**REPUBLIC OF KENYA**

**High Court at Malindi**

**Environmental & Land Case 43 of 2005**

**DR. SARAH JELANGAT SIELE……..……PLAINTIFF**

**VERSUS**

**THE COMMISSIONER OF LANDS……..…….1ST DEFENDANT**

**THE CHIEF LAND REGISTRAR…….…..……..……2ND DEFENDANT**

**REMO LENZI……..……..……3RD DEFENDANT**

**SEVEN ISLANDS WATAMU LIMITED……...…..…..….4TH DEFENDANT**

**RULING**

**1.** The Plaintiff's Notice of Motion dated and filed on 22nd November, 2012 is brought under Order 40 Rule 1, 2 and 10 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law. This application, for which I certified as urgent on 23rd November, 2012 has three main prayers, to wit;

(a) **Pending the hearing and determination of this application a temporary injunction do issue restraining the 3rd and 4th Defendants from trespassing upon or otherwise interfering with the suit property PLOT 103 WATAMU.**

(b) **Pending the hearing and determination of this suit a temporary injunction do issue restraining the 3rd and 4th Defendants from trespassing upon or otherwise interfering with the suit property PLOT 103 WATAMU.**

**(c) This court be pleased to make such further orders as may be necessary for the preservation of the suit property pending the determination of this suit.**

**1.** The grounds in support of the application are, firstly, that the issue in dispute revolves around the ownership, use and occupation of the Plaintiff's PLOT NO. 103 WATAMU which the 3rd and

4th Defendants insist is their Land Title No. KILIFI/JIMBA/1125. Secondly, it is stated that the suit is partly heard but the 3rd and 4th Defendants have commenced systematic destruction and or development of and on disputed property despite the pendency of the suit. Thirdly, that unless the application is allowed the findings of this court might be rendered nugatory and the Plaintiff might never enjoy the fruits of litigation in the event she ultimately succeeds and finally that it is in the broader interest of justice that the application be allowed.

**2.** The application is supported by the affidavit of the Plaintiff/Applicant. The essential elements of the depositions by the Applicant are that she brought the current suit against the 3rd and 4th Defendants claiming that the said Defendants had encroached onto her land described as PLOT NO. 103 WATAMU and the said Defendants were occupying and using the same without her consent or authority.

**3.** The applicant further depones that after she gave her evidence in this court, she moved the court vide her application dated 20th April, 2011 seeking for an order allowing her surveyor to access the property with a view of establishing the beacons for PLOT NO. 103 vis a vis title no. KILIFI/JIMBA/1125. The 3rd and 4th Defendants who were occupying the plot had refused her surveyor to access the plot.

**4.** The application was allowed by the court on 19th July, 2011 and on 30th March, 2012, her representatives and the surveyor together with the Deputy Registrar were led by the 3rd and 4th Defendants' representative to what they claimed to be KILIFI/JIMBA/1125 in Watamu christened PAPA REMO BEACH.

**5.** The deponent averred that the surveyor identified the beacons to her plot number 103 WATAMU and the neighbouring plot numbers 102 and 101 which showed that land parcel number KILIFI/JIMBA/1125 had purportedly subsumed her plot.

**6.** The deponent avers that on the weekend of 16th – 18th November, 2012, while on holiday in Watamu, she noticed people digging up her plot for the construction of a hotel despite the findings during the visit by the court on 30th March, 2012. Consequently, the applicant deponed, the 3rd and 4th Defendants should be restrained by this court from carrying out the stated activities as they were literally creating quarries on the disputed land.

**7.** The 3rd Defendant, on his own behalf and on behalf of the 4th Defendant swore a lengthy Replying Affidavit on 11th December, 2012 and filed the same in court on 13th December, 2012.

**8.** The 3rd Defendant's deposition was that by way of a Chamber Summons dated 3rd May, 2005, the Plaintiff sought for orders against the 3rd and 4th Defendants seeking to stop them from trespassing into or interfering with plot number 103 Watamu, the suit property. The said application was dismissed on 28th October, 2005 for want of prosecution and or non-attendance.

**9.** The 3rd Defendant deponed that the Plaintiff took out another Chamber Summons dated 16th February, 2006 to reinstate the dismissed application which was heard inter partes and dismissed. On advice of his Counsel, the 3rd Defendant believes that the reliefs sought in the present application are similar to the reliefs in the applications dated 3rd May, 2005 and 16th February, 2006 which were dismissed by the court and therefore the Plaintiff is precluded by law from bringing an application with similar reliefs.

**10.** That the current application, the 3rd Defendant deponed, is the third similar application brought by the Applicant; that the suit is part heard and that it is too late in the day to present a frivolous and vexatious application such as the current one.

**11.** The 3rd Defendant further averred that the 4th Defendant is the absolute proprietor of

KILIFI/JIMBA/1125; that the said property does not subsume PLOT NO 103 WATAMU and that no evidence has been placed before the court to prove that allegation and that KILIFI/JIMBA/1125 was amongst the plots which were allocated by the Government through the Settlement Fund Trustees Squatter problem to the local inhabitants who were squatting on it.

**12.** The 3rd Defendant then goes into the history of how the 4th Defendant acquired the property from the original allotees and that the 4th Defendant is the 3rd successive proprietor of the property. The 3rd Defendant admits that since the acquisition of the property he has continuously been putting up developments on the property known as KILIFI/JIMBA/1125.

**13.** The 3rd Defendant finalizes his depositions by stating that the Plaintiff has failed to show how he acquired Plot Number 103 Watamu and that the 4th Defendant is neither occupying the said Plot No. 3 Watamu nor carrying out any developments, excavations or constructions on Plot Number 103 Watamu as alleged by the Applicant; that in the event the orders that the Plaintiff is seeking are granted, the 4th Defendant will suffer irreparable loss and damages and that the balance of convenience tilts in favour of the 4th Defendant and not the Plaintiff.

**14.** Mr. Otieno, counsel for the Plaintiff and Mr. Wagara, counsel for the 3rd and 4th Defendants appeared before me on 14th December, 2012 and made their oral submissions.

**15.** Mr. Otieno, counsel for the Plaintiff submitted that the crux of this case can be found in the draft agreed issues number 2 and 3 that were filed in court by the 3rd and 4th Defendants on 16th November, 2007, which are:

(a) Where is Plot No. 103 Watamu?

(b) Where is Plot No. KILIFI/JIMBA/1125?

**1.** In addressing the above two issues, counsel reiterated verbatim the averments of the Plaintiff's affidavit which I have summarized above and submitted that because the issues are yet to be determined by this court, it is important that the subject matter of the suit be preserved, not because the same will prejudice the Plaintiff but to protect the legal process of the trial.

**2.** The Plaintiff's advocate submitted further that the 3rd and 4th Defendants have not denied that their agents are actually on the suit property. Counsel relied on the provisions of Order 40 Rule 10 of the Civil Procedure Rules, 2010 in support of his submissions that the suit property should be preserved. This, it was urged, will enable either party to enjoy the final judgment of the court.

**3.** In response, Mr. Wagara, counsel for the 3rd and 4th Defendants submitted that the orders that are to be made under the provisions of Order 40 Rule 10 of the Civil Procedure Rules, 2010 cannot be made in abstract. They are injunctive orders in all respect and consequently the three basic principles for the relief of injunction to be given must be met by the Plaintiff.

**4.** Counsel further submitted that the Plaintiff has since the inception of this suit filed three applications seeking similar reliefs. The first Chamber Summons application, it was urged, was filed by the applicant on 6th May, 2005. Relief number 3 in that application sought for an order of injunction against trespass, construction and interference with PLOT NO. 103. According to the advocate, the current application is seeking the same relief as that in the application of 3rd May, 2005 that was dismissed for non- attendance.

**5.** After the dismissal of the application dated 3rd May, 2005 and filed on 6th May, 2005 for non-attendance, Mr. Wagara submitted that the Plaintiff filed another application dated 16th February, 2006 in which she sought to reinstate the application of 3rd May, 2005.

**6.** The application for reinstatement, counsel urged, was also seeking for injunctive orders against the 3rd and 4th Defendants and was argued and refused on merit. According to counsel, the injunctive relief that was refused on merit is the same relief that the Plaintiff is seeking in the current application. In line with the oxygen principle, counsel urged, litigation must not be expensive and that parties should not be allowed to continuously bring one application after the other. On that ground alone, counsel submitted, the current application is *Res Judicata*, vexatious and frivolous and should be dismissed.

**7.** The 3rd and 4th Defendants' counsel then delved into the merits of his clients' case and in particular on how his clients acquired KILIFI/JIMBA/1125 where development has been going on since 2003. In conclusion, and after taking the court through the lengthy Replying Affidavit and the annextures, counsel submitted that the title held by the Plaintiff for parcel of land number KILIFI/JIMBA/1125 is good and that no evidence has been placed before the court to show that PLOT NO.103 Watamu was subsumed in KILIFI/JIMBA/1125 as alleged by the Plaintiff.

**8.** On the issue of whether damages can adequately compensate the Plaintiff in the event that she succeeds in her claim, counsel submitted that the Plaintiff has sought for damages as an alternative relief in the Amended Plaint thus conceding that indeed she is amenable to compensation. If anything, it was submitted, it is the 3rd and 4th Defendants who are likely to suffer irreparable damage in the event the injunctive orders are granted because they have been in continuous occupation of the suit property for more than 11 years and that they have carried out developments for those years to the tune of Kshs. 700,000,000.

**9.** Finally, it was the 3rd and 4th Defendant's submissions that the balance of convenience tilts in favour of his clients because they are in occupation of the suit property.

**10.** In response, Mr. Otieno, counsel for the Plaintiff submitted that the application dated 3rd May, 2005 that was dismissed for non-attendance was never heard on merit. According to counsel, section 7 of the Civil Procedure Act sets out the principle of *Res judicata* and the said principle is not applicable if the matter is not heard on merit.

**11.** In respect to the second application that was filed by the Plaintiff to reinstate the first application, counsel submitted that that application was for reinstatement and not for injunctive orders. The issue as to whether the injunction should issue as against the 3rd and 4th Defendants was never ventilated in the second application. According to Mr. Otieno, the Ruling of 16th May, 2006 dismissing the Plaintiff's application for reinstatement did not deal with the question of injunction.

**12.** In the present application, it was urged, the Plaintiff, in addition to injunctive orders in prayer numbers 2 and 4 is also asking, in the alternative for the preservation of the suit property pursuant to the provisions of Order 40 Rule 10 of the Civil Procedure Rules, 2010. This prayer, according to the advocate, was never prayed for in the two applications that were dismissed.

**13.** According to the Plaintiff's counsel, in enacting Order 40 Rule 10 of the Civil Procedure Rules, the framers of the Rules contemplated that there should be a distinction between a temporary injunction and an order of preservation.

**14.** The court was directed to the 3rd and 4th Defendant's Replying Affidavit and more specifically to annexture RN 3, which is a letter from the Commissioner of Lands stating that the suit property is in Jimba which has had problems with double allocation of land. The court was also directed to a Ruling which has been attached on the Defendants' list of documents in which it was stated that parcel of land number 1125 did not exist. Consequently, counsel submitted that the Plaintiff has shown that she has a *prima facie* case which has a reasonable chance of success.

**15.** To buttress the argument that his client has shown that she has established a prima facie case, counsel referred the court to the site visit that was made by the court in the presence of all parties where

the beacons for PLOT NO.103 were found by the surveyor. In the absence of any other evidence to the contrary, it was submitted, the applicant's case would succeed.

**16.** Finally, it was submitted on behalf of the Plaintiff that the current actions of the 3rd and 4th Defendant's and in particular the digging of the suit property will change the character and the face of the property and that no amount of damages can buy a similar property.

**17.** I have considered the Application which is before me, the Supporting Affidavit, the Replying Affidavit and the rival submissions by counsels. My task would be to determine if the current application is *Res Judicata* or if it is an abuse of the court process, vexatious and frivolous and if the answer is in the negative, whether on the material before me, the applicant has established a *prima facie* case with a probability of success to warrant the grant of a temporary injunction pending the hearing and determination of the main suit.

**18.** I will also determine whether, even if a *prima facie* case exists, the applicant has proved that she will suffer loss that is incapable of compensation by an award of damages and if in doubt in whose favour the balance of convenience tilts. These are the well-known principles in *Giella Vs Cassman Brown (1973) E.A 358* .

**19.** I am alive to the fact that what is before me is an interlocutory application. Accordingly I am not required to determine the very issues which will be canvassed at the trial with finality. All I am entitled to inquire into at this stage is whether the applicant is entitled to a temporary injunction and or a preservation order.

**20.** It is not in dispute that on 6th May, 2005, the application by the Plaintiff dated 3rd May, 2005 was certified urgent by Justice Ouko, as he then was, and an ex parte injunctive order was given *"restraining the 3rd and 4th Defendants*

*from trespassing into, alienating, developing and or in any manner dealing with the aforementioned plot number KILIFI/JIMBA/1125 as to prejudice the Plaintiff's PLOT NO. 103 Watamu."*

**21.** The said application was fixed for hearing inter partes on 24th May, 2005, 14th July, 2005, 23rd August, 2005 and on 22nd September, 2005 when it did not proceed for hearing at the instance of the Plaintiff. When the application came up for inter partes hearing on 28th October, 2005, the applicant's advocate was not in court and the application was dismissed for non-attendance.

**22.** Aggrieved by this decision, the applicant moved the court on 21st February, 2006 seeking that the orders for dismissal of their application dated 3rd May, 2005 be set aside and the application be reinstated for hearing on merit. Further, that a temporary order of injunctionbe issued to restrain the Defendants from interfering with the suit property pending the hearing of the application. The application was heard *inter partes* and the same was dismissed by Justice Ouko in the following words:

**"The applicant having obtained ex parte orders was clearly contented with the status quo. Six months later her application had not been heard inter partes. Yet the ownership of the suit property is contested by the Respondents, particularly the 4th Respondent has been restrained from trespassing onto, alienating, or developing it. Today, as I deliver this ruling one year has lapsed yet the application has not been heard.**

**23.** After the dismissal of the application for reinstatement of the application for injunctive orders, the applicant did not pursue the issue any further. The suit proceeded for trial on 9th and 10th December, 2010 when the Plaintiff testified. The suit was fixed for further hearing on 4th , 5th and 6th May, 2011 but did not proceed on the said dates because the Plaintiff filed an application in which she sought for the orders of the court to allow her surveyor to access the suit property. That application was heard and allowed by Hon. Lady Justice Omondi on 19th July, 2011.

**24.** Pursuant to the order of the court of 19th July, 2011, the Applicant's surveyor together with the Deputy Registrar and the parties' representatives visited the suit property on 30th March, 2012. The surveyor is supposed to prepare his report and testify on behalf of the Plaintiff when the matter comes up for hearing on 18th February, 2013.

**25.** It is now trite law that the principle of *Res judicata* applies not only to suits but also to applications. ***Res judicata***, though a common law doctrine whose policy objective is the prevention of repetitive litigation, finds a firm standing in section 7 of the Civil Procedure Act, Cap 21. The said section provides as follows:

***"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."***

**26.** Explanation 5 of the said section which is relevant to the matter before me states as follows:

***"Any relief, claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.***

**27.** The Plaintiff's application of 3rd May, 2005 which was dismissed for non-attendance sought for a temporary injunction order against the 3rd and 4th Defendants from trespassing, alienating, developing or dealing in any manner with KILIFI/JIMBA/1125 as to prejudice the Plaintiff's right over PLOT NO. 103 WATAMU. Having been dismissed for non-attendance, the application dated 3rd May, 2005 was not "*heard and finally decided*" as contemplated under section 7 of the Civil Procedure Act. Consequently, a subsequent application of a similar nature cannot be *Res Judicata*. Such application, in my view, can only be tantamount to abuse of court process.

**28.** The law provides the mechanism that a party should employ in case he wants an application which has been dismissed for non-attendance revived, and that is the mechanism that the Plaintiff initiated when he filed his application dated 16th February, 2006 seeking for two substantive orders which are:

(a) **This Honourable Court be pleased to set aside its order of 28th October, 2005 dismissing the Plaintiff's Chamber Summons application dated 3rd May, 2005 for non-attendance and to have the same reinstated for hearing and determination on merit.**

(b) **A temporary order of injunction pending hearing and determination of this application be granted restraining the defendants, their servants, agents officers and other persons under their control from wasting, damaging or alienating the suit property namely the Plaintiff's land known as Plot No. 103 Watamu which is wrongfully, unlawfully and irregularly subsumed in all that land known as Title Number Kilifi/Jimba/1125 in particular that the 3rd and 4th Defendants be restrained effecting or continuing any construction of any kind or nature whatsoever on the suit property or any part thereof.**

**1.** As I have stated above, the application of 16th February, 2006 was dismissed on 16th May, 2006 after being heard on merit. I have looked at the Ruling of Justice Ouko of 16th May, 2006 dismissing the application for reinstatement. I agree with the Plaintiff's counsel that the judge did not make any reference to the prayers for injunctive orders which had been pleaded in the application for reinstatement and in my view, for good reasons.

**2.** The judge was to determine whether the application which had been dismissed for non-attendance should be reinstated and not whether the Plaintiff was entitled to injunctive orders which were

the same orders that were being sought in the dismissed application.

**3.** That being the case, the prayer for an injunctive order in the application dated 16th February, 2006 for the reinstatement of the application dated 3rd May, 2005 that was dismissed for non-attendance was not necessary. The inclusion of the said prayer, though not addressed by the judge in his Ruling is caught up by explanation **number 5** of **Section 7** of the Civil Procedure Rules which I have quoted above. The inclusion of the relief for injunction in that application, for the purposes of section 7 and explanation number 5 of the Civil Procedure Act is deemed to have been refused by the Judge.

**4.** To the extent that the current application is seeking for a temporary injunctive order which is similar in substance to the second relief in the application dated 16th February, 2006 that was heard and dismissed, I find and hold that the current application is *Res judicata* and an abuse of court process. That is so despite the fact that the Plaintiff has, in the alternative, prayed for an order of preservation of the suit property, which, in the circumstances of this case, is the same as praying for injunctive orders.

**5.** Having failed in her application for reinstatement of the application of 3rd May, 2005 which sought to stop the 3rd and 4th Defendants from developing the suit property, the best the applicant could have done was to appeal against the Ruling of Justice Ouko than to now come by way of another application seeking the same orders that were in the first two applications. Other than the current application being *Res Judicata*, the same is a proper case of abuse of court process.

**6.** Abuse of court process was defined by the Supreme Court of Nigeria in the matter of **African Continental Bank PLC Vs. Damian Ikechukukwa Nwai; SC No. 35 of 2001** to include a situation where a party improperly uses judicial process to the irritation, harassment and annoyance of his opponent and to interfere with the administration of justice. In my view, the current application falls in this definition considering that, firstly, a similar application was dismissed for non-attendance and secondly, that this matter is partly heard. The applicant cannot use the evidence that has been produced in the ongoing trial to support his current application for injunctive or preservation orders as he has attempted to do.

**7.** That ground alone would suffice to have the application dated 22nd November, 2012 dismissed with costs. However, I should perhaps briefly express my view on the main argument by the applicant's counsel that the *status quo* should be maintained so as to enable either party to enjoy the Judgment of this court, and further that Order 40 Rule 10 provides for the preservation of the suit property and that the principles in the *Giella Vs. Cassman Brown* are not applicable under that Rule.

**8.** The question that arises from that argument is, firstly, what is the *status quo* in a matter where a party is in possession of the suit property and where, on the face of the material before the court that person is not out rightly a trespasser ? Secondly, what would be the status quo in a matter where a party has been dealing with a property on the basis that an application which had sought to stop him from dealing with the property was dismissed six years ago? To answer those questions, it is sufficient for me to refer to **Halsbury's Laws of England: Hailsham Edn; Vol. XVIII, paras. 41 to 44 (pp. 27-30**), which was written way before the principles in *Giella Vs. Cassman Brown* were set down:

**"I have always understood that the whole purpose of an injunction is that matters ought to be <u>preserved</u> in status quo until the question to be investigated in the suit can finally be disposed of. Here the question was whether the appellant or the respondent was entitled to occupation of the suit premises and to carry on the hotel business. The appellant was admittedly in possession: the injunction, however, did not purport to maintain the status but actually ordered him to vacate the premises and cease doing business. An interlocutory injunction of this nature is unique in my experience and could only be justified if the appellant had admitted that he was a trespasser upon the premises."**

**9.** On the same issue, the court of appeal in **George Orango Orago Vs. George Liewa Jagalo & 3 others (2010) eKLR** had this to say:

**"The appellant was in possession. Prima facie, he is the owner of the land and until his title to it is set aside, there would be no proper basis for dispossessing him of the land. The denial of injunction has the effect of dispossessing the appellant of his land."**

**10.** This position was followed by the High Court in **Aldofo Guzzini & Another Vs. Emmanuel Charo Tinga; HCCC NO. 107 of 2005** in which the court quoted with approval Sarkar's Law of Evidence, 10th Edition at page 80 which states as follows:

**"The policy of the law is to allow a person in possession of property to continue his possession until a rival claimant proves his title thereto."**

**11.** The traditional doctrine with regard to an application for interlocutory injunction requires the court to consider whether the applicant has a prima facie case with a probability of success and if he does whether he cannot be adequately compensated in damages and where the court is in doubt in respect to the first criterion, it should decide the matter by weighing the balance of convenience.

**12.** Those conditions are treated as necessary, whether, in my view, one is asking for a temporary injunctive order or the preservation of the suit property. However, the remedy of injunction is ultimately an equitable one and the court should never be blind to the fact that it ought not to be issued to a party whose conduct is shown not to meet the established doctrines of equity.

**13.** The 4th Respondent has deponed that it has been carrying out developments on KILIFI/JIMBA/1125 for over 10 years. Throughout those ten years, it has been running tourism activities including ocean diving, deep sea fishing, beech parties picnics and a restaurant. These activities, according to the 3rd Defendant, are ongoing and are enjoyed by both local and international tourists. This deposition was not controverted by the Plaintiff.

**14.** If the injunction or preservation order is granted as prayed by the Plaintiff, the same will not maintain the status quo as argued by the Plaintiff but actually order the 4th Defendant to vacate the suit property before establishing by way of evidence whether indeed KILIFI/JIMBA/1125 subsumed PLOT NO. 103. Indeed, there are circumstances in which a party may *prima facie* establish a right over a piece of land and have a party who is in possession dispossed of the same at an interlocutory stage if and when the evidence placed before the court warrants that.

**15.** I hasten to add that the above mentioned activities by the Defendants on the suit property should not influence the trial court while determining the issue of proprietorship. The court has a constitutional mandate to do justice to all.

**16.** I have looked at the material placed before me at this stage and hold that even if I was wrong on the issue that this application is Res judicata and an abuse of the court process, the Plaintiff/Applicant has not established a *Prima facie* case with a probability of success neither has she shown that she is likely to suffer irreparable loss that is incapable of compensation if the orders that she has prayed for are not granted.

**17.** For all those reasons and considerations, I dismiss the Plaintiff's application dated 22nd November, 2012 with costs.

Dated and delivered at Malindi this **8th** day of **February**, 2013.

**O. A. Angote**
**Judge**