

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**FAMILY DIVISION SUIT NO. E003 OF 2025 (OS)**

MARY WANGUI MWAI .....APPLICANT

VERSUS

PATRICK KARIUKI MUTONYI .....1<sup>ST</sup> RESPONDENT

ANN WAITHERA ..... 2<sup>ND</sup> RESPONDENT

MONICA NYAWIRA MWAI .....3<sup>RD</sup> RESPONDENT

***(SUED AS THE LEGAL REPRESENTATIVES OF HEZRON MWAI  
MUTONYI DECEASED)***

**RULING**

1. Before this Court is the Applicant's Notice of Motion dated 8<sup>th</sup> April, 2025, brought under Orders 40 Rules 1, 3 and 10 and Order 51 Rules 1 and 3 of the Civil Procedure Rules, seeking Orders that:-

***1. Spent.***

***2. Spent.***

***3. This Honourable Court be pleased to issue a temporary injunction restraining the Respondents, whether by themselves, their agents, servants, or any other person acting under their authority, from appointing estate agents to manage the said LR No. 202/32 in the Free Area Estate of Nakuru City pending the hearing and determination of this suit. The costs of the application be provided for.***

2. The Application is premised on the grounds on the face of the Notice of Motion and supported by the Affidavit of the Applicant, sworn on the same date.

3. The Applicant states that she is the widow of the late Hezron Mwai Mutonyi and asserts that they acquired the suit property during their marriage, which lasted from 1967 until he died in 2018. She argues that under the Married Women's Property Act of 1882 and following her active partnership in her

husband's businesses and farming, she has a recognised right to joint property ownership.

4. Relying on among others, the case of *Dorcas Wangari Macharia Vs Public Trustee and KCB; High Court Civil Suit No. 18 of 2003(OS), Esther Wanjiru Githatu V Mary Wanjiru Githatu [2019] eKLR and Succession Cause No. 451 of 1996; In the Matter of the Estate of James Nyamweya (Deceased)*, she argues that a widow has the right to separate her own property interests from her deceased husband's estate, even if the properties are registered solely in the husband's name.
5. She contends that she and her late husband were tenants in common, meaning she is legally entitled to possession, use, and enjoyment of the land, and cannot be ousted by the Respondents herein.
6. It is alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are overstepping their authority by attempting to remove a tenant in common from possession. Furthermore, she states that the Respondents have failed to work collegially as administrators by side-lining the 1<sup>st</sup> Respondent and unilaterally demanding that tenants pay rent to a specific agent, namely, Pata Commercial Enterprises.
7. She states that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have instructed their advocate to send a letter to the tenants, requiring that all future rent be paid to Pata Commercial Enterprises, failure to which, they would take legal action for distress for rent.
8. The Applicant asserts that Pata Commercial Enterprises is acting on instructions from incompetent legal representatives and has gone ahead to issue its own management circular to tenants without proper authority.
9. She emphasises that the rental income from the property is her primary means of livelihood. She argues that if her husband could not have legally removed her from possession during his life, the Respondents lack the authority to do so now.

10. She urges this court to invoke its inherent jurisdiction to protect the subject matter of the suit, ensuring that any final judgment in the Applicant's favour is not rendered useless by the Respondents' current actions.
11. Citing *Assanand v Pettitt [1989] KLR* at page 241, the Applicant argues that an injunction is necessary to maintain the *status quo* and prevent the Respondents from dealing with the property in a way that defeats her eventual legal claims.
12. The Applicant argues that the Respondents' actions deprive her of the fundamental incidents of ownership, specifically the right to possess, manage, and enjoy the income generated by the property.
13. She therefore states that unless the court restrains the Respondents, she will suffer significant financial hardship.
14. In his Replying Affidavit sworn on 25<sup>th</sup> June, 2025, the **1<sup>st</sup> Respondent** states that he is the Applicant's brother-in-law. He confirms his legal standing as a court-appointed Administrator of the estate of his late brother, Hezron Mwai Mutonyi, serving alongside the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
15. He confirms the Applicant's claim that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents appointed Pata Commercial Enterprises to manage rent collection for the deceased's building on L.R. No. 202/32 in Nakuru. He states that this appointment was made by his co-administrators without his consent and against his wishes.
16. He wonders why the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are attempting to manage the estate's assets without his involvement, despite his equal status as an administrator, and suspects their motives may be sinister.
17. He notes that the Applicant is his late brother's first wife, married around 1967, whereas the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents entered into marriage with his brother in the early or mid-2000s.
18. He states that his late brother and the Applicant were a hardworking couple who acquired various properties together during their lifetime. He believes that the Applicant contributed both directly and indirectly to the acquisition

- of the properties currently forming the deceased's estate, including the one in dispute. He therefore asserts that it is only fair and just for the Applicant to receive a share of the rental income generated by the property in question.
19. Relying on advice from his legal counsel that administrators are legally required to manage the estate in the best interest of all beneficiaries and ensure fair and equitable treatment, he opposes the appointment of Pata Commercial Enterprises Limited. He argues that since they were appointed without his concurrence, they will likely serve only the interests of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to the detriment of other beneficiaries.
  20. Declaring that his Affidavit is in support of Mary Wangui Mwai's application, he urges the Court to grant the orders sought, arguing that allowing the application is necessary to serve the interests of justice.
  21. In their Replying Affidavit sworn by the 3<sup>rd</sup> Respondent on 9<sup>th</sup> May, 2025, on his behalf and on behalf of the 2<sup>nd</sup> Respondent, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the Application.
  22. The 3<sup>rd</sup> Respondent confirms that all the three Respondents are the legally recognised representatives of the estate of the late Hezron Mwai Mutonyi, while the Applicant is their co-wife.
  23. She states that the deceased was the sole owner of the commercial building known as Buffalo Site located on L.R. No. 202/32 and that the Applicant does not live on the property and did not collect rent from it during the deceased's lifetime.
  24. She claims that the deceased personally managed the property and used the rental income to support all three of his wives and their respective households. She depones that upon the deceased's passing, the three widows initially agreed that the 1<sup>st</sup> Respondent would collect the rent and distribute it among the three houses, but the 1<sup>st</sup> Respondent failed to distribute the rent as agreed and instead gave all the money collected to the Applicant.
  25. She explains that as a result of this non-distribution, she and the 2<sup>nd</sup> Respondent were left without any means of financial support. She further

alleges that the 1<sup>st</sup> Respondent has refused to provide an account of the rent collected to his co-administrators. She justifies the appointment of Pata Commercial Enterprises as a necessary move by the majority of the administrators to ensure the estate is managed professionally and that all beneficiaries receive their fair share.

26. She contends that the Applicant's claim of co-ownership is a matter to be determined during the distribution stage of the succession and should not prevent the administrators from managing the estate now.
27. She argues that the 1<sup>st</sup> Respondent is biased toward the Applicant and is failing in his fiduciary duty to act in the best interest of all beneficiaries. She denies the alleged sinister motive and maintains that the goal is simply transparent management of the estate's income.
28. In conclusion, she asks the court to dismiss the Applicant's prayer for an injunction, arguing it would hinder the proper administration of the estate.
29. In her Further Affidavit, which she swore on 23<sup>rd</sup> June, 2025, the Applicant refers the court to her previous Supporting Affidavit detailing how she and her late husband acquired various properties between 1967 and 2018.
30. While she acknowledges the status of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as wives of the late Hezron Mwai Mutonyi, she maintains that this acknowledgement does not affect the ownership of assets acquired during her coverture, in which she claims the Respondents played no role.
31. She emphasises the acquisition of LR No. 20232 in 1994 for Kshs. 220,000/-, explaining that the commercial building known as Buffalo site was funded by the sale of cattle and sheep she had been rearing at Kiptangwanyi.
32. She contends that although the deceased was the registered legal owner, she is a beneficial owner of that property and all others acquired during their marriage due to her financial contributions.

33. The Applicant asserts the joint purchase of two plots in JB town, noting that one of them is developed with a storey house where she lived with the deceased, while the other remains undeveloped.
34. She argues that the 2<sup>nd</sup> Respondent's relationship with her late husband was brief, lasting only from 2005 to 2007, when she left him and only returned to the property one week before the deceased passed away in 2018.
35. Regarding the 3<sup>rd</sup> Respondent, the Applicant points out a lack of evidence concerning a 1992 marriage or business activities at Lanet Country Hotel and Dundori. She emphasises that her late husband's affairs with both Respondents occurred only after all the suit properties had already been acquired.
36. Opposing any attempt by the Respondents to collect rental income, she maintains that her share of the property must be separated from the estate before the Respondents can claim any entitlement to the deceased's portion. She accuses the Respondents of attempting to scramble and partition the estate, including an effort to sell land known as Dundori/6/PHS III/RESS in 2020.
37. She largely denies the allegations made in the 3<sup>rd</sup> Respondent's (Monica Nyawira Mwai) Replying Affidavit and urges the Court to grant an injunction to preserve the subject properties from further irregular dealings.
38. Parties agreed to have the application canvassed by way of written submissions. As regards the 1<sup>st</sup> Respondent, she indicated that she would not be filing any but fully associated herself with submissions filed by the Applicant.

### **Applicant's Submissions**

39. Relying on the principles set in *Giella vs. Cassman Brown & Co. Ltd (1973) EA 358*, in regard to the granting of a temporary injunction, the Applicant argues she has a strong legal claim based on the principle of resulting trusts. She asserts that while the property (LR No. 202/32) is

registered in her late husband's name, her direct and indirect contributions over a 51-years of marriage create a beneficial interest in her favour.

40. She emphasises that non-monetary contributions, such as managing family businesses and farming, are legally equivalent to financial support. Consequently, she claims a 50% ownership stake in the property under the maxim equality is equity, arguing that this interest must be separated from the deceased's estate before any distribution to other beneficiaries can occur.
41. As regards her status as an equitable tenant in common, the Applicant maintains that as a co-owner, she has an absolute right to the possession, use, and management of the land. She contends that the Respondents' attempts to install an external management firm (Pata Commercial Enterprises) constitute an illegal attempt to oust her from her own property. She argues that even her late husband could not have legally removed her from the property during his lifetime, and therefore, his administrators possess no greater power to do so now.
42. The Applicant asserts that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents acted unilaterally by appointing an estate agent without the consent of the 1<sup>st</sup> Respondent when they are all legal administrators of the Estate. Citing *Odhiambo & another v Kenya Tourist Development Corporation & another (Commercial Case 11 of 2019) [2024] KEHC 16267 (KLR)*, she argues that Administrators must act as a collective trust. Therefore, since the appointment of Pata Commercial Enterprises lacked the concurrence of all three administrators, the Applicant argues, the appointment is a legal nullity and should be set aside.
43. On irreparable injury, she argues that the rental income from the Buffalo Site building, totalling approximately Kshs. 60,000 per month is her primary source of livelihood. Hence, the Respondents' interference deprives her of her rights associated with ownership, more particularly, the right to income and management. She maintains that if the Court does not intervene, her

proprietary rights will be permanently extinguished before the main suit is even heard.

44. Lastly, she relies on the case of ***Assanand vs. Pettitt*** (supra), and argues that the purpose of an injunction is to maintain the status quo to ensure that the eventual judgment of the court is not rendered ineffectual or a mere academic exercise.

45. In conclusion, she states that the balance of convenience tilts heavily in her favour, as granting the injunction preserves both the property and her livelihood until the court can make a final determination on the ownership of the assets.

### **2<sup>nd</sup> and 3<sup>rd</sup> Respondents' submissions**

46. They frame one issue for determination, that is, whether the prayer for a temporary injunction to stop them from appointing estate agents to manage LR No. 202/32 in the Free Area Estate of Nakuru should be granted.

47. Arguing that granting an injunction is an exercise of judicial discretion that must be done judiciously, they rely on Order 40 Rule 1(a) of the Civil Procedure Rules 2010 as the substantive law governing the matter. Further, reliance is then placed on the ***Giella -vs- Cassman Brown (supra) & Co. Ltd (supra)*** on the three conditions for grant of an injunction, which is: a prima facie case with a probability of success, proof of irreparable injury, and the balance of convenience.

48. Regarding a prima facie case, they argue that the Applicant has failed to establish one. They assert that the deceased was the sole registered owner of the property and that the Applicant has not provided sufficient evidence of her alleged financial contribution to its acquisition.

49. The Respondents contend that the Applicant is merely a beneficiary and not a co-owner. They argue that as administrators, they have the legal mandate to manage the estate's assets for the benefit of all beneficiaries, not just one.

50. On the irreparable injury, they argue that the Applicant will suffer none since the property is commercial and generates rent, hence, any loss could

be easily calculated and compensated by damages, which disqualifies the need for an injunction.

51. The Respondents allege that the Applicant has been collecting all the rent exclusively, leaving the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents with nothing and therefore, appointing a professional agent (Pata Commercial Enterprises) is necessary to ensure transparency and equitable distribution of income.

52. Arguing that the balance of convenience is in their favour, they maintain that the estate needs professional management to prevent the Applicant and 1<sup>st</sup> Respondent from siphoning funds to the detriment of the other widows.

53. In conclusion, they assert that the application is an attempt to stay the administration of the estate and should be dismissed with costs to allow the administrators to perform their duties.

#### **Analysis and Determination**

54. Upon thorough perusal of the Application, the Affidavit in support and opposition, together with the rival submissions, the only issue for determination herein is whether the Applicant has satisfied the Court on all the grounds for grant of an injunctive Order.

55. As rightly acknowledged by the parties herein, the Applicant has to satisfy the conditions established in *Giella v Cassman Brown* (supra) that:-

**(i) She has a prima facie case with a probability of success.**

**(ii) She will suffer irreparable injury, which would not adequately be compensated by an award of damages.**

**(iii) If the court is in doubt, it will decide an application on the balance of convenience.**

56. Regarding the above conditions, the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others [2013] KECA 347 (KLR)* clarified that the three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.

57. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others (Civil Appeal 39 of 2002)*

***[2003] KECA 175 (KLR) held: “A prima facie case in a civil application includes but is not confined to a genuine and arguable case.” It is a case 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.”***

58. In this case, the Applicant claims her beneficial interest in the suit properties in that the subject land and the Buffalo Site were acquired and developed through her direct contribution, specifically, the sale of her livestock to fund the construction, which is fully supported by the 1<sup>st</sup> Respondent, a co-administrator, who depones that the Applicant and the deceased acquired these assets through joint effort long before the deceased entered into subsequent unions with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
59. On the other hand, the 3<sup>rd</sup> Respondent maintains that the deceased was the sole proprietor of the assets and that the income generated therefrom was utilised for the maintenance of all three households. She argues that any inquiry into ownership is premature and ought to be reserved for the distribution stage within the succession cause.
60. The issue, therefore, is whether the Applicant can move the court for the division of matrimonial property after the death of their husband.
61. In [\*Esther Wanjiru Githatu v Mary Wanjiru Githatu \[2019\] KECA 811 \(KLR\)\*](#), the Court was of the view that **Order 37 Rule 1** of the Civil Procedure Rules allows any party, including an administrator or an heir or a beneficiary of a trust, to bring an originating summons requiring the determination of his/her rights.
62. In *re Estate of M’Ramare Nkunga (Deceased) [2018] KEHC 6471 (KLR)*, Gikonyo J. posed the question as to whether it is legally tenable to abrogate the vested property rights of a surviving spouse in the brutal manner seemingly permitted by Section 40 of the Law of Succession Act: Does death of one spouse extinguish the proprietary interests of the survivor,

reducing them to a mere unit of distribution equal to or, as is often the case with widows, subordinate to the children of the marriage? While the court in *M’Ramare* raised this issue *obiter*, it did not substantively determine it, as the issue had not arisen.

63. That scenario is replayed in the Originating Summons before this Court. While it is not prudent to delve into the ultimate merits of the main suit at this interlocutory stage, it is clear that the Applicant has established a *prima facie* case with a probability of success.

64. Regarding irreparable injury, the Applicant depones that she has historically relied on the rental income from the subject property as her sole source of livelihood. She contends that the Respondents' unilateral appointment of Pata Commercial Enterprises to take over rent collection would deprive her of her sustenance.

65. The Respondents justify this move as a measure for transparency and professional management, alleging that the 1<sup>st</sup> Respondent (a co-administrator) has failed to distribute the proceeds fairly.

66. It is noted that the Respondents do not deny that the Applicant was in possession and control of these proceeds before this dispute. Further, no evidence of financial mismanagement has been tendered before this Court. Given the Applicant’s historical reliance on these funds, the Court finds that the sudden disruption of her income is prejudicial to her. In the circumstances, the balance of convenience tilts in her favour.

67. While the Respondents argue that an injunction may impede the administration of the estate, it is evident that there is no cohesion among the three administrators, who are by law required to work together towards the administration of the Estate of the deceased.

68. Considering that the Applicant seeks to protect a co-ownership interest which arguably predates the Respondents’ claims as beneficiaries, the interest of justice demands that the property be shielded from interference until the rights of the parties are fully ventilated.

69. Accordingly, this Court makes the following **Orders**:-

1. **A temporary injunction is hereby issued restraining the Respondents, whether by themselves, their agents, servants, or any other person acting under their authority, from appointing estate agents to manage the said LR No. 202/32 in the Free Area Estate of Nakuru City pending the hearing and determination of this suit.**
2. **Cost shall be in the cause.**

**Dated, signed and delivered at Nakuru this 20<sup>th</sup> April, 2026.**

**PATRICIA GICHOHI**

**JUDGE**

**Mr. Ndungu h/b for Dr. Kuria for Applicant**

**Mr. Kioko for 1<sup>st</sup> Respondent**

**Ms Wangari for 2<sup>nd</sup> and 3<sup>rd</sup> Respondent**

**Erickson, Court Assistant**