



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sawe & another v Arusei (Land Case E019 of 2024)  
[2025] KEELC 3172 (KLR) (7 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3172 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
LAND CASE E019 OF 2024  
GMA ONGONDO, J  
APRIL 7, 2025**

**BETWEEN**

**JOSEPH KIPROTICH SAWE ..... 1<sup>ST</sup> PLAINTIFF**

**PHILIP CHERUIYOT KOSGEI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SELLY ARUSEI ..... DEFENDANT**

**RULING**

1. In the application by way of Notice of Motion dated 10<sup>th</sup> December 2024 and filed herein on 11<sup>th</sup> December 2024 (the application) originated under Order 40 Rules 1, 2 and 3 and Order 51 of the [Civil Procedure Rules](#), 2010, the plaintiffs/applicants through Chebii and Company Advocates, seeking the orders infra:
  - a. Moot
  - b. Moot
  - c. That there be temporary orders of injunction restraining the defendant/respondent by herself, her servants and/or agents from trespassing, entering, damaging, fencing, wasting, alienating, planting trees, transferring, dealing or in any other way interfering with the plaintiffs' use, possession, occupation and ownership of all that parcel of land known as Nandi/Sigot/271 (the suit land herein) pending the hearing and determination of the main suit herein.
  - d. That costs of this application be provided for.
2. The application is founded on two grounds as infra:
  - a. The plaintiffs/applicants have been in the use, possession and occupation of the suit land measuring 3.0 Ha for over 12 years.



- b. The defendant/respondent intends to evict the plaintiffs/applicants out of the suit land which they have been in occupation for over 12 years.
3. Further, the application is anchored on the applicants' supporting affidavit of nineteen paragraphs sworn on even date, by Joseph Kiprotich Sawe, alongside the annexed documents marked as JKS-1 and 2 which are; a copy of the green card for the suit land and photographs showing the developments on the suit land.
4. Briefly, the applicants lament that they are brothers and the sons of the late Sawe arap Maiyo (deceased 1). That sometime in the year 1979, deceased 1, who owned the suit land, registered the same in the name of one Cheptanui Taprandich (a sister to the applicants' mother), to hold the same in trust for him and his beneficiaries. That they have been in use, possession and occupation of the suit land since birth and have acquired title thereto by way of adverse possession. That the respondent has transmitted the suit land to herself and excluded the applicants.
5. The respondent through Limo and Njoroje Advocates, opposed the application by way of a Replying Affidavit sworn on 30<sup>th</sup> January 2025. She deponed that she is the registered proprietor of the suit land, having acquired the same through proper and lawful transmission from the previous registered owner, Cheptanui Taprandich, who had purchased the suit land from the original owner, deceased 1 herein.
6. Also, the respondent stated that the suit land is the subject of another suit, to wit, Eldoret MCCC No. 159 of 1994, filed by the applicants' late mother, Mary Chepsongok, and the same is pending determination. That the applicants cannot claim that the suit land was held in trust for them on one hand, and on the other hand, lay claim to the title thereto by virtue of adverse possession. That the applicants have failed to meet the threshold for granting an injunction as set out in the landmark case of *Giella v Cassman Brown* [1973] EA 358. Thus, she urged the court to dismiss the same with costs to the respondent.
7. The application was heard by way of written submissions in the spirit of Article 159 (2)(b) of the [Constitution of Kenya](#), 2010; see also Order 51 Rule 16 of the [Civil Procedure Rules](#), 2010.
8. Accordingly, the applicants' counsel filed submissions dated 14<sup>th</sup> February 2025 and submitted that the applicants have stayed on the suit land for an uninterrupted period in excess of 12 years and are entitled to the title thereof by virtue of adverse possession. That the respondent has not established a *prima facie* case to warrant her declaration of the suit land. That since the applicants are in occupation of the suit land and have made developments thereon, they stand to suffer irreparable harm unless injunction orders are issued herein. That no prejudice shall be occasioned to the respondent if the orders sought herein are granted. To fortify the submissions, counsel cited various authoritative pronouncements including [Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others](#) [2004] KECA 161 (KLR), [Joseph Gachumi Kiritu v Lawrence Munyambu Kabura](#) [1996] eKLR and [Mrao Limited v First American Bank of Kenya Limited & 2 others](#) [2003] KECA 175 KLR, among others.
9. Learned counsel for the respondent filed submissions dated 20<sup>th</sup> February 2025 and identified two issues for determination thus: a) Whether the applicants have met the threshold for granting an interlocutory injunction as established in *Giella case (supra)* and Whether the applicants' claim is an abuse of the court process. Counsel submitted that applicants have failed to establish a prima facie case since they have not demonstrated any overt action by the respondent that suggests an imminent threat to their possession of the suit land. That the respondent holds an indefeasible title to the suit land, and the applicants have not presented any credible evidence to challenge such ownership. That the applicants have not demonstrated how they stand to suffer irreparable harm that cannot be



compensated by damages. That the balance of convenience lies with the respondent as the lawful and the legal owner of the suit land.

10. Furthermore, counsel stated that the failure of the applicants to disclose that there exists another suit over the suit land herein, to wit, Eldoret MCCC No. 159 of 1994, amounts to an abuse of the court process and disentitles them from the equitable remedy of injunction. Thus, counsel prayed that the instant application be dismissed with costs to the respondent. To reinforce the submissions, counsel relied on various authorities, *inter alia*, the cases of *Giella, Mrao Ltd* (both *supra*) and *Nguruman Limited v Jan Bonde Nielsen and 2 others* [2014] eKLR among others.
11. I have looked attentively at the application, the response thereto and the parties' respective submissions. In the foregone, the duty of the court is to determine whether or not the applicants have established that they are entitled to the orders sought in the application.
12. Before I examine the merits of the instant application, it has come to the attention of this Court that there exists another ongoing suit, Eldoret MCCC No. 159 of 1994, between the parties herein over ownership of the suit land. The same is disclosed in the Replying Affidavit filed by the respondent herein, specifically at paragraphs 5, 6 and 8. It is also contained in the respondent's submissions on record. Notably, the applicants have not denied the existence of the suit in Eldoret Law Courts.
13. Section 6 of *Civil Procedure Act*, Chapter 21 Laws of Kenya provides for the sub-judice doctrine as follows;

“...No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed..”
14. I have perused the pleadings filed in Eldoret Chief Magistrate's Court Civil Case No. 159 of 1994 annexed to the respondent's Replying Affidavit dated 30<sup>th</sup> January 2025 and marked as SA-02. I note that the suit was initiated by one Mary Chepsongol, who the respondent has explained is the mother of the applicants herein, against the respondent.
15. Also, the suit land therein is Land Parcel No. Nandi/Sigot/271, which is the suit land in this suit. The orders sought are that the defendant (respondent) herein transfers the suit land to the plaintiff in that suit and costs. The same has been opposed by the respondent herein by way of a Statement of Defence and Counterclaim dated 7<sup>th</sup> February 1994. Clearly, the issues in dispute herein are also directly and substantially in issue in that suit.
16. The rationale behind sub-judice is to prevent a situation of having conflicting orders emanating from two or more different courts over the same subject matter; see *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR.
17. Section 11 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya provides that a suit ought to be instituted in the court of the lowest grade competent to try it. Therefore, this court cannot make a determination on the issues raised herein, until the subordinate court makes a finding on the same. Any party who shall be aggrieved by the decision of the subordinate court shall be at liberty to file an appeal before this court pursuant to Section 13(4) of the *Environment and Land Court Act*, 2015 [2011].



18. One of the national values and principles of good governance provided for under Article 10(2)(c) of the *Constitution of Kenya*, 2010 is transparency. It is noteworthy that in the present application, the applicants concealed material facts. In particular, the applicants failed to disclose the existence of Eldoret MCCC No. 159 of 1994, thus, deliberately misleading this Honourable court.
19. Accordingly, this application hereby fails.
20. In the interest of justice and pursuant to, inter alia, Sections 3 and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, I hereby strike out the Originating Summons dated December 10, 2024.
21. Costs to be borne by the applicants.
22. It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAPSABET THIS 7<sup>TH</sup> DAY OF APRIL 2025.**

**G.M.A ONG'ONDO**

**JUDGE**

Present

1. Ketter N. K holding brief for Dr. Chebii, Learned Counsel for the plaintiffs/applicants
2. Mr. Chebon, Learned Counsel for the respondent
3. Walter, Court Assistant

