Kilonzo & 2 others v Mohamud (Environment & Land Case E063 of 2023) [2025] KEELC 812 (KLR) (25 February 2025) (Ruling)

Neutral citation: [2025] KEELC 812 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE E063 OF 2023

NA MATHEKA, J

FEBRUARY 25, 2025

BETWEEN

PETER MAKOLA KILONZO ..... 1ST APPLICANT

ANTONY LUITA KILONZO ..... 2ND APPLICANT

MARGARET NJERI GICHURU ..... 3RD APPLICANT

AND

ABDINOOR MOHAMUD ..... RESPONDENT

RULING

1. The application is dated 28th November 2023 and is brought under Section 152A, 152B, 152E and 152F of the *Land Act*, 2012 and Rule 3 of High Court (Practice and Procedure) Rules seeking the following orders;

    1. That this application be certified as urgent and directions issue due to its urgency.

    2. That this Honourable Court be pleased to make an order of temporary injunction against the defendants whether by themselves, agents, family, servants, or anybody claiming through them from further construction, depositing building materials, trespassing, leasing, invading or in any other manner interfering with Title No. IR Number: 226583 land reference No. 20321 situate at Mavoko Municipality in Machakos District belonging to the Plaintiffs pending hearing and determination of this application.

    3. That this Honourable Court be pleased to make an order of temporary injunction against the defendants and the other unknown trespassers whether by themselves, agents, family servants, or anybody claiming through them from further construction, depositing building materials, trespassing, leasing, invading or in any other manner interfering with Title No.

IR Number 226583 land reference No. 20321 situate at Mavoko Municipality in Machakos District belonging to the Plaintiffs pending hearing and determination of this suit.

4. That this Honourable Court does issue M/S Icon Auctioneersthe mandate to carry out the eviction.

5. That costs be in the cause.

2 It is supported by the annexed affidavit of Peter Makola Kilonzo and on the following grounds that the Applicants are and have always been the legally registered proprietors of all that land described as Title No, IR No. 226583 land reference No. 20321 situate at Mavoko Municipality in Machakos district with all the rights and interests apportionment thereto. That without color of right and or any justification, the Respondent entered trespassed and remained on the Applicants' aforesaid parcel of land without courtesy of seeking the Applicants' consent. That the continued illegal occupation by the Respondent herein is inhibiting any intended development or constructive utility of the said parcel hence interfering with the Applicants' right to own properly. That the Applicants herein have since issued demand notices on vacation in compliance with the law to the Respondent whose continued occupation and trespass of the land is gravely causing loss and damage hence the Applicants seeking the intervention of this honorable court. That the Applicants have equally sent copies of demands to the local administration and police service for assistance in eviction but the two offices have emphatically insisted that for them to take any action, a court order must first issue. That it is evident that unless eviction orders are granted, the auctioneers herein proposed will be incapacitated to carry out their work and with that the assistance and supervision of the OCS Mlolongo Police Station will be crucial for the process to be smooth and avoid any breach of peace.

3. This court has considered the application, affidavits, annexures and submissions therein. The prayer for temporary injunction is well discussed in the celebrated case of Giella vs Cassman Brown (1973) EA 358. In Nguruman Limited vs Jan Bonde Nielsen & 2 others *CA No.77 of 2012* (2014) eKLR the Court of Appeal held that;

> in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
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> These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".

4. On the first pillar, the Plaintiffs state that they are the joint legally registered owners of all that land described as Title No. IR. Number: 226583 land reference no. 20321 situated at Mavoko Municipality in Machakos district with all the rights and interests apportionment thereto (Annexed herein is a copy of search as "A"). That the Respondent in this suit has deprived them of the use and quiet enjoyment of the suit property by his illegal actions of encroaching into the said property by trespassing without any color of right, justification or consent.

5. Section 26 of the *Land Registration Act* states as follows;

   (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner,

subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."

6. On the 2nd pillar of temporary injunctions, the Plaintiffs are required to show irreparable injury and I am guided by Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR where court held;

> "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. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

7. The Plaintiffs state that the continued illegal occupation by the Respondent herein is inhibiting any intended development or constructive utility of the said parcel hence interfering with the Applicant's right to own property. That they have since issued eviction notices on vacation dated 6th June, 2021 to the Respondent, Machakos Police Station and the Assistant County Commissioner in compliance with the law to the Respondent whose continued occupation and trespass of the land is gravely causing loss and damage hence the Applicants seeking the intervention of this Honourable Court. (Attached is a copy of the vacation notices marked "B"). they hence seek eviction orders against the Respondent so that they can enjoy the benefits associated with being proprietors of land.

8. The 3rd pillar which is the balance of convenience. In Pius Kipchirchir Kogo case (Supra) the court held;

> "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. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
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> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

9. The Respondent submitted that he has been in occupation of property known as L.R No. 32744 and not IR No. 226583 land reference No. 20321 situate at Mavoko Municipality in Machakos District which suit land is separate and distinct and unrelated to the suit property herein. The Respondent has attached his certificate of title marked AM-1. It is not clear at this stage to determine whether the two properties discussed above a one and the same and if so who the legitimate owner is. It is also not disputed that the Respondent is currently in possession and I find the balance of convenience falls in the favour of the Respondent. I find that the Applicants have failed to establish a prima facie case. I find this application is not merited and is dismissed. Costs of this application to be in the cause. Parties are advised to comply with order 11 and fix the matter for hearing.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF FEBRUARY 2025.

N.A. MATHEKA

JUDGE