



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kilonzo v Mutisya & 4 others (Land Case E064 of 2023)  
[2025] KEELC 2900 (KLR) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2900 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
LAND CASE E064 OF 2023  
NA MATHEKA, J  
MARCH 26, 2025**

**BETWEEN**

**GABRIEL MAITHA KILONZO ..... APPLICANT**

**AND**

**PHYLLIP MUTISYA ..... 1<sup>ST</sup> RESPONDENT**

**MOURICE ONGUDI ..... 2<sup>ND</sup> RESPONDENT**

**GREVASIO MARETE ..... 3<sup>RD</sup> RESPONDENT**

**JOSEPHATE KAVALE ..... 4<sup>TH</sup> RESPONDENT**

**JOHN KINYANJUI ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The application is dated 28<sup>th</sup> 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 No. 226580 with LR. Number 20320 situate at Mavoko Municipality in Machakos District belonging to the Plaintiff 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 No. 226580 with LR. Number 20320 situate at Mavoko Municipality in Machakos District belonging to the Plaintiff pending hearing and determination of this suit.

4. That the OCS Mlolongo Police Station provides security to the Applicant in carrying out the eviction.
5. That costs be in the case.
2. It is supported by the annexed Affidavit of Gabriel Maitha 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. 226580 with LR NO. 20320 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 Applicant's aforesaid parcel of land without courtesy of seeking the Applicant's 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 Applicant's right to own property. That the Applicant's 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 Applicant's seeking the intervention of this Honourable Court. That the Applicant has 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. The Respondents stated that they have been in occupation of the suit premises for over 20 years with their families. When they moved there the land was vacant and they have built there and lived peacefully. That they have instituted a suit for adverse possession against the registered owners who is not the applicant.
4. 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.
5. 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”.
6. On the first pillar, the Plaintiff states that he is the legally registered owners of all that land described as Title No. IR Number: 226280 land reference No. 20320 situated at Mavoko Municipality in Machakos district with all the rights and interests apportionment thereto (Annexed is a copy of search as “A”). That the Respondents have 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.



7. 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.”
8. On the 2<sup>nd</sup> pillar of temporary injunctions, the Plaintiff is 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.”
9. The Applicant states that the continued illegal occupation by the Respondents 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 dated 6<sup>th</sup> June, 2021 to the Respondents, 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 Applicant is seeking the intervention of this Honourable Court. (Attached is a copy of the eviction notices marked “B”). They hence seek eviction orders against the Respondents so that they can enjoy the benefits associated with being proprietors of land.
10. The 3<sup>rd</sup> 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.
11. 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”.
12. The Respondents submitted that they have been in occupation of property known as L.R No. 20320 and IR Number: 226580 for over 20 years. The Applicant seeks eviction orders. It is therefore not disputed that the Respondents are currently in possession and I find the balance of convenience falls



in the favour of the Respondents. I find that the Applicant has failed to established a prima facie case. Eviction orders cannot be given at this interim stage. 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 26<sup>TH</sup> DAY OF MARCH 2025.**

**N.A. MATHEKA**

**JUDGE**

