Gatitu Kingori.
85. It was the further testimony of the witness that the suit property is developed. Furthermore, the witness confirmed that the suit property is where the Continental Hotel is located.
86. Regarding the sharing of rents and other affairs in respect of the suit property, the witness averred that same is not aware of those details because same has her own properties.

87. The second witness who testified on behalf of the 3<sup>rd</sup> Defendant was Magdaline Kingori. Same testified as DW2.
88. It was the testimony of the witness [DW2] that same is the 3<sup>rd</sup> Defendant. Furthermore, the witness further averred that by virtue of being 3<sup>rd</sup> Defendant, same is conversant with the facts of the subject matter.
89. It was the further testimony of the witness that same has since recorded a witness statement in respect of the subject matter. To this end, the witness referenced the witness statement dated **20<sup>th</sup> February 2025** and which witness statement the witness sought to adopt and rely on as her evidence in chief. To this end, the witness statement was duly adopted and constituted the evidence in chief of the witness.
90. Additionally, the witness adverted to the list and bundle of documents dated **21<sup>st</sup> February 2025** and thereafter sought to adopt and rely on same as exhibits before the court. There being no objection to the production of the documents at the foot of the list dated **21<sup>st</sup> February 2025**, same were admitted and marked exhibits D1-D8 respectively.
91. Furthermore, the witness testified that same had filed a further list and bundle of documents dated **27<sup>th</sup> September 2024** and which documents the witness sought to produce as further exhibits. There being no objection, the documents under reference were admitted and marked as exhibits D9-D14 on behalf of the 3<sup>rd</sup> Defendant.
92. It was the further testimony of the witness that the suit property is currently registered in the names of three persons, including Gabriel Kubai [1/3]; Dominic Ntongai [1/3] and Maria Gatitu [1/3]. However, the

witness clarified that the share of Maria Gatitu, deceased, was held on trust for the daughters, who are seven in number.

93. On cross-examination by learned counsel for the 1<sup>st</sup> Defendant, the witness averred that same has produced various documents before the court, including a copy of the consent entered *vide* Nairobi ELC No. 310 of 2010. Furthermore, the witness averred that the consent has never been revoked.

94. On cross-examination by learned counsel for the 2<sup>nd</sup> Defendant, the witness testified that the consent which was entered into *vide* Nairobi ELC 310 of 2010 was never objected to by Gabriel Kubai. Moreover, the witness confirmed that the terms of the consent have been complied with. In particular, the witness averred that the parties have been collecting rent in accordance with the terms of the consent.

95. It was the further testimony of the witness that Dominic Ntongai [the 1<sup>st</sup> Defendant] has been collecting rent[s] from the structures constructed on the reverse of the suit properties. On the other hand, the witness averred that the Plaintiff and Maria Gatitu, deceased, were collecting rent from the Continental Hotel.

96. While still under cross-examination, the witness averred that the rents from the hotel were being shared equally between the Plaintiff and Maria Gatitu Kingori, now deceased.

97. It was the further testimony of the witness that upon the death of Maria Kingori, the rents which were previously being collected by her are now being collected and shared amongst the daughters of Maria Gatitu

Kingori. In particular, the witness averred that the daughters include the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

98. On further cross-examination, the witness testified that same is aware of the various cases involving the tenant who occupies the Continental Hotel. In particular, the witness averred that there were proceedings before the business premises rent tribunal, and thereafter an appeal before the ELC. Moreover, the witness testified that an eviction order was indeed issued.

99. On further cross-examination, the witness testified that same is also aware of a decision by Hon. Justice Githinji *vide* the succession court in Meru. In particular, the witness testified that the ruling in question confirms that the suit property belongs to three persons in line with the consent that was issued *vide* Milimani ELC No. 310 of 2010.

100. On cross-examination by learned counsel for the Plaintiff, the witness testified that the consent which was issued *vide* Milimani ELC No. 310 of 2010 remains *in situ*. For good measure, the witness reiterated that the consent has never been set aside.

101. It was the further testimony of the witness that the dispute in respect of Milimani ELC No. 310 of 2010 was fully settled. In addition, the witness also averred that the distribution of the suit property was also confirmed in the succession cause.

102. With the foregoing testimony, the 3<sup>rd</sup> Defendant's case was closed.

103. Upon the close of the hearing, the advocates for the parties sought time to file and exchange written submissions. To this end, the court proceeded to and issued directions pertaining to the filing and exchange of the submissions. Moreover, the court also circumscribed the timelines for the filing and exchange of the submissions.
104. The Plaintiff filed written submissions dated **3<sup>rd</sup> October 2025** and wherein same has highlighted two key issues, namely; whether the Plaintiff has proved her case on balance of probabilities or otherwise, and who pays the costs of the suit.
105. The 1<sup>st</sup> Defendant filed written submissions dated **16<sup>th</sup> October 2025** and wherein same has canvassed three key issues. The issues canvassed on behalf of the 1<sup>st</sup> Defendant are namely; whether the Plaintiff is the rightful owner of the suit property; whether the plaintiff is entitled to a permanent injunction restraining the defendants from evicting or interfering with the Plaintiff's quiet possession of the suit premises; and who should bear the costs of the suit.
106. The 2<sup>nd</sup> Defendant filed written submissions dated **16<sup>th</sup> October 2025** and wherein same has highlighted three key issues for consideration. The issues canvassed at the foot of the 2<sup>nd</sup> Defendant's submissions are namely; whether the plaintiff is entitled to the declarations sought in terms of prayers 1A and 2A of the amended plaint; whether the Plaintiff is entitled to an order of permanent injunction as sought or at all; and who pays the costs of the suit.
107. Having reviewed the pleadings filed on behalf of the parties; the evidence tendered [both oral and documentary] and upon consideration of

the written submissions filed by/on behalf of the respective parties; I come to the conclusion that the determination of the subject matter turns on two key issues, namely; whether the Plaintiff has established and proved her claims to the requisite standard of proof or otherwise; and whether the instant suit constitutes an abuse of the due process of the court or otherwise.

108. Regarding the first issue, it is imperative to recall and reiterate that the Plaintiff has approached this court seeking various orders. In particular, the Plaintiff who is the legal administratrix of the estate of Gabriel Kubai Kingori- now deceased, has sought a declaration that the deceased was the rightful owner of the suit property. In addition, the plaintiff has also sought a declaration that the 1<sup>st</sup> Defendant holds the suit property in trust for the estate of Gabriel Kubai Kingori- deceased.

109. Flowing from the declarations under reference, the plaintiff has thereafter sought an order of permanent injunction to prohibit/restrain the defendants from evicting or interfering with the Plaintiff's quiet possession and enjoyment of the suit premises.

110. Having made the foregoing assertions, it was incumbent upon the Plaintiff to tender and adduce before the court plausible; cogent; concrete; and credible evidence to underpin the contention that the suit property lawfully belonged to Gabriel Kubai Kingori. In this regard, it behooved the plaintiff to place before the court evidence showing how Gabriel Kubai Kingori- now deceased, acquired the property to warrant a declaration that same was the rightful owner.

111. Has the Plaintiff tendered any evidence to that effect? To start with, it is common ground that the suit property was previously owned by

one Joseph Kingori – now deceased. Moreover, it is a common fact that Joseph Kingori was the father of Gabriel Kubai Kingori [now deceased] and the Defendants herein.

112. Additionally, it is important to highlight that upon the death of Joseph Kingori, his estate including the suit property, was distributed according to his wives. Furthermore, it is not in contest that Joseph Kingori was married to two wives, namely; Maria Gatitu Kingori [now deceased] and Mary Kingori [DW1].

113. It is also important to underscore that the suit property was distributed to the house of Maria Gatitu Kingori. To this end, it is instructive to take cognizance of exhibit P8 and P9, respectively, which highlighted that the suit property was distributed to the house of Maria Gatitu Kingori. Furthermore, it is not lost on me that following the distribution of the estate of Joseph Kingori according to wives, the suit property was registered in the names of Maria Kingori and Dominic Ntongai Kingori as trustees of the children of Maria Gatitu Kingori.

114. It is also imperative to reiterate that subsequently, a suit was filed *vide* Milimani ELC No. 310 of 2010 involving the various parties. For good measure, Gabriel Kubai Kingori was the 4<sup>th</sup> Plaintiff, whereas the 2<sup>nd</sup> Defendant [Elizabeth Kariuki] was the 2<sup>nd</sup> Defendant in the said suit. Moreover, the 1<sup>st</sup> Defendant herein was also involved.

115. The parties herein, namely, the Plaintiff [PW1] and the Defendants [DW2, DW3, and DW4] all testified that a consent was entered into pertaining to and concerning ownership of the suit property. Furthermore, it was confirmed that the consent order which was recorded *vide*

Milimani ELC No. 310 of 2010, has neither been challenged nor set aside. For good measure, the plaintiff [PW1] confirmed that the terms of the consent have never been varied.

116. It is also instructive to recall that according to the consent, the suit property is owned by three people, namely; Gabriel Kubai Kingori [1/3]; Dominic Ntongai Kingori [1/3]; and Maria Gatitu Kingori [1/3]. In addition, it was also agreed that the share owned by Maria Gatitu Kingori- now deceased, was held on trust for the daughters, including the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

117. The foregoing constitutes the facts underpinning the ownership of the suit property. These facts are settled and are not in contest. For good measure, it is instructive to reproduce the salient features of the Plaintiff's evidence as pertains to the foregoing facts.

118. Same [Plaintiff] testified as follows while being cross-examined by learned counsel for the 3<sup>rd</sup> Defendant:

***“I do confirm that the estate of Joseph Kingori was distributed according to the two houses. I have availed the evidence to that effect. Regarding exhibit P8, the witness confirms that the said exhibit has been brought to court by herself. Moreover, the witness avers that Exhibit P8 confirms that the suit property was distributed to the house of Maria Gatitu Kingori- the 1<sup>st</sup> Wife. I do confirm that Maria Gatitu was the mother of my husband, Gabriel Kubai Kingori.”***

119. While still under cross-examination by learned counsel for the 3<sup>rd</sup> Defendant, PW1 stated as hereunder;

***“Referred to page 2 of exhibit P8, the witness confirms that Gabriel Kubai was present at the meeting and same signed the minutes. I do confirm that the estate of Joseph Kingori was distributed according to exhibit P8. I do confirm that the plot in question was registered in the names of Maria Gatitu and Dominic Ntongai to hold in trust for the children of Maria Gatitu”.***

120. Additionally, and while still under cross-examination, PW1 stated thus;

***“I do confirm that the green card reflects the two, namely Maria Gatitu Kingori and Dominic Ntongai Kingori as trustees. I do confirm that the green card does not show that the property was being held on trust for Gabriel Kubai.”***

121. From the foregoing excerpts, what becomes apparent is that the Plaintiff is conceding that the suit property was distributed to the house of Maria Gatitu Kingori, who was the 1<sup>st</sup> wife of Joseph Kingori, deceased.

122. Moreover, it is also conceded that following the distribution of the said property to the house of Maria Gatitu, the suit property was registered in the names of Maria Gatitu Kingori and Dominic Ntongai [1<sup>st</sup> Defendant] albeit to hold in trust for all the children of Maria Gatitu Kingori. For good measure, the suit property was not being held on trust for Gabriel Kubai only.

123. To my mind, it was incumbent upon the Plaintiff to tender and place before the court evidence to demonstrate that the suit property was distributed to Gabriel Kubai only; or that the same was being held on trust for him. However, the evidence on record demonstrates otherwise.

124. At any rate, there is no gainsaying that the Plaintiff herself conceded that the green card in respect of the suit property does not show that same was being held on behalf of Gabriel Kubai-now deceased.

125. With the foregoing testimony, it is difficult to discern on what basis the plaintiff herein contends that the suit property lawfully belongs to Gabriel Kubai Kingori- deceased. Notably, evidence abound that Gabriel Kubai Kingori was only entitled to a third of the suit property and not otherwise.

126. The second aspect that merits consideration touches on and concerns the import of the consent that was entered into vide Milimani ELC No. 310 of 2010. Suffice it to state that the consent under reference is one of the documents that was tendered before the court by the Plaintiff. Moreover, the Plaintiff is on record confirming that same wishes that the court adopts and relies on the content of the said consent.

127. For ease of reference, the Plaintiff who testified as PW1 stated as hereunder while under cross-examination by learned counsel for 1<sup>st</sup> Defendant;

***“I have also filed the consent emanating from Nairobi ELC No. 310 of 2010. I have filed the consent. I do confirm that the consent has a limb where it was ordered that the suit property be subdivided into three equal portions. The order is still in place. I do confirm that limb one of the consent speaks to the parties herein. I do confirm that the 4<sup>th</sup> person is Gabriel Kubai. I do confirm that Gabriel Kubai was involved in the said case. I therefore confirm that he was aware of the contents of the consent.”***

128. I hear the Plaintiff to be confirming that there is a consent that was entered into vide Nairobi ELC 310 of 2010; the consent was entered into in the presence and with the involvement of Gabriel Kubai Kingori; the consent touches on ownership of the suit property; the consent decreed that the suit property be subdivided into three equal portions; and that the consent has never been varied.

129. Surely, it is difficult to fathom how and on what basis the plaintiff herein can assert that the suit property rightfully belongs to Gabriel Kubai Kingori- now deceased, yet the evidence on record stipulates otherwise.

130. Flowing from the foregoing analysis, I find and hold that the Plaintiff herein has neither tendered nor adduced any evidence to warrant a declaration that the suit property rightfully belongs to the estate of Gabriel Kubai Kingori, now deceased.

131. Similarly, I am unable to discern on what basis the Plaintiff contends that the suit property is being held by the 1<sup>st</sup> Defendant on trust for the estate of Gabriel Kubai. Moreover, it is not lost on me that the plea of trust must ordinarily be pleaded and particularized in the body of the plaint, save where otherwise the plea touches on constructive trust. [See **Order II rule 4 of the Civil Procedure Rules 2010**].

132. In respect of the subject matter, there is no gainsaying that the plea of trust was neither pleaded nor particularized in the body of the plaint. For good measure, the issue of trust has been adverted to only in the reliefs sought. In this regard, I beg to underscore that the claim based on

trust is not only premature and misconceived but same is also legally untenable [see *John Gitiba Buruna & another v Jackson Rioba Buruna [2007] KECA 431 (KLR); Kazungu Fondo Shutu & another v Japhet Noti Charo & another [2021] KECA 592 (KLR); and Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 others [2015] KECA 713 (KLR)*].

133. *In a nutshell*, I conclude that the plaintiff herein has neither tendered nor adduced any evidence to warrant a finding that Gabriel Kubai Kingori was the lawful owner of the suit property. In addition, the claim based on trust was stillborn for want of the requisite pleading.

134. Moreover, even assuming that there were proper pleadings as pertains to trust [which is not the case] no evidence was tendered to warrant a finding on trust.

135. Before concluding on this issue, it is imperative to reference the decision in the case of *James Muniu Mucheru v National Bank of Kenya Limited [2019] eKLR - Civil Appeal 365 of 2017*, where the court of appeal expounded on the obligation of the claimant to prove his/her case to the requisite standard.

136. For coherence, the court stated as hereunder:

***“19. In Karugi & Another v Kabiya & 3 Others [1987] KLR 347, this Court held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.*”**

***20. In that regard, before a trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities, the court must be satisfied that the plaintiff has adduced some credible and believable evidence which can stand in the absence of rebuttal evidence by the defendant. The plaintiff must adduce evidence, which, in the absence of rebuttal evidence by the defendant, convinces the court that on a balance of probabilities, proves the claim.”***

137. Turning to the second issue, *namely*; whether the instant constitutes an abuse of the due process of the court.

138. It is important to highlight that the plaintiff herein was knowledgeable of and familiar with the terms of the consent order that was recorded *vide* Milimani ELC No. 310 of 2010. In particular, the plaintiff tendered and produced a copy of the said consent as part of her evidence before the court.

139. Furthermore, there is no gainsaying that the Plaintiff herself conceded that the consent in question was entered into and recorded in the presence of Gabriel Kubai Kingori, now deceased. Besides, it was conceded that the terms of the consent have neither been challenged nor varied.

140. Even though the Plaintiff was and remains aware of the said consent, same has approached this court seeking various orders *inter alia* a declaration that the suit property belongs to the estate of Gabriel Kubai Kingori- Deceased.

141. In my humble view, what the plaintiff is seeking to accrue *vide* the subject suit is technically an order to supersede and to set aside the consent issued in Milimani ELC No. 310 of 2010, albeit through the back door. Such an endeavor does not only constitute an abuse of the due process of the court but also an attempt to undermine the rule of law.

142. I beg to underscore that the endeavor by the plaintiff espoused *vide* the instant suit ought not to be countenanced. On the contrary, such attempts ought to be nipped in the bud, frowned upon, and deprecated by all and sundry.

143. The second aspect that highlights abuse of the court process emanates from the fact that the plaintiff herself had previously raised the same issue; ownership of the suit property in the succession file culminating into the delivery of a ruling by Hon. Justice Muriithi. In this regard, it suffices to reference the ruling delivered on 8<sup>th</sup> August 2024 and wherein the learned judge highlighted the terms of the consent order and thereafter returned a finding that the issue of ownership of the suit property had been finalized in Nairobi ELC 310 of 2010 [see paragraph 24 and 32 of the said ruling].

144. Notably, the Plaintiff and her legal counsel [Miss Gikundi] were aware of the said ruling. For good measure, it is not lost on me that the learned counsel for the Plaintiff herein participated in the said proceedings.

145. There is no gainsaying that the terms of the said ruling are known to the Plaintiff and counsel. Nevertheless, the plaintiff and counsel have the temerity to still propagate the matter before this court. Quite clearly,

the subject suit amounts to playing lottery with the due process of the court.

146. Finally, it is also important to recall that the issue of ownership of the suit property and whether same was distributed exclusively to Gabriel Kubai Kingori was again addressed by the High Court vide ruling rendered by Hon. Justice Githinji. The decision of Justice Githinji is similarly within the knowledge of the plaintiff and her legal counsel. For good measure, the import and tenor of the said decision was referenced by DW2 during her cross-examination. The witness stated as hereunder;

***“I am aware that a decision has since been made in the succession matter. The decision was delivered by Justice Githinji. The ruling confirmed that the suit property was to be divided into three portions in line with the consent that was recorded in Milimani ELC 310 of 2010.”***

147. If anyone, this court not excepted, was looking for a case that constitutes a classic abuse of the due process of the court, then the subject suit suffices. For good measure, it is imperative for parties to internalize the claims to be canvassed before the court prior to filing the suit. With such circumspection, suits like the one beforehand would surely not reach the doors of judiciary.

148. The concept of abuse of the due process of the court and what amounts to such abuse has been the subject of various decisions. In the case of ***Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] KEHC 6100 (KLR)***, the court [per Mativo J- Judge as he was then] stated as hereunder;

*“28. Multiplicity of actions on the same matter between the same parties, even where there exists a right to bring the action, is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than the exercise of the right per se. The abuse consists in the intention, purpose and aim of person exercising the right to harass, irritate, and annoy the adversary and interface with the administration of justice. I find no difficulty in concluding that this Judicial Review Application is based on similar grounds as the Petition referred to above.*

*29. This obstacle to the efficient administration of justice is not immovable. Courts need not and should not wait for lawyers and litigants to initiate proceedings where there is substantial reason to believe that the processes of the court have been abused. Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception, fraud and blatant abuse of judicial processes.*

*30. All courts have an inherent or implied jurisdiction to prevent their processes from being used as an instrument of oppression. Courts are able to modify their procedures to avoid such prejudice and take any steps that are necessary to prevent an abuse of process. The concept of abuse of process extends to the use of the court’s processes in a way that is inconsistent with two fundamental*

*requirements arising in Court proceedings. These are, first, that the Court protect its ability to function as a Court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that unless the Court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court's processes will be seen as lending themselves to oppression and injustice.*

*31. The concept of abuse of process overlaps with the obligation of a Court to provide a fair trial. The content of these obligations cannot, however, be stated exhaustively or analytically. These obligations rely on intuitive judgments formed by experience. The obligation on a court is to provide a fair trial in accordance with law. The due administration of justice is a continuous process. Courts must be vigilant to ensure that public confidence in the administration of justice is maintained.”*

149. The Supreme Court of Kenya has also added its voice to the concept of abuse of the due process of the court. In the case of *Rutongot Farm Ltd v Kenya Forest Service & 3 others (Petition 2 of 2016) [2018] KESC 27 (KLR) (19 September 2018) (Ruling)*, the Apex court stated thus;

*“The concept of “abuse of the process of the Court” bears no fixed meaning, but has to do with the motives behind the guilty party’s actions, and with a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice. The bottom line in a case of abuse of Court process is that it “appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption...” Beyond that threshold lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process.”*

150. I have said enough to underscore the fact that the subject suit constitutes a classic abuse of the due process of the court. I wish to add no more.

**FINAL DISPOSITION.**

151. Flowing from the analysis alluded to in the body of the judgment, I conclude that the subject suit was premature, misconceived, and legally untenable. Moreover, the suit itself constituted an abuse of the due process of the court.

152. In the upshot, the final orders that commend themselves to the court are as hereunder;

- i. The suit be and is hereby dismissed.**
- ii. Cost of the suit be and are hereby awarded to the Defendants and same shall be borne by the Plaintiff.**
- iii. The orders of status quo which were granted on 16<sup>th</sup> October 2024; be and are hereby vacated.**

153. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 12<sup>TH</sup> DAY OF NOVEMBER 2025**

**OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].**

**JUDGE**

**In the presence of:**

Court Assistant Hussein

Miss. Gikundi for the Plaintiff

Miss. Mburukwa for the 1<sup>st</sup> Defendant

Mrs. Kinyanjui for the 2<sup>nd</sup> Defendant

Mr. Murango Mwenda for the 3<sup>rd</sup> Defendant