



REPUBLIC OF KENYA



KENYA LAW
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**Kassim v Kiende & 3 others (Environment & Land Case 4 of 2022)
[2023] KEELC 21788 (KLR) (27 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21788 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND CASE 4 OF 2022
PM NJOROGE, J
NOVEMBER 27, 2023**

BETWEEN

ADAN KULLOW KASSIM PLAINTIFF

AND

JENNIFER KIENDE 1ST DEFENDANT

MIN. OF LANDS & PHYSICAL PLANNING 2ND DEFENDANT

ISIOLO LAND REGISTRAR 3RD DEFENDANT

ISIOLO NATIONAL LAND COMMISSION OFFICE 4TH DEFENDANT

RULING

1. This application is dated 4/7/2022 and seeks orders;
 1. That this application be certified urgent and be heard ex-parte in the first instance.
 2. That an interlocutory injunction do issue restraining the 1st Defendant/Respondent whether acting in person, by proxy, through her servants or Agents, Advocates or Employees or any other person acting for and/or their behalf, from transferring, trespassing into, cultivating, constructing upon, Leasing and/or otherwise howsoever interfering with the ownership of title to land/or interest in All That property known as Plot No. 105 Kiwanjani, Isiolo pending the hearing and determination of this application inter-parties.
 3. That an interlocutory injunction do issue restraining the 1st Defendant/Respondent whether acting in person, by proxy, through her Servants or Agents, Advocates or Employees or any other person acting for and/or on their behalf, from transferring trespassing into, cultivating, constructing upon, leasing and/or otherwise howsoever interfering with the Plaintiff/Applicant's ownership of title to and/or interest in All that property known as



Plot No. 105 Kiwanjani, pending hearing and determination of this application Inter parties pending the hearing and determination of the suit filed herewith.

4. That an order of eviction be and is hereby issued against the 1st Defendant/Respondent.
 5. That the Officer Commanding Station Isiolo Police Station do ensure compliance with this order.
 6. That an order do issue against the 3rd Defendant/Respondent to provide a report on the ownership of Plot No. 105 and 106 within 21 days or within a stipulated period deemed fit by this Honourable Court.
 7. That the Plaintiffs/Applicant be at liberty to apply for such further or other orders and/or directions as this Honourable court may deem fit and just to grant.
 8. That the cost of this application be provided for.
2. The application is supported by the affidavit of Adan Kulow Kassim, the applicant and has the following grounds;
1. The plaintiff/applicant herein is the registered proprietor of all that piece of land known as Plot No. 105, Kiwanjani, Isiolo having acquired the said property from one Zipporah Muthoni sometimes in the year 2011 and having successfully registered the transfer in 2013.
 2. The 1st Defendant/Respondent is the registered proprietor of all that piece of land known as Plot No. 106, Kiwanjani, Isiolo and has illegally encroached into the 1st Plaintiff/Applicant property and has continued trespassing on the suit property in blatant disregard of the Plaintiff/Applicant's proprietary rights.
 3. The 1st Defendant/Respondent continues to encroach on the suit property, illegally took possession of it, remained in illegal possession and ignorantly proceeded to develop and construct upon the suit property without consent from the 1st Plaintiff/Applicant.
 4. The 1st Defendant/Respondent continues to encroach and trespass on all that Property known as Plot No. 105 Kiwanjani Isiolo occasioning oppression and breach of the plaintiffs' proprietary rights.
 5. The defendant/respondent has misused, damaged, wasted, cut trees, destroyed and degraded the suit property depriving the Plaintiff of his rights to use and enjoy quiet possession of the suit property.
 6. The 1st Defendant/Respondents' encroachment, entry and occupation of the suit property without the Authority, consent and/or permission by the Plaintiff/Applicant who is the lawful owner of the suit property constitutes trespass and therefore liable to eviction.
 7. The suit property is in real and imminent danger of being dissipated and wasted away completely due to the actions of the 1st Defendant/Respondents and unless the orders sought herein are granted, the Plaintiff's said interests will be alienated.
 8. The 1st Defendant/Respondents (sic) have refused, neglected and/or ignored to evict the Plaintiff/Applicant's property (sic) despite several attempts at stemming the 1st Defendant/Respondent's illegal actions including intervention from County Survey Office, and the Police. The 1st Defendant/Respondent continues to violate the 1st Plaintiff/Applicants proprietary rights.



9. The Plaintiff has been subjected to the flagrant disregard of his rights, title and interest in the suit property as a result of the Defendant/Respondent's encroachment and have suffered loss and damage in the diminution of its value.
 10. The 1st Defendant/Respondent's action is oppressive and illegal and they have no legal mandate to use the property in any manner.
 11. In all the circumstances, the 1st Defendant/Respondent have acted capriciously, fraudulently and recklessly and have treated the Plaintiff/Applicant oppressively out of bad faith and malice.
 12. The Plaintiff/Applicants' case against the Defendant/Respondents herein has a very high probability of success.
 13. It is in the interest of justice that the application herein be heard as a matter of urgency and a temporary injunction be granted pending the hearing and determination of the application and suit herein.
 14. The plaintiff will further rely on the grounds set out in the Plaint filed herewith and the affidavit in support of this application.
3. The application was canvassed by way of written submissions.
 4. The applicant has submitted that he is the registered proprietor of Plot No. 106, Kiwanjani, Isiolo. He says that the 1st Defendant has illegally encroached on the said plot and that there is a real and imminent danger of his property being dissipated and wasted away unless the orders sought in this application are granted.
 5. The applicant says that he has satisfied the principles of having demonstrated existence of a prima facie case, possibility of irreparable injury if the orders sought are not granted, and that the balance of convenience leans in his favour, as enunciated in the classic cases of *Giella Versus Cassman Brown* (1973) EA 358 and *[Nguruman Limited Versus Jan Bonde Nielson & 2 Others](#)*, CA No. 77 of 2012 (2014) eKLR. Regarding prima facie case, he has relied on the case of *[Mrao Ltd Versus First America Bank of Kenya Ltd](#)* [2003] eKLR. For irreparable injury he has proffered the Case of *[Pius Kipchirchir Kogo Versus Frank Kimeli Tenai](#)* [2018] eKLR. He has also proffered the Case of *[Robert Mugo Wa Karanja Versus Ecobank \(Kenya\) Limited & Another](#)* [2019] eKLR for his assertion that his property is in danger of being wasted, damaged or otherwise Injuriously handled.
 6. The 1st Respondent has opposed the application through her replying affidavit sworn on 11th day of November. She says that she has no need to encroach on the applicant's plot which is adjacent to her plot. She informs the court that in CMCC ELC No. 106, the lower court divested itself of jurisdiction after stating unequivocally that the dispute before it was a boundary dispute which fell within the realm and ambit of the Land Registrar. The respondent is adamant that her Plot is No. 106 whereas the Applicant's Plot is No. 105. She says that she is in possession of her plot which she has developed and on which she lives. She urges the court to dismiss the application.
 7. I have carefully considered the pleadings proffered by the parties to buttress their diametrically incongruent assertions. I do note that this matter was handled in CMCC ELC No .100 of 2018. The applicant claims to own Plot No. 105 and the respondent claims to own Plot No. 106. In his Plaint, the plaintiff, in addition to praying for a declaration that he owns Plot No. 105, Kiwanjani, Isiolo, seeks a permanent injunction restraining the defendant from interfering with the suit. In this application, the applicant prays for an interlocutory injunction restraining the defendant from interfering with the suit land. I opine that if this court grants this prayer, it will be touching on the main issue to be determined



in the main suit. As there is no dispute that Plot No. 105 Kiwanjani Isiolo, belongs to the applicant and Plot No. 106 Kiwanjani, Isiolo, belongs to the respondent, what is involved herein is basically a boundary dispute. I do not find it merited that this court should issue interlocutory orders as sought by the applicant.

8. In the circumstances, the following orders are hereby issued;
 - a. This application is dismissed.
 - b. Costs shall be in the cause.
 - c. the parties are ordered to concurrently comply with order 11, [CPR](#) within 10 days of today and to come to court for directions on 19/2/2024.

DELIVERED IN OPEN COURT AT ISIOLO THIS 27TH DAY OF NOVEMBER, 2023 IN THE PRESENCE OF:

Court assistant: Balozi/Rahma

Caleb Mwiti present for 1st Respondent.

Benjamin Kimathi for 2nd and 3rd Respondent.

HON. JUSTICE P.M NJOROGE

JUDGE

