



**Sawa & another v Nyongesa (Environment and Land Case
E008 of 2025) [2025] KEELC 5781 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5781 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND CASE E008 OF 2025
EC CHERONO, J
JULY 31, 2025
IN THE MATTER OF LAND REFERENCE NO. KIMILILI/KIMILILI/561
AND
IN THE MATTER OF SECTIONS 4(4) AND 38 OF THE LIMITATION OF ACTIONS ACT**

BETWEEN

JOSEPHAT WANGILA SAWA 1ST APPLICANT

**JOHANSON WAFULA MASASABI (SUING AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF JOINA NABANG MASASABI) 2ND APPLICANT**

AND

EMMANUEL NYONGESA RESPONDENT

RULING

1. This ruling arises from the Notice of Motion application dated 17/04/2025 seeking the following orders;
 - a. This Application be certified as urgent and service of the same be dispensed with in the first instance.
 - b. That this honourable court be pleased to issue a temporary injunction to restrain the defendants/Respondents, his agents or servants from transferring, subdividing, selling, or in any way disposing off parcel of land number Kimilili/Kimilili/561 herein pending hearing and determination of this application inter-parties.
 - c. That pending hearing and determination of the main suit herein, this honourable court be pleased to issue a temporary injunction to res train the defendants/Respondents, his agents or servants from transferring, subdividing, selling, or in any way disposing off parcel of land



number Kimilili/Kimilili/561 herein pending hearing and determination of this application inter-parties.

- d. Costs of the application be provided for.
2. The application is supported by the affidavit of Joseph Wangila Sawa and grounds on the face of the said application sworn and dated on 08/04/2025. In his Supporting affidavit, the Applicant deposed that they are the Legal representatives as well as the administrators of the estate of Joina Nabanga Masasabi (deceased) who is the registered owner of land parcel number Kimilili/Kimilili/561 (hereinafter referred to as the suit land). That the Respondent has no known interest in the suit land but intends to have it transferred to his name for purposes of selling it to third parties. That the Respondent obtained judgment against Joina Nabanga Masasabi (deceased) on 11th July, 2012 in OS 38 of 2003 on 11th July 2012 but failed to execute the judgment/Decree which is over 12 years ago. That they stand to suffer prejudice if orders sought herein are granted.
3. In opposition, the Respondent filed a Replying affidavit sworn on 28/05/2025 where he confirmed that Judgement was entered in his favour against Joina Nabanga Masasabi on 11/07/2012 and a decree issued on the 01/08/2012. That the court in the said judgment held that Joina Nabang Masasabi holds 5 acres of the suit land in trust for him after a claim for adverse possession was determined and that she should transfer the same to him. That Joina Masasabi passed on before executing the transfer forms and that the Applicants herein commenced succession proceedings vide succession cause No. 197 of 2016 and were issued with a grant of letters of administration on 08/05/2018. That he followed up with the Applicants herein to sign the transfer documents but they declined. That the Deputy Registrar Bungoma law courts executed the transfer documents and he lodged them with the Land Registrar. That he begun executing the court's Judgment/Decree before the lapse of the 12year period otherwise the Deputy Registrar would not have executed the documents.
4. He further argued that the land being held in trust would not ideally be affected by the requirement for execution within 12 years under section 20(1) of the *limitation of actions act*. It was further deposed that the Applicants herein have not established the threshold to warrant an order for injunction as set out in the locus classicus case of Giella vs Cassman Brown and Company Limited. Lastly it was stated that the application herein is fatally defective, misplaced, ill-advised and a waste of the Court's precious time and that the same should be dismissed with costs.
5. When the said application came up for directions, the parties agreed that the same be disposed of by way of submissions.
6. The Applicants filed submissions dated 17/04/2025 where they submitted that they had established a prima facie case which has a very high chance of success. They stated that their main reason for seeking the injunction order is that the suit land is registered in the name of Joina Nabangala Masasabi whose estate they represent and that the Respondent obtained judgment in his favour in 2012 and slept on his rights until he was caught up with section 4(4) of the *Limitation of Actions Act*. That the said judgment has expired and become stale upon expiry of 12 years of its delivery. That the Respondents rights over the suit land have therefore been extinguished and this court should issue an injunction to stop him from selling or transferring the suit land pending hearing and determination of this suit. They argued that they will suffer undue prejudice, loss or undue hardship if the said land which forms part of the estate of their mother is sold and or transferred to third parties. That the balance of convenience tilts in their favour hence, the orders of injunction should be issued. Reliance was placed in the case of Hezron Kamau Gichuru V Kianjoya Etrprises Ltd & Another [2022] eKLR.
7. The Respondent on the other hand filed submissions dated 28/05/2025 where he submitted that he has a clear and legal entitlement to the five (5) acres of land awarded to him pursuant to a Judgment



delivered on 11/07/2012 in Bungoma High Court Civil Suit No. 38 of 2003. He stated that the said Judgment confirmed his rights over the suit land parcel Kimilili/Kimilili/561, and a Decree was subsequently issued in his favour on 01/08/2012. It was further submitted that the Applicants herein who are the legal representatives of the deceased estate are holding the 5 acres of the suit parcel in trust for the Respondent herein. It was his further contention that the provisions of the Limitation of Actions Act does not apply to an action by a beneficiary under a trust. Lastly, they submitted that Applicants have failed to establish the requirements for an order of injunction as established in the locus classicus case of *Giella vs Cassman Brown & Company Limited, (1973)* as cited in *Ephraim Wambu Miano Vs Kenya Commercial Bank LTD [2004] eKLR*.

Analysis and determination.

8. Before I proceed to consider the merits or otherwise of the application, I note that the Applicant in the application seeks orders pending the hearing and determination of the application. However, this Court is inclined to take a purposive interpretation and considers that the Applicant intended to seek interim relief pending hearing and determination of the main suit, to wit; the Originating Summons. In the interest of substantive justice and guided by the provisions of Article 159(2)(d) of the Constitution as well as the oxygen principles under Sections 1A, 1B, and 3A of the Civil Procedure Act, this Court shall not give undue weight to procedural lapses where the intention of the Applicant is clear and no prejudice is likely to be occasioned to the Respondent. Courts are enjoined to rise above procedural technicalities in order to render substantive justice, particularly where the error does not occasion any miscarriage of justice.
9. Having considered the application, the respective affidavits and submissions by parties the only issue that arises for determination is whether the applicant is entitled to interim orders of injunction pending hearing and determination of the main suit.
10. The law regarding grant of interlocutory injunctions is found in Order 40 Rule 1 of the Civil Procedure Rules. The applicant herein is seeking for orders of temporary injunction. The conditions for the grant of a temporary injunction was succinctly established in the case of *Giella v Cassman Brown & Co. Ltd (1973) E.A 358* where it was held that: -

“The conditions for the grant of an interlocutory injunction are well settled in East Africa. First, 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.”
11. The above provision of the Civil Procedure Rules gives the court discretion to issue orders which are in the nature of an injunction restraining dealings on land pending further orders by the court. The provision was designed to preserve property from acts that would otherwise render a court order incapable of being executed and to preserve the suit property from being wasted pending hearing and determination of a suit.
12. This courts attention is drawn to the pronouncement by the Court in *Silvester Momanyi Marube – Vs- Guizar Ahmed Motari & Another (2012) eKLR*, where Odunga J. held as follo: -

“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application



for injunction although the court cannot find conclusively who is to be believed or not, the court is not excluded from expressing a prima facie view of the matter and the court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.”

13. On whether the Applicants have demonstrated that they have a prima facie case with chances of success, it is this courts consideration that indeed it appears that the title of the suit land is registered in the name of Joina Nabangala Masasabi with an inhibition that reflect the judgment of the court as in Bungoma High Court Judgment Civil Suit No. 38 of 2003 delivered on 11/07/2012. It is my view that it is not in contention that there is a judgment that awarded the Respondent 5 acres of the suit land. What to me seems to be in contention is whether the said judgment is enforceable at this point in time.
14. Although a certificate of title is prima facie evidence of proprietorship, such title is subject to other rights particularly overriding interests under section 28 of the *Land Registration Act*. The Respondent’s claim is based on such overriding interest namely adverse possession and/or trust. Whether indeed the overriding interest exists is a matter to be determined in the main hearing.
15. An Applicant is also called upon to demonstrate to the court that the nature of loss and/or injury, to be suffered, is irreparable and therefore, not capable of being compensated in monetary terms. In the case of Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR the court stated as follows;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient.
16. In the instant case, the Applicants are apprehensive that the Respondent is likely to transfer the land to himself and sell it to third parties.
17. The applicants also have to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (supra), the concept of balance of convenience was defined as follows;

“The meaning of balance of convenience will favour of the Plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed.”
18. In considering these elements, the courts are called upon to consider which route bears the lower risk. In determining the issue at hand, I am persuaded that granting the injunctive relief at this stage bears the lower risk as opposed to not granting the same.
19. In the end I make the following disposal order;
 - a. That pending the hearing and determination of this suit, a temporary injunction IS hereby issued restraining the Defendant/Respondent, his agents or servants from transferring, subdividing, selling, or in any way disposing off parcel of land number Kimilili/Kimilili/561 herein pending hearing and determination of the main suit.
 - b. This suit to be prosecuted within 120 days from today failing which the injunctive orders shall lapse.
 - c. The costs of this application shall be costs in the cause.
20. It is so ordered.



DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JULY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Nabibia for the Plaintiff.

Mr. Oira H/B for M/S Masengeli for the Defendant.

Bett C/A.

