



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 139 OF 2007

MUENI MUSAU.....PLAINTIFF

=VERSUS=

BREK AWADH MBARAK.....DEFENDANT

RULING

Before me is the Notice of Motion dated 28th October 2011 in which the Applicant by way of prayers (3) and (4) seeks an injunction order to restrain the Respondent, his servants, agents and any other person acting on the authority of the Respondent from disposing off, alienating, mortgaging and/or charging any of the 15 properties, the subject matter of this suit between the two, pending the hearing and determination of an appeal filed in the Court of Appeal challenging the decision of this court in **HCCC 139 of 2007** dated 21st September 2011. Briefly the Applicant had filed a suit before the High Court in Mombasa seeking amongst other reliefs distribution of the suit properties, which she claims were acquired during the course of her marital union with the Respondent. This court in its judgment delivered on 21st September 2011 dismissed the Plaintiff's suit. The Plaintiff has filed an appeal against the decision of this court and in the interim seeks injunctive orders to restrain the Respondent from selling and/or disposing of the disputed properties. **MR. GIKANDI** Advocate argued the application on behalf of the Applicant whilst **MR. ABED** who acted for the Respondent opposed the same.

I have given careful consideration to the submissions made by both counsel in this application. The Applicant has come to court seeking injunctive orders. The rules governing the grant or otherwise of an injunction are well set out in the celebrated case of **GIELLA –VS- CASSMAN BROWN**. Certainly this court cannot purport to sit in appeal over its own decision. That is a function exclusive to the Court of Appeal. However I note that the Applicant is not herself in possession or occupation of any of the cited properties. As such I fail to see how her appeal risks being rendered nugatory. If the Applicant succeeds upon appeal then she may be adequately compensated in monetary terms. I therefore fail to see what prejudice she stands to suffer if the orders sought are not granted.

However I do note [and this did come up during the hearing] that the Respondent allowed the Applicant to collect rent from one house standing on **Plot No. 807/11/MN old Malindi Road** at Soko Mjinga. This she has done from the time of its construction upto very recently. The Applicant relies on this rent for her upkeep. In order not to render her totally destitute and in view of the history of the marriage between the couple I feel that it is only just and fair that the Applicant be allowed to continue to collect the rent from this one house pending the hearing and final determination of her intended appeal. As such I do make

orders that the Applicant not be restrained from collecting and utilizing the rental income from **one** house standing on Plot No. 807/11/MN old Malindi Road at Soko Mjinga as she has always done. **Save only** for this exception the prayers (3) and (4) of the present application seeking injunctive orders are hereby disallowed. No order as to costs.

Dated and Delivered in Mombasa this 20th day of December 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Gikandi for Applicant
Ms. Wachira for Respondent