

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**CIVIL CASE NO 10 OF 2000**

**RAEL TARKOK SAWE**  
**PHILIP KIPROP SAWE**  
**FRANCIS KIPKEMBOI SAWE** (All suing as the legal representatives  
of the Estate of **DAVID CHEPTUM SAWE**.....  
.....**PLAINTIFFS**

**VERSUS**

**JONAH KIPSAINA CHEROTICH**.....**1<sup>ST</sup>**  
**DEFENDANT**  
**PERIS JEPKEMBOI KIMUTAI**  
**ISAAC KIBIWOR CHEROP**  
**FRANCIS KIPSANG KIMUTAI** (All suing as the legal representative of  
the  
Estate of **WILSON KIMUTAI CHEROP**.....**2<sup>ND</sup>**  
**DEFENDANT**  
**KIPRONO ARAP TOROITICH**.....**3<sup>RD</sup>**  
**DEFENDANT**  
**ATTORNEY GENERAL** .....**4<sup>TH</sup>**  
**DEFENDANT**  
**CHIEF LAND REGISTRAR**.....**5<sup>TH</sup>**  
**DEFENDANT**  
**JOHN KOSGEI TOROITICH** (Legal Representative of the estate of  
**TOROITICH CHEBOI**.....**6<sup>TH</sup>**  
**DEFENDANT**

**Coram: Justice R. Nyakundi**

**M/s Mathai Maina & Co Advocates**

**M/s R.M. Wafula & Co Advocates**

**M/s Tororei & Co Advocates**

**M/s J.N Njuguna & Co Advocates**

**M/s Cheptoo Masai & Co Advocates**

**RULING**

**Litigation background**

1. The Litigation history of this civil case turns back to over two (2) decades ago. This suit commenced in the year 2000 when the sole Plaintiff therein David Cheptum Sawe (deceased) filed a Plaint dated 18<sup>th</sup> January 2000 in this Honourable Court seeking the following prayers: -
  - a. *Declaration that the surrender of the Plaintiff's farm to the Kenya Government and the subsequent issue of new titles is null and void and that the Land Registrar Uasin Gishu cancel the said new titles;*
  - b. *An order evicting the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, their servants and agents from the Plaintiff's said farm and the Defendants to be condemned to pay the costs of the suit.*
2. The gist of the Plaintiff's case was that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly, wrongfully, fraudulently and unlawfully conspired amongst themselves to defraud him and injure his business of farming in the Plaintiff's property referred as LR No. 10520 (suit property) situated at plateau in Uasin Gishu. The wrongful acts which the Plaintiff therein (deceased) had preferred against the Defendants includes among others:
  - 
  - a. *That the Defendants instructed Uasin Gishu District Survey Office without consent of the Plaintiff to survey and subdivide the suit property into eleven parcels, which parcels were thereafter unlawfully transferred to various people, the 3 Defendants inclusive.*
  - b. *They caused the preparation of a surrender document of the suit property by forging the signature of the Plaintiff and purporting that he signed and executed it.*
  - c. *They unlawfully retained an advocate to purportedly act for the Plaintiff in the said subdivisions and transfers. The Advocate, Mr. David Githanda Wachira (Mr. Wachira), purportedly witnessed the signature in a surrender document presented to the Commissioner of Lands for any transfer in favour of Kiprono. Neither had he authorized*

*any one to sign on his behalf. It was his testimony that the title document, MFI-7 invalid.*

3. The case proceeded for a full trial and on 29<sup>th</sup> May 2025, Ibrahim J (as then he was, delivered the judgement with the following orders: -

***“[110] As a result, this court hereby enters judgement for the plaintiff and gives further orders in the following terms:***

- i) A declaration is hereby made that the surrender of the plaintiff’s farm to the Kenya Government and the subsequent issue of the new titles is null and void and that the Land Registrar Uasin Gishu cancel the said new titles;*
- ii) Through the 4<sup>th</sup> defendant, the Attorney General, the Agricultural Finance Corporation which is a statutory body and parastatal owned by Government, shall release and surrender the eleven titles to the 5<sup>th</sup> defendant, the Chief Land Registrar for cancellation and rectification of the Title;*
- iii) The 5<sup>th</sup> defendant, the Chief Land Registrar, upon receipt of the eleven titles, shall cancel the same and rectify the plaintiffs title to revert back to the original title: Land Reference Number 10520, situated in Uasin Gishu District in the name of DAUDI CHEPTUM SAWE;*
- iv) Upon such rectification and reversion, the 5<sup>th</sup> defendant shall return the said Original title: L.R. No. 10520, to the Agricultural Finance Corporation in its capacity as chargee;*
- v) Upon complying with these orders, the 5<sup>th</sup> defendant shall give notice of the cancellation of the eleven titles and rectification of original title, to any other affected persons;*
- vi) The 1<sup>st</sup> and 2<sup>nd</sup> defendants shall bear the plaintiff’s costs in this suit. No costs are ordered as against the 3<sup>rd</sup> defendant given the findings in this judgement.*

vii) *There shall be no orders as to costs in respect of the 4<sup>th</sup> and 5<sup>th</sup> defendants.*

*Orders accordingly."*

#### **Civil Application No 59 of 2016 at the Court of Appeal**

4. Consequently, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed Civil Application No. 59 of 2016 at the Court of Appeal in Eldoret being an application for extension of time within which to lodge an appeal from the judgment of the High Court of Kenya at Eldoret of Ibrahim, J (as then he was) dated 4<sup>th</sup> June, 2015. This application was by way of Notice of Motion brought under Rule 4 of the Court of Appeal Rules (the Rules) in which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sought the following orders; *the time limited for the 1<sup>st</sup> and 2<sup>nd</sup> applicants with the Notice of Appeal be enlarged or extended to allow the filing and serving of the same within such time as the court shall deem fit and Costs of and incidental to this application abide the result of the application.* Moreover, the applicants filed an amended Notice of Motion at the Court of Appeal on 8<sup>th</sup> May, 2017 and sought the following orders; - *The notice of appeal dated 17-6-2015 and the letter dated 17-6-2015 applying for the superior court's proceedings among others were filed on 17-6-2015; The Deputy Registrar in a letter dated 15-9-2015 wrote to the applicants' former advocates/counsels to collect the proceedings and Judgment upon payment of the court charges since the sum of Kshs.500 had been paid; The notice of motion dated 30-6-2015 for stay of execution, notice of application dated 17-3-2016 and the bill of costs have been pending and made the parties engaged in the superior court ever since 4-6-2015 to date in the case of the applications and until 29-3-2017 in the case of the bill of costs and the applicants have an arguable appeal."*
5. Vide a ruling delivered by J. Mohammed dated 15<sup>th</sup> February 2018, while dismissing the application it was held as follows;

*“[16] The impugned judgment was delivered on 4<sup>th</sup> June, 2015. It is important to note that as far back as 15<sup>th</sup> September, 2015 the Deputy Registrar of the High Court wrote to the applicants’ previous advocates informing them that the proceedings and judgment were ready for collection. Counsel for the applicants submitted that due to the applicants’ financial constraints they were unable to pay for the proceedings and judgment and that their previous advocates did not file the record of appeal expeditiously. There is no indication what positive steps the applicants took towards prosecuting the appeal until 8<sup>th</sup> August, 2016 when the instant application for extension of time was made. It cannot be denied that there was inordinate delay which has not been satisfactorily explained. The respondents have certainly been prejudiced by the long delay of about 3 years since the impugned judgment was delivered which has kept them away from the fruits of their judgment.*

*[17] It is upon the applicant to place sufficient material before the court which would explain the delay in filing the record of appeal. The court has to balance the competing interests of the applicants with those of the respondents. The Rules of the Court must prima facie be complied with so that litigation can be brought to an end.*

*[18] A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favorably exercised. Aganyanya, JA in **Monica Malel & Another Vs R. Eldoret Civil Application No. Nai 246 of 2008** stated;*

*“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show ... the applicants are not quite sure of why the delay in filing the notice of appeal*

*within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”*

[19] I am guided by the case of **Waweru A Another Vs Karoni [2003] KLR 448** where it was stated that;

*“The rules of the Courts must prima facie be obeyed and in order to justify a Court in extending the time during which some step in the procedure requires to be taken there must be material on which the Court can exercise its discretion.”*

[20] *In the circumstances of this case, there is no material placed before me to warrant the exercise of my discretion in favour of the applicants and accordingly, I find that this application has no merit. In the result, I dismiss the Amended Notice of Motion dated 8th May, 2017 with costs to the respondents.”*

### **Notice of Motion Application dated 17<sup>th</sup> July 2018**

6. After the application was dismissed by the Court of Appeal, the interested party/6<sup>th</sup> Defendant filed an application dated 17<sup>th</sup> July 2018 seeking the following orders; *Pending the hearing of the application the court stay all proceedings herein; Pending the hearing of the application the court stay the proceedings herein and in particular the cancellation of Title of the parcel of land known as Kaptagat/Block 1 (Lotonyok)/10 be stayed; The Honourable court enjoin the applicant as a defendant in the suit and The Honourable court review and set aside the judgement of 29th May 2015, grant the defendant leave to defend this suit and order for a fresh hearing of the suit.* The application was made on the grounds that the court ordered the cancellation of title on 29<sup>th</sup> May 2015, of land parcel Kaptagat/Block 1 (Lotonyok)/10 and the late Toroitich Arap Cheboi was not enjoined in the proceedings. That the court has jurisdiction to review the same and the defendant has a good defence. Further, that unless the application is allowed his right to be heard shall be violated and that the

plaintiff shall not suffer any prejudice. In dismissing the application, the session Judge S.M Githinji J held as follows;

*“The Applicant has not given an explanation for the delay of three years. The judgment was delivered in 2015 and the application made 3 years later. I find that the delay was unreasonable and the application is a ploy to stop the plaintiffs from enjoying the fruits of the judgment. In the premises, the application fails in its entirety. Costs goes to the respondents.”*

7. What is thus pending before this Honourable Court for determination is a Notice of Motion dated 31<sup>st</sup> January 2025 brought pursuant to section 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act, Order 40 Rule 1 and Order 51 of the Civil Procedure Rules 2010 in which the Plaintiffs/Applicants are seeking the following orders: -

a. *Spent*

b. *A temporary order of injunction be and is hereby issued restraining the Defendants/Respondents, their servants, employees, and /or agents from trespassing onto, constructing, continuing with construction, taking possession, alienating, disposing off, subdividing, leasing, evicting the Plaintiffs/Applicants, interfering with the Plaintiffs/Applicants peaceful occupation and utilization and/or otherwise dealing with any part of the whole of that parcel of land known as LR NO. 10520 pending the hearing and determination of this application interpartes.*

c. *A temporary order of injunction be and is hereby issued restraining the Defendants/Respondents, their servants, employees, and /or agents from trespassing onto, constructing, continuing with construction, taking possession, alienating, disposing off, subdividing, leasing, evicting the Plaintiffs/Applicants, interfering with the Plaintiffs/Applicants peaceful occupation and utilization and/or otherwise dealing with any part of the whole of that parcel of*

- land known as LR NO. 10520 pending the hearing and determination of this suit.*
- d. That an order of eviction do issue against the Defendants herein in enforcement of the Court decree.*
  - e. That the County Land Surveyor Uasin Gishu County and the area Chief Kaptagat location be summoned to appear in court in person to explain from whose authority and/or order were undertaking surveying and reestablishing of the boundaries exercise.*
  - f. That the OCS Naiberi Police Station should supervise the enforcement of the orders both in the interim and in the final orders.*
  - g. That the costs of this application be provided for.*
8. The Application is made on the following grounds on the face of it among others;
- a. That the late DAUDI CHEPTUM SAWE is the legitimate owner of the whole of that land parcel known as LR NO. 10520 measuring about 518 Acres.*
  - b. The Defendants/Respondents without any colour of rights have trespassed onto that parcel of land known as L.R NO 10520 commenced construction of temporal structures, erecting a fence and denied the Plaintiff and the entire beneficiaries of the Estate of DAUDI CHEPTUM SAWE access to the land.*
  - c. That the Plaintiffs and the Estate of DAUDI CHEPTUM SAWE stand to suffer irreparable loss/harm that cannot be compensated by way of damages.*
  - d. That the Plaintiffs/Applicants have prima facie case with high probability of success.*
  - e. That the balance of convenience tilts in favour of the Plaintiffs/Applicants.*
  - f. It is in the interest of justice that the orders sought be granted.*

9. The Application is grounded upon the annexed supporting affidavit of Phillip Kiprop Sawe who deponed as follows: -
- a) *That I am the second Plaintiff herein.*
  - b) *That we are the administrators of the Estate of the late DAUDI CHEPTUM SAWE who was the Plaintiff herein.*
  - c) *That the late DAUDI CHEPTUM SAWE was the owner of the whole of that parcel of land known as L.R No 10520 measuring approximately 518 Acres.*
  - d) *That the late DAUDI CHEPTUM SAWE had instituted this suit against the Defendants herein and judgement was delivered in his favour by Justice Ibrahim as then was.*
  - e) *That the Defendants filed an application dated 18<sup>th</sup> July 2019 seeking for stay of execution of the Decree.*
  - f) *That the said application for stay was eventually dismissed by Justice S.M Githunji.*
  - g) *That the Defendants herein adopted to challenge the Ruling dismissing the application for stay of execution at the Court of Appeal.*
  - h) *That on the 29<sup>th</sup> January 2025, we received a letter dated 22<sup>nd</sup> January 2025 from the Chief of Kaptagat Location informing us that the County Surveyor Uasin Gishu County were coming to re-establish boundaries on the 30<sup>th</sup> January 2025.*
  - i) *That on the 30<sup>th</sup> January 2025, the Defendants herein through hired goons invaded the land and started constructing temporal structures and erecting a fence.*
  - j) *That the legal invasion is illegal and unlawful meant to defeat the enforcement of the Judgement hence the same ought to be restrained by an order of injunction.*
  - k) *That we have since reported the invasion at Naiberi Police Station under OB No. 21/30/01/25 but no action has since been taken.*

- l) That the decree of the Court should be enforced by evicting the Defendants from the suit land.*
- m) That after the death of the late DAUDI CHEPTUM SAWE we substituted him in this cause and we are therefore the right parties to make this application.*
- n) That based on the above stated we have prima facie case with high probability of success.*
- o) That the compensation cannot be compensated by an award of costs since judgement has already been rendered.*
- p) That the balance of convenience tilts in favour of granting the orders of injunction.*
- q) That this application has been brought without any delay.*

### **Replying Affidavit**

10. The Application is opposed by the 3<sup>rd</sup> Defendant vide a Replying Affidavit sworn by Kiprono Arap Toroitich who deposed as follows;

- a) That I am the third defendant herein and have the authority of the 2<sup>nd</sup> Defendant to depose herein on her behalf.*
- b) That the application before court dated 31<sup>st</sup> January 2025 is frivolous, vexatious and ought to be dismissed with costs to the Defendants.*
- c) That the said application is misguided for reasons that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants interests were never challenged by the deceased during the hearing of the suit.*
- d) That in the judgement of the court delivered on 29<sup>th</sup> May 2015 and exhibit marked PKS3, the interests of the 1<sup>st</sup> - 3<sup>rd</sup> Defendants were not vacated by the court and the reliefs sought in the present application cannot therefore arise at this stage.*
- e) That the 1<sup>st</sup> - 3<sup>rd</sup> Defendants are partners with the deceased a fact that came out clearly during the hearing of suit, a fact which was*

*neither disputed nor denied by the deceased Plaintiff Daudi Cheptum Sawe.*

- f) That the parcels which we are in occupation of, are centre plots which we have been in occupation and utilizing prior to the institution of the suit and during its hearing until judgement occupation which was never challenged by the deceased's Plaintiff Daudi Cheptum Sawe and occupation which neither arose during the hearing and not addressed by the judgement of this court.*
- g) That I am informed by my advocates on record which information I verily believe to be true that there are no orders from the judgement of this court restraining the Defendants from utilizing their share/portions of land and the issue of eviction can therefore not arise.*
- h) That contrary to the information provided by the applicant that we have invaded the suit parcel, the Plaintiffs/Applicants through their agents caused structures erected by myself to be destroyed. The same has been reported at Naiberi Police Station and the matter is pending investigations.*
- i) That the orders the Applicant is seeking is against public policy and cannot issue.*

### **Grounds of Opposition**

11. The application is also opposed by way of Grounds of Opposition dated 12<sup>th</sup> February 2025 sworn by the interested party/6<sup>th</sup> Defendant summarized as follows;

- a) That the Plaintiff's application is misconceived, brought in bad faith and an abuse of the court process.*
- b) That the application is untenable since there is no suit pending for determination before this court as judgement was delivered on 29<sup>th</sup> May 2015.*

- c) *That the orders of temporary injunction as sought pending hearing of suit will serve no purpose since the suit is already heard and determined.*
- d) *That this Honourable Court is therefore functus officio in view of the judgement already delivered hence cannot determine the application before it.*
- e) *That the judgement ordered land parcel No. Kaptagat/Block 1 (Lotonyok)/10 to be cancelled yet the estate of the late Toroitich Cheboi was not a party to the suit.*
- f) *That there is a pending appeal being Eldoret Civil Appeal No E015 OF 2020 in an attempt to defend the estate of the late Toroitich Cheboi and issuance of any orders by this court will render the said appeal nugatory.*
- g) *That from the foregoing, the application should be dismissed with costs.*

12. The Application was canvassed by way of written submissions.

### **Applicants Submissions Summary**

13. The Plaintiffs/Applicants filed their written submissions dated 10<sup>th</sup> March 2025 through their learned Counsel Mr. Mathai who submitted that the Estate of the late Daudi Sawe commenced this suit through a plaint dated 18<sup>th</sup> January 2000 seeking declarations that the surrender of the deceased's farm to the Government and the subsequent issuance of new titles was null and void and further sought orders for cancellation of the said titles and eviction of the Defendants. The counsel submitted that after a full hearing, Justice M.K. Ibrahim (as he then was) delivered judgment on 29<sup>th</sup> May 2015, declaring the surrender and new titles invalid, directed the Agricultural Finance Corporation to surrender the eleven titles to the Chief Land Registrar for cancellation, ordering rectification of the registers to revert the land to L.R No. 10520 in the

name of Daudi Cheptum Sawe and returning the rectified title to AFC as chargee. Costs were awarded against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

14. Counsel submitted that despite this clear judgment, the substituted Plaintiffs/Applicants were compelled to move the court for injunctive relief when on 4<sup>th</sup> January 2025, the Defendants through hired goons invaded the suit land, erected structures and attempted to fence it off. This intrusion, it was argued, is a blatant attempt to defeat the judgment of the court and unlawfully interfere with the Estate's quiet possession. Relying on the locus classicus ***Giella Vs Cassman Brown (1973) EA***, as reaffirmed in ***Nguruman Ltd Vs Jan Bonde Nielsen & 2 Others, CA No. 77 of 2012 (2014) eKLR***, counsel reiterated the three mandatory requirements for a temporary injunction: -
- a) establishment of a prima facie case;
  - b) demonstration of irreparable harm if the injunction is not granted;  
and
  - c) where doubt exists, the balance of convenience must favour the applicant.
15. Learned counsel submitted that the Applicants have demonstrated a prima facie case as the judgment of 29<sup>th</sup> May 2015 conclusively confirmed the suit land belongs to the Estate of Daudi Sawe. He further submitted that the ongoing construction and invasion pose a real risk of rendering the judgment nugatory and amount to an unlawful interference with rights protected under Article 40 of the Constitution as well as Sections 24 and 25 of the Land Registration Act which vest absolute ownership and all attendant privileges in the registered proprietor. It was argued that the Applicants stand to suffer irreparable harm as they cannot file a fresh suit to seek eviction due to the doctrine of res judicata and only this court within these proceedings can issue the necessary injunctive and eviction orders. Moreover, counsel opined that the continued intrusion denies the

Estate its rightful inheritance and enjoyment of its property, a loss that cannot be remedied by damages.

16. On the balance of convenience, counsel submitted that it tilts overwhelmingly in favour of the Applicants, as they hold a favourable judgment and the ongoing acts of trespass are intended to undermine the authority of the court. Finally, learned counsel urged the court to issue orders of eviction. Although the earlier judgment did not expressly grant eviction, counsel argued that the prayer had been pleaded in the original plaint and the court retains jurisdiction and responsibility to protect the rights of parties and to ensure the ends of justice are met. It was the learned counsel's submission that any persons claiming interest in the Estate must pursue such claims through due process and may only be recognized as creditors if they establish their rights; they cannot, however, arrogate themselves ownership by forcefully occupying the land.
17. Counsel therefore submitted that the Applicants have satisfied all the requisite conditions for the grant of a temporary injunction and eviction order and urged the court to allow the application in its entirety.

### **Interested party/proposed 6<sup>th</sup> Defendant's Submissions Summary**

18. The 6<sup>th</sup> Defendant filed its written submissions dated 17<sup>th</sup> February 2025 in which the learned Counsel submitted on 2 issues for determination as follows: -
  - a. Whether the Court has jurisdiction to hear and determine the application
  - b. Whether the orders sought can issue.
19. On the first issue, counsel argued that the Court lacks jurisdiction as it is functus officio, noting that judgment in this matter was delivered on 29<sup>th</sup>

May 2015. Relying on ***J M W Vs J N K & Another [2015] eKLR***, counsel emphasized that once a court has rendered its final judgment, it cannot reopen the matter or entertain fresh applications arising from it. The cited decision held that the court, having pronounced itself, became functus officio; therefore, any subsequent application becomes untenable. Accordingly, it was the counsel's submission that the present application seeking temporary injunction orders cannot be entertained.

20. On the second issue, whether the orders sought can issue, the learned counsel for the 6<sup>th</sup> Defendant submitted that the application must fail for three reasons. First, the Court is functus officio and therefore bereft of jurisdiction to consider or grant the orders sought. Second, counsel argued that judgment in this matter conclusively ordered that Land Parcel No. 10520 revert to the Estate of the late Daudi Cheptum Sawe and that some of the parcels one of which is now claimed by the proposed 6<sup>th</sup> Defendant remain the subject of a pending appeal. Counsel noted that the application seeking to enjoin the 6<sup>th</sup> Defendant was earlier dismissed and that granting the orders now sought, particularly eviction orders, would render the pending appeal nugatory.
21. Third and without prejudice to the issue of jurisdiction, counsel submitted that even on merits, the Plaintiffs/Applicants have failed to satisfy the three-tier test for injunctions as laid down in ***Giella Vs Cassman Brown & Co. Ltd (1973) EA 358***. On the first limb, prima facie case, counsel relied on ***Mrao Ltd Vs First American Bank of Kenya Ltd (2003) eKLR*** where a prima facie case was defined as one demonstrating a right that has been infringed and requiring rebuttal. Counsel argued that the Applicants have not shown any such right. He further pointed out that at pages 37-38 of the judgment, the Court found that the late Daudi Cheptum Sawe had no objection to the sale agreements with the Defendants and even directed the administrators to renegotiate the

completion of the transactions. Moreover, counsel noted that issuing eviction orders now would undermine the pending appeal, thereby failing the prima facie requirement.

22. On the second limb of irreparable harm, the learned counsel referred to ***Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR***, which defines irreparable injury as damage that cannot be compensated by monetary award. Counsel argued that the value of the suit land is quantifiable and thus compensable in damages and conversely, it is the 6<sup>th</sup> Defendant who stands to suffer greater harm because the title alleged to be cancelled in these proceedings belongs to him, yet he has not been accorded a right to be heard. Regarding the final limb of balance of convenience, counsel cited ***Paul Gitonga Wanjau Vs Gathuthi Tea Factory Co. Ltd & 2 Others (2016) eKLR***, where the Court held that the balance of convenience favours the party who would suffer greater prejudice if the injunction is either granted or refused. Counsel submitted that, given the pending appeal, the balance of convenience tilts in favour of the 6<sup>th</sup> Defendant, who risks irreversible prejudice should eviction orders issue at this stage.

23. In conclusion, the learned counsel for the 6<sup>th</sup> Defendant submitted that the application dated 31<sup>st</sup> January 2025 is fatally defective, jurisdictionally untenable and fails on merit. He therefore prayed that the application be dismissed with costs.

### **Analysis and determination**

24. I have read and considered the Application, the Replying Affidavits in opposition, the Grounds of Opposition and the rival submissions. There are six (6) issues manifest for determination by this Honourable Court: -

- a. *Whether this Court has jurisdiction to entertain this application?*
- b. *Whether this application is Res judicata?*

- c. *What is the correct position of the 3<sup>rd</sup> Defendant with regards to the 2015 judgement?*
- d. *Whether a temporary order of injunction should be granted?*
- e. *Whether this Court should grant an eviction order?*
- f. *Whether the equitable remedies are applicable in this case?*

**Whether this Court has jurisdiction to entertain the application?**

25. The learned counsel for the 6<sup>th</sup> Defendant has raised a preliminary objection that this Court is functus officio having delivered judgment on 29<sup>th</sup> May 2015. The argument proceeds on the basis that once a court has pronounced its final judgment, it is denuded of jurisdiction to entertain any further applications arising from the same subject matter save for interpretation or clarification of the orders made.
26. The doctrine of functus officio is well spelt out in our jurisprudence. The doctrine of functus officio dictates that once a court has rendered its final decision, it ceases to have jurisdiction over the matter, save for specific exceptions such as review or correction of clerical or arithmetical errors. The Supreme Court, in **Raila Odinga & 2 Others Vs IEBC & 3 Others (2013) eKLR**, while discussing the doctrine of functus officio, stated:-

*“We, therefore, have to consider the concept of “functus officio,” as understood in law. Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:*

*“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality.”*

*According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once*

*such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”*

27. In **Telkom Kenya Limited Vs Ochanda (Suing on his own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR**, the Court of Appeal held that: -

*Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.*

*The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in **Re-St Nazarire Co, (1879), 12 Ch. D 88**. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions.”*

28. From the above, the Court of Appeal reaffirmed the doctrine of functus officio, holding that once a court has fully and finally adjudicated upon a matter, it cannot reopen or reconsider the case, except under defined circumstances such as through a successful application for review. The functus officio principle serves to ensure finality in judicial decisions and prohibits courts from revisiting matters already conclusively determined, except where expressly permitted by law. It promotes judicial efficiency, certainty and the integrity of the judicial process.

29. However, the learned counsel for the 6<sup>th</sup> Defendant has conflated two distinct concepts: the finality of the substantive judgment and the court's inherent powers to ensure that its orders are given practical effect. It is trite law that jurisdiction flows from either a Statute or the Constitution, and no court assumes jurisdiction on its own. In the case of **Owners of Motor Vessel “Lilian S” Vs Caltex Oil (Kenya) Ltd (1989) eKLR**, the Court held that;

*“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”*

30. On the source of a Court’s jurisdiction, the Supreme Court of Kenya in **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & others (2012) eKLR** stated as follows: -

*A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.*

31. **I must ask myself what then is the situation before this Court?**

The judgment of 29<sup>th</sup> May 2015 with regards to this Civil Case made

specific orders requiring: AFC to release and surrender the eleven titles to the Chief Land Registrar; The Chief Land Registrar to cancel the eleven titles; The Chief Land Registrar to rectify the registers and revert the land to LR No. 10520 and The rectified title to be returned to AFC. In particular Ibrahim J (as then he was, delivered the judgement with the following orders: -

***“[110] As a result, this court hereby enters judgement for the plaintiff and gives further orders in the following terms:***

- a) A declaration is hereby made that the surrender of the plaintiff’s farm to the Kenya Government and the subsequent issue of the new titles is null and void and that the Land Registrar Uasin Gishu cancel the said new titles;*
- b) Through the 4<sup>th</sup> defendant, the Attorney General, the Agricultural Finance Corporation which is a statutory body and parastatal owned by Government, shall release and surrender the eleven titles to the 5<sup>th</sup> defendant, the Chief Land Registrar for cancellation and rectification of the Title;*
- c) The 5<sup>th</sup> defendant, the Chief Land Registrar, upon receipt of the eleven titles, shall cancel the same and rectify the plaintiffs title to revert back to the original title: Land Reference Number 10520, situated in Uasin Gishu District in the name of DAUDI CHEPTUM SAWE;*
- d) Upon such rectification and reversion, the 5<sup>th</sup> defendant shall return the said Original title: L.R. No. 10520, to the Agricultural Finance Corporation in its capacity as chargee;*
- e) Upon complying with these orders, the 5<sup>th</sup> defendant shall give notice of the cancellation of the eleven titles and rectification of original title, to any other affected persons;*

f) *The 1<sup>st</sup> and 2<sup>nd</sup> defendants shall bear the plaintiff's costs in this suit. No costs are ordered as against the 3<sup>rd</sup> defendant given the findings in this judgement.*

g) *There shall be no orders as to costs in respect of the 4<sup>th</sup> and 5<sup>th</sup> defendants.*

*Orders accordingly."*

32. The Constitutional Court of South Africa, in **Burchell Vs Burchell Case No 364/2005** underlined the importance to the rule of law, of compliance with court orders in the following terms: -

*"Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law."*

33. It is apparent from the material placed before the Court that the orders issued pursuant to the 2015 judgment with regards to the cancellation of the titles and rectification of the register have since been implemented. The resultant titles have been cancelled and the registers duly rectified, with the said parcel of land reverted to the name of the deceased. The very purpose of the 2015 judgment namely, to undo the fraudulent subdivision has therefore been achieved. In those circumstances, it cannot be said that the judgment remains unexecuted rather, the Court's mandate in that regard has been duly discharged.

34. However, I must sound a note of caution. While this Court retains jurisdiction to ensure implementation of the 2015 orders, it cannot

entertain applications that seek to re-litigate matters already determined or to obtain orders inconsistent with the findings in the judgment. The line between enforcement and re-litigation must be carefully maintained. Consequently, I find that this Court has jurisdiction to entertain applications aimed at giving practical effect to the 2015 judgment, but not to grant orders that would be repugnant to the findings and spirit of that judgment. Whether the present application falls on the right or wrong side of that line is a matter I shall address presently.

### **Whether this Application is Res judicata?**

35. Before examining whether the applicants have established grounds for injunctive relief and eviction, I must first confront a fundamental question: What did the 2015 judgment actually decide about the rights of the parties to occupy and develop the suit land? The doctrine of res judicata is enshrined in Section 7 of the Civil Procedure Act which provides that no court shall try any suit in which the matter in issue has been directly and substantially in issue in a former suit between the same parties. In particular, Section 7 of the Civil Procedure Act, which provides that: -

*“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”*

36. It is clear from the forgoing that this doctrine applies to bar subsequent proceedings where there has been adjudication by a court of competent and/or concurrent jurisdiction which conclusively determined the rights of

the parties with regard to all or any matters in controversy. In the case of **John Florence Maritime Services Limited & another Vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)**, the Supreme Court delved into an in-depth discussion of the concept of res judicata thus;

*“This court in the case of **Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another Motion No 42 of 2014 [2016] eKLR (Muiri Coffee case)** held as follows regarding the doctrine of res judicata:*

*“Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights...The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.*

*It emerges that, contrary to the respondent’s argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of the Constitution, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept. 56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a*

*judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293): The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."*

37. While the present matter is not a fresh suit, the principle applies with equal force to prevent parties from obtaining orders inconsistent with findings already made by the court. What then were the findings in the 2015 judgment regarding occupation of the land? At **paragraph 106** of the judgment, Ibrahim J (as he then was) made the following critical findings which I reproduce in full: -

*"The plaintiff has also asked for an eviction order as against the 1st, 2nd and 3<sup>rd</sup> defendant. As already stated in this judgement, the plaintiff made no direct claim as against the 3rd defendant. He only stated that he did not sign the transfer in his favour. Consequently, an eviction order, if issued in this matter, cannot be extended as against the 3rd defendant. I have already found that the defendants entered the land and developed it with the full knowledge and consent of the plaintiff who subsequently made no attempts to evict them. This position, fortified by the plaintiff's intended contract of sale to the defendants leads to the conclusion that the he acquiesced to the defendants' occupation."*

38. At paragraph 107, the learned Judge continued: -

*"The plaintiff hoped that the defendant will earnestly complete payment of their purchase prices. While this court is a court of law, it is also a court of equity. Equity considers as done that which ought to be*

*done. I have said much to show that the plaintiff, David Sawe's intention was to complete a sale transaction with the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Consequently, while this transaction was frustrated midway, an eviction order is not the remedy to give in the present circumstances."*

39. These were not obiter dicta or passing remarks. These were findings of fact and conclusions of law that formed part of the ratio decidendi. The learned Judge found as a fact that: -

- a) The defendants entered the land with the full knowledge and consent of David Cheptum Sawe*
- b) David Sawe never attempted to evict them*
- c) David Sawe acquiesced to their occupation*
- d) David Sawe's intention was to complete sale transactions with the 1<sup>st</sup> and 2<sup>nd</sup> defendants*
- e) Eviction was not the appropriate remedy*

40. Most significantly, at **paragraph 108**, Ibrahim J (as then he was) addressed the 3<sup>rd</sup> defendant specifically: -

*"Before concluding this matter, while the orders herein below form the decision of this court as regards what the law says, the court noted that the plaintiff, the late Mr. David Sawe, categorically stated that he had no objection to the 3<sup>rd</sup> defendant's entitlement to the 24 acreage of land he is holding. Hence the deceased's estate and the 3<sup>rd</sup> defendant are at liberty to commence a legal process to ensure that they finalize the transfer of the property portion."*

41. The import of these findings cannot be overstated. The 2015 judgment did not find that the defendants were trespassers or that they occupied the land unlawfully. On the contrary, it found that they occupied with the plaintiff's knowledge, consent and acquiescence, pursuant to intended sale transactions. The fraud that vitiated the subdivision was in the process, the forgery, the unauthorized involvement of Mr. Wachira, the

manipulation of AFC and not in the defendants' occupation of the land per se. These findings bind this Court and the parties. I also take note that where a court has made findings of fact in its judgment, those findings are conclusive between the parties and cannot be reopened in subsequent proceedings. To allow otherwise would make a mockery of the administration of justice and permit parties to litigate endlessly.

**What is the correct position of the 3<sup>rd</sup> Defendant with regards to the 2015 judgement?**

42. The position of the 3<sup>rd</sup> Defendant, Kiprono Arap Torotich, requires particular consideration. The 2015 judgment made clear and unequivocal findings regarding him: -
- a. David Sawe had no objection to the 3<sup>rd</sup> defendant's entitlement to 24 acres
  - b. The estate and 3<sup>rd</sup> defendant were at liberty to finalize the transfer
  - c. No eviction order was to be extended against the 3<sup>rd</sup> defendant
43. These findings were not qualified or conditional. They were definitive. The late David Sawe himself, through his testimony, acknowledged the 3<sup>rd</sup> defendant's right to the 24 acres. This was not a finding about fraud in the process; it was a finding about substantive entitlement. The present application seeks, inter alia, orders restraining the 3<sup>rd</sup> defendant from "trespassing onto, constructing, continuing with construction, taking possession, alienating, disposing off, subdividing, leasing, evicting the Plaintiffs/Applicants, interfering with the Plaintiffs/Applicants peaceful occupation and utilization and/or otherwise dealing with any part of the whole of that parcel of land known as LR NO. 10520." This prayer is fundamentally inconsistent with the findings in the 2015 judgment. The 3<sup>rd</sup> defendant cannot be a trespasser on land which the deceased owner acknowledged he was entitled to occupy. He cannot be restrained from

dealing with land which the court found he should be at liberty to have transferred to him.

44. I find that insofar as the 3<sup>rd</sup> defendant is concerned; the application is not merely misconceived but is an impermissible attempt to re-litigate matters already determined. The 3<sup>rd</sup> defendant's entitlement to 24 acres stands as a finding of the 2015 judgment and that portion of land cannot form part of what is now claimed for the estate of David Cheptum Sawe. Consequently, any orders I make in this matter cannot and will not extend to the 3<sup>rd</sup> defendant or to the 24 acres which the deceased acknowledged as his entitlement. To order otherwise would be to violate the doctrine of res judicata and to disregard the express findings of the 2015 judgment.
45. With regards to the **Nature of the dispute** before this Honourable Court, having established what, the 2015 judgment actually decided, the true nature of the present dispute becomes clear. This is not, as the applicants would have it, a straightforward case of trespassers invading land following a court judgment. Rather, it is a dispute arising from frustrated sale transactions which the 2015 judgment contemplated should be completed through proper legal processes. The 2015 judgment was primarily concerned with correcting a fraudulent process, the forged surrender, the unauthorized subdivision, the manipulation of the land registry. It ordered the cancellation of titles obtained through that fraudulent process and the reversion of the land to the original LR No. 10520. But it did not find that the defendants had no rights to portions of the land or that they should be evicted.
46. On the contrary, the judgment recognized that David Sawe had entered into agreements to sell portions of land to the 1st and 2nd defendants, that these agreements had been partially performed through occupation and development with his knowledge and consent, and that equity demanded completion of these transactions rather than eviction. In **Walsh v. Lonsdale (1882) 21 Ch D 9**, one of the foundational cases on

equitable doctrine, Jessel MR stated: "*Equity looks on that as done which ought to be done.*" This maxim was expressly invoked by Ibrahim J in paragraph 107 of the 2015 judgment.

47. The estate now seeks to treat the 2015 judgment as if it were a simple finding of fraud leading to total reversion of all rights to the estate. But that is not what the judgment says. The judgment found fraud in the process while recognizing legitimate expectations of occupation and completion arising from the deceased's own conduct and intentions. This Court cannot grant orders that would undo these findings or frustrate the equitable approach adopted in the 2015 judgment. To do so would be to exercise jurisdiction in a manner repugnant to the earlier decree.

#### **Whether a temporary order of injunction should be granted?**

48. I take cognizant note that Order 40 Rule 1 and 2 of the Civil Procedure Rules, 2020 provides that the court has powers to grant an order of temporary injunction to restrain such acts and prevent the wasting, damaging, alienation, sale, removal or disposition of the suit land. This is an application for temporary injunctive relief pending suit and is governed by the principles in **Giella Vs Cassman Brown** and reiterated in the case of **Nguruman Limited Versus Jan Bonde Nielsen & 2 Others Ca No. 77 of 2012 (2014) eKLR** where the Court held thus: -

*"The conditions for the grant of an interlocutory injunction are now, I think, 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 damages; and if the court is in doubt then it can decide the application on a balance of convenience.*

49. Therefore, according to the principles set out in **Giella Vs Cassman Brown**, an applicant is required to establish: -

- a. *The existence of a prima facie case based on the Notice of Motion Application and Affidavit Evidence.*
- b. *The likelihood of irreparable injury to the applicant if the injunction is not granted;*
- c. *On where the balance of convenience tilts in case the court cannot decide based on the first two requirements.*

50. On what a prima facie case is the case of **Mrao v First American Bank of Kenya Limited & 2 Others [2003] eKLR**, the Court of Appeal defined the same when the court held;

*“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...”*

*But as I earlier endeavored to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.” In light of the above, therefore, the onus of establishing a prima facie case commences from the evidence adduced before the courts and that indeed the case of the applicant’s case is one that is arguable with a probability of success.*

51. In the case of **Naftali Ruthi Kinyua Vs Patrick Thuita Gachure & another [2015] eKLR** the Court of Appeal stated that: "With reference to the establishment of a prima facie case, Lord Diplock in the case of *American Cyanamid vs Ethicon Limited [1975] AC 396* stated thus, "If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief."

52. On the first limb, the applicants argue that they have a prima facie case based on the 2015 judgment which declared the subdivision null and void. However, this argument ignores the findings regarding occupation and the intended sale transactions. As I have demonstrated, the 2015 judgment did not find that the defendants were unlawful occupiers. It found the opposite. Moreover, the applicants seek eviction, but the 2015 judgment expressly held that eviction was not the appropriate remedy. An application seeking relief that the court has already determined should not be granted cannot be said to have a probability of success. The applicants' case fails at the first hurdle of the Giella test.
53. On the second limb, the applicants claim irreparable harm from the defendants' continued occupation. But this occupation has continued for over thirty years with the knowledge and consent of the deceased. The 2015 judgment was delivered nearly ten years ago, yet the applicants took no action until January 2025. Moreover, the applicants had Grant of Letters of Administration since the death of David Sawe in 2002. The judgment was delivered in 2015. The alleged "invasion" occurred in January 2025. What changed? Why the sudden urgency after a decade of inaction? The applicants have provided no satisfactory explanation.
54. On the third limb, the balance of convenience must favour the party who would suffer greater harm if the orders are either granted or refused. The status quo is that the defendants have occupied and developed portions of the land for over three decades. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have built structures, established homes and created livelihoods on the land with the knowledge of the deceased. The 3<sup>rd</sup> defendant's occupation was expressly acknowledged by the deceased as legitimate. To evict them now would cause far greater hardship than allowing the occupation to continue while the proper legal processes contemplated by the 2015 judgment are pursued. Moreover, the balance of convenience is informed by the conduct of the parties. The deceased allowed the defendants to

occupy and develop the land. He entered into agreements with them. He hoped they would complete payment. He never attempted to evict them. The estate, as the deceased's successor, cannot now claim to be prejudiced by a situation that the deceased himself created and acquiesced to.

55. In view of the above discussed legal principles, I find that the applicants have failed to satisfy any of the three limbs of the Giella test. The application for injunctive relief must therefore fail on this ground as well.

### **Whether this Honourable should grant an eviction order?**

56. The applicants seek an order of eviction against the defendants. This prayer warrants separate consideration given the specific findings in the 2015 judgment regarding eviction. I take note that at paragraph 106 of the 2015 Judgement, Ibrahim J expressly stated:

***"Consequently, while this transaction was frustrated midway, an eviction order is not the remedy to give in the present circumstances."***

57. This was not a temporary withholding of eviction pending some future event. It was a definitive finding that eviction was not the appropriate remedy given the circumstances of the case. Those circumstances included: -

- a) The defendants' occupation with the plaintiff's knowledge and consent*
- b) The plaintiff's intention to sell portions of land to the defendants*
- c) The plaintiff's acquiescence to their occupation*
- d) The partial performance of the sale agreements*
- e) The need for an equitable solution*

58. Have these circumstances changed? The defendants still occupy with the same knowledge and consent that existed during the deceased's lifetime. The intended sale transactions remain uncompleted for the same reasons

they were uncompleted then, the fraudulent process needs to be corrected and proper conveyancing needs to be undertaken. The need for an equitable solution is, if anything, more pressing now than it was in 2015.

59. The applicants have not demonstrated any material change in circumstances that would justify departing from the 2015 finding that eviction is not the remedy. The alleged "invasion" of January 2025 is not an invasion at all, it is the continuation of an occupation that has existed for decades and which the deceased permitted. The reference in the supporting affidavit to the County Surveyor attempting to re-establish boundaries does not constitute an unlawful invasion. If anything, it suggests that the defendants are seeking to formalize their occupation through proper surveying exactly the kind of legal process that the 2015 judgment contemplated which also I note from the record that this Honourable Court granted.
60. I find that an eviction order cannot be granted in this matter. To grant such an order would be to disregard the express finding in the 2015 judgment that eviction is not the appropriate remedy. It would also work a grave injustice to the defendants who have occupied the land for decades with the deceased's knowledge and consent and in furtherance of intended sale transactions.

### **Whether the equitable remedies are applicable in this case?**

61. This Court, like all superior courts, is both a court of law and a court of equity. The maxims of equity are not mere platitudes; they are binding principles that must guide the exercise of judicial discretion. Several equitable maxims are particularly pertinent to this matter among others:
- a. *Equity regards as done that which ought to be done*
  - b. *Equity follows the law*
  - c. *He who comes to equity must come with clean hands*

*d. Equity will not assist a volunteer*

62. The first maxim was expressly invoked in the 2015 judgment. David Sawe intended to sell portions of land to the defendants. Agreements were executed. Partial payment was made. Occupation commenced with his consent. Equity regards these transactions as having been completed and demands that the proper legal formalities be undertaken to give effect to what was intended. The second maxim requires that equity operate within the framework of law. The law, as declared in the 2015 judgment, is that the subdivision was fraudulent and the titles must be cancelled. But the law also, as declared in the same judgment, is that the defendants occupied with consent and that eviction is not the remedy. Any equitable solution must respect both aspects of the law as declared. The third maxim is instructive in examining the applicants' conduct. They seek equitable relief in the form of injunctions. But they come to court seeking to disregard the deceased's own intentions, to evict people he consented to occupy the land, and to undo arrangements he entered into. Can it be said that they come with clean hands? The fourth maxim reminds us that equity does not assist those who have not given value. The defendants are not volunteers, they entered into agreements, made payments, developed the land, and established their lives there in reliance on the deceased's representations. The applicants, on the other hand, seek to obtain the land free from the obligations that the deceased undertook.
63. In **Fry Vs Lane (1888) 40 Ch D 312**, Kay J stated: "*The court has, from a very early period, set aside voluntary alienations where the person who has so alienated property was in such a condition, that he could not exert his own free will.*" While that case involved unconscionability, the principle is broader: equity protects those who have acted in reliance on another's representations. The defendants have spent decades on this land. They have built homes, established farms, raised families, created livelihoods. They did so because David Sawe told them he was selling them the land.

They paid money, the evidence shows substantial sums were paid. The fact that the legal formalities were frustrated by a fraudulent process does not negate their equitable rights.

64. In **Walsh Vs Lonsdale (1882) 21 Ch D 9**, the court held that an agreement for a lease is as good as a lease in equity. By parity of reasoning, an agreement for sale, partially performed through payment and occupation, creates equitable rights that cannot be lightly brushed aside. The equitable approach, which was adopted by Ibrahim J in 2015 and which I adopt now, is that the defendants have equitable interests in the portions of land they occupy arising from the agreements entered into with the deceased, the payments made and the decades of occupation with his consent. These equitable interests must be respected and given effect through proper legal processes, not extinguished through eviction.

65. If eviction is not the remedy and if the applicants' prayers cannot be granted, what then is the proper way forward? The answer lies in the 2015 judgment itself. At paragraph 108, Ibrahim J stated:

*"Hence the deceased's estate and the 3<sup>rd</sup> defendant are at liberty to commence a legal process to ensure that they finalize the transfer of the property portion."*

66. While this specific direction was given for the 3<sup>rd</sup> defendant, the logic applies to the 1<sup>st</sup> and 2<sup>nd</sup> defendants as well. The 2015 judgment contemplated that the fraudulent process would be undone (through cancellation of titles and reversion to LR No. 10520) and that proper legal processes would then be undertaken to complete the intended transactions. The proper way forward, therefore, is for the parties to engage in good faith negotiations to complete the sale transactions that David Sawe intended. This would involve: -

- a) *Determining the portions each defendant is entitled to based on the agreements entered into*
- b) *Establishing the balance of purchase price outstanding (if any)*

- c) *Undertaking proper subdivision of LR No. 10520 in accordance with law*
- d) *Applying for and obtaining Land Control Board consent*
- e) *Executing proper transfers in favour of the defendants upon full payment*

67. This approach is consistent with the findings in the 2015 judgment. It respects the deceased's intentions. It protects the defendants' equitable rights. It ensures that proper legal processes are followed. And it provides finality to a dispute that has lingered for too long. However, I am conscious that this Court cannot order parties to negotiate or to enter into agreements. The most I can do is to decline the eviction orders sought, preserve the status quo and encourage the parties to follow the path contemplated by the 2015 judgment. I am also conscious that some parties may be unwilling to negotiate in good faith. In that event, the appropriate course would be for the defendants to file suits for specific performance of the agreements entered into with the deceased or for the estate to file suits determining the precise entitlements of each party. But those are matters for another day.

**Commentary on the existence of the Civil Case No 10 of 2000 and Succession Cause No 63 of 2002.**

68. I take note that that this **Civil Case No 10 of 2000** goes together with **Succession Cause No 63 of 2002 in the Matter of the Estate of David Cheptum Sawe** who was the Plaintiff in the Civil Case. This Honourable Court through the Session Judge therein Githinji J gave an order categorically on 25<sup>th</sup> November 2019 that the Main File Eldoret High Court Civil Case No 10 of 2000 be concluded first and the title attained so that this succession cause can proceed for distribution.

69. What I ask myself then is whether, following the implementation of the judgment in **Eldoret High Court Civil Case No. 10 of 2000** and the

rectification of the register reverting L.R. No. 10520 (now known as Kaptagat/Lotonyok/Block 1/10520) to the name of the deceased, the 24 Acres occupied and acknowledged in favour of the 3<sup>rd</sup> Defendant ought to be excluded from the estate available for distribution in **Succession Cause No. 63 of 2002 (In the Matter of the Estate of David Cheptum Sawe)**.

70. It is not in dispute that Ibrahim J (as he then was), in the judgment delivered on 29<sup>th</sup> May 2025 in Civil Case No. 10 of 2000, declared the surrender of the plaintiff's farm and the resultant subdivision null and void and directed cancellation of the eleven resultant titles and rectification of the register to revert to the original title L.R. No. 10520 in the name of DAUDI CHEPTUM SAWE. The material placed before this Court demonstrates that those orders have since been fully implemented. The resultant titles were cancelled and the register rectified. The parcel has reverted to the name of the deceased. The substratum of the civil dispute namely the fraudulent subdivision has therefore been addressed conclusively.

71. However, paragraph in 85 of the same judgment, there was a fundamental finding which is instructive. The learned Judge expressly noted that: -

*“85. In respect to the 3<sup>rd</sup> Defendant, the Plaintiff testified that he had resided with him for a long time since 1965. Mr. Sawe stated that the 3<sup>rd</sup> Defendant had 24 Acres and he had no dispute with him as he was what he called a 'legal squatter.' His grievance was with the 3<sup>rd</sup> Defendant's son who is not a party to this suit and such allegations are immaterial to this suit. This Court noted that the only claim against the 3<sup>rd</sup> Defendant was that the Plaintiff never signed the alleged transfer in his favour. Hence while there is no sale agreement as between the Plaintiff and the 3<sup>rd</sup> Defendant, there is no dispute as to the ownership of the 24 Acres by the 3<sup>rd</sup> Defendant. The manner of acquisition of his*

*title is what is questioned. Other than that, the Plaintiff seems to have abandoned the claim against the 3<sup>rd</sup> Defendant and he never referred to him adversely in the Cause of pleading his case.”*

72. From the above finding, I deduce the following taking into consideration the letter and spirit of the judgement therein: -

- a. The Plaintiff had no dispute with the 3<sup>rd</sup> Defendant regarding the 24 Acres he occupied.
- b. The Plaintiff described the 3<sup>rd</sup> Defendant as a “legal squatter.”
- c. There was no dispute as to the ownership of the 24 Acres by the 3<sup>rd</sup> Defendant.
- d. The Plaintiff appeared to have abandoned any adverse claim against the 3<sup>rd</sup> Defendant.
- e. The only concern raised was the manner of acquisition of title, not the occupation or entitlement to the 24 Acres per se.

73. This finding is critical. While the court nullified the subdivisions for want of legality in process, it did not render a substantive determination extinguishing the 3<sup>rd</sup> Defendant’s beneficial interest or long-standing occupation over the 24 Acres. To the contrary, the court acknowledged the absence of dispute regarding the 24 Acres and the Plaintiff’s own concession in that respect. The rectification of the register reverting the entire title to the deceased must therefore be understood as restoring the legal position pending proper regularization not as extinguishing equitable or beneficial interests acknowledged in the judgment.

74. Further, this Court cannot ignore the order issued by Githinji J on 25th November 2019 in Succession Cause No. 63 of 2002 directing that Civil Case No. 10 of 2000 be concluded first and the title attained so that the succession cause could proceed. That direction was intended to ensure clarity of title before distribution not to enlarge the estate beyond what was substantively uncontested. In succession proceedings, the estate available for distribution comprises the **free property of the deceased.**

Where there exists a judicial acknowledgment that a defined portion (24 Acres) was not in dispute and was effectively conceded, it would be unjust and contrary to the findings of the High Court to treat that acreage as wholly available for distribution without first recognizing that interest.

75. To hold otherwise would amount to re-litigation of an issue substantially addressed and would undermine the findings in Civil Case No. 10 of 2000. Accordingly, although the legal title now stands in the name of the deceased following rectification, equity and the findings in paragraph 85 of the judgment require that the 24 Acres occupied and acknowledged in favour of the 3<sup>rd</sup> Defendant be delineated and excluded from the distributable estate.
76. From the above, this Court finds that the orders issued in Civil Case No. 10 of 2000 have been fully implemented and the register duly rectified. Notwithstanding such rectification, the 24 Acres acknowledged in paragraph 85 of the judgment as being undisputedly occupied and owned by the 3<sup>rd</sup> Defendant ought to be extracted and excluded from the parcel L.R. No. Kaptagat/Lotonyok/Block 1/10520 and that the said 24 Acres shall not form part of the net estate available for distribution in Succession Cause No. 63 of 2002.
77. Therefore, in light of the foregoing analysis and based in the interests of justice and the discussed legal principles, I make the following orders: -
  - a) *That the application dated 31<sup>st</sup> January 2025 seeking eviction orders and injunction reliefs against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants is devoid of merit and the same is dismissed.*
  - b) *That the 24 Acres acknowledged in paragraph 85 of the judgment in Eldoret High Court Civil Case No. 10 of 2000 as belonging to the 3<sup>rd</sup> Defendant shall be surveyed, excised and delineated from L.R. No. Kaptagat/Lotonyok/Block 1/10520 and excluded from the net intestate estate of the deceased available for distribution.*

- c) That the claims by the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants in Civil Case No. 10 of 2000 shall be taken into account by the Administrators in **Succession Cause No. 63 of 2002 In the Matter of the Estate of David Cheptum Sawe** who was the Plaintiff in the Civil Case during confirmation and distribution of the estate.
- d) That Eldoret High Court Civil Case No. 10 of 2000 be and is hereby marked as closed.
- e) That the Administrators in Succession Cause No. 63 of 2002 are hereby directed to move with earnest and ensure that the succession cause is concluded expeditiously.
- f) That in the interim, the status quo shall be preserved pending the finalization of proper legal processes.
- g) That I encourage the parties, in the spirit of the 2015 judgment, to engage in good faith negotiations toward completing the intentions of the late David Cheptum Sawe. The estate should recognize the deceased's intentions and the defendants' equitable rights.
- h) That there shall be a status conference in Succession Cause No. 63 of 2002 on **24<sup>th</sup> March 2026** to confirm progress toward confirmation and distribution of the estate.
- i) That liberty is granted to any party to apply.
- j) Each party shall bear its own costs of this application.

78. Orders accordingly

**DATED, SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 11<sup>TH</sup> DAY  
OF FEBRUARY 2026**

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**R. NYAKUNDI**

# JUDGE