



**Kakono v Mkauma (Environment & Land Case 77 of 2018)  
[2022] KEELC 12696 (KLR) (20 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 12696 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 77 OF 2018**

**MAO ODENY, J  
JULY 20, 2022**

**BETWEEN**

**JOHA MKUZI KAKONO ..... PLAINTIFF**

**AND**

**MKUZI SAHA MKAUMA ..... DEFENDANT**

**JUDGMENT**

1. By an amended plaint dated 25<sup>th</sup> February 2021 the plaintiff sued the Defendant seeking the following orders; -
  1. A Permanent injunction against the defendant, his servants, agents and/or any persons acting under the Defendant's authority from trespassing, encroaching upon, subdividing, selling off, building upon, constructing upon, alienating, damaging, wasting, disposing off, and or in any manner whatsoever carrying out any activities or at all over the suit land to wit all the plot number Kaliangombe/Jimba 581 at Rabai in Kilifi.
  2. Costs of the suit
  3. Any other relief as the honourable court may deem necessary to grant.

**Plaintiff's Case**

2. PW1 adopted his statement and stated that he is the registered owner of the suit land which the Defendant has encroached on and urged the court to grant an order of a permanent injunction against the Defendant. It was further the PW1's evidence that despite attempts of intervention from the local administration, the Defendant has refused to stop the encroachment.
3. On cross examination by Ms. Kayatta, he stated that he had not brought any evidence to show that the Defendant had encroached on the suit land and further that the dispute in regard to the issue had been resolved in favour of the Defendant



## Defendant's Case

4. DW1 adopted his statement and denied that the Plaintiff is the owner of the suit land. He further stated that he is the owner of Plot No. Kaliangombe/Jimba 580 located at Rabai which was bequeathed to him by his late father in the year 1962. That around the same time he went to work in Tanzania and upon his return, he found the Plaintiff and his father occupying a portion of the plot and upon inquiry he was informed that the Plaintiff's father had requested for a place to stay temporarily as DW1's wife continued to cultivate the land.
5. According to DW1, there has been a long drawn dispute over the suit land going back to the year 2000 whereby DW1 instituted proceedings before the Kaya Elders against the Plaintiff's father which dispute was resolved in DW1's favour.
6. It was DW1's case that during land adjudication the portion which the Plaintiff had built his house was curved out and given a new number plot No. 581 which plot is separate from the DW1's parcel No. Kaliangombe/Jumba/580. That DW1 together with his family have never encroached on plot No. 581.

## Analysis and Determination

7. The issue for determination is whether the Plaintiff has met the threshold for grant of permanent injunctive orders against the Defendant.
8. What constitutes a permanent or perpetual injunction was aptly stated in the case of *Kenya Power & Lighting Co. Ltd -vs- Sheriff Molana Habib* (2018) eKLR thus:-

A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.”
9. Temporary injunctions are meant to preserve the substratum of the suit property pending the hearing and determination of the suit in which the principles of *Giella v Cassman Brown and Co Ltd* (1973) 358, where a party is to prove that he/she has a prima facie case with a probability of success, that if the order of injunction is not granted he/she will suffer irreparable loss not capable of being compensated by an award of damages, and if the court is in doubt to decide on a balance of convenience.
10. In permanent injunctions the order is granted upon the claimant proving the case on a balance of probabilities that he is entitled to the order sought to restrain the Respondent perpetually from doing the acts complained of.
11. The question is whether the Plaintiff has proved that he is entitled to an order of a permanent injunction from the evidence and material availed to the court. It is not in dispute that the suit land has been subject of land Adjudication proceedings which the Plaintiff chose to refer to an incomplete proceedings of the Rabai District Adjudication Board dated 11<sup>th</sup> January 2003.
12. The court is fortunate that the Defendant produced the complete proceedings which demonstrates that on 17<sup>th</sup> January 2003 the Board ruled against the Plaintiff and ordered that the suit property remains registered in the Defendant's name.



13. Further, it is on record that the Plaintiff admitted during cross examination that he had not presented any evidence that the Defendant has encroached on the suit land. The evidence before the court points to the conclusion that the Plaintiff has not proved his case against the Defendant therefore the case is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 20<sup>TH</sup> DAY OF JULY, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

