



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. E053 OF 2025

MANCA

FRANCESCO.

.....PLAINTIFF/APPLICANT

VERSUS

ASMA HAMZA AL-ATTAS.1ST

DEFENDANT

AL-LEITH OMAR BALLETH..... 2ND

DEFENDANT

AND

CHIEF LAND REGISTRAR, NAIROBI..... 1ST INTERESTED

PARTY, DISTRICT LAND REGISTRAR, KILIFI2ND

INTERESTED PARTY.

RULING

1. Before this Court are the 1st and 2nd defendants' Notice of Preliminary Objection (PO) dated May 26, 2025, and the plaintiff's Notice of Motion Application dated June 2, 2025.
2. The plaintiff/applicant's Notice of Motion is supported by the affidavit of Manca Francesco, sworn on the same date, seeking the following orders: an injunction against the 1st and 2nd respondents; in the alternative, ownership of all that parcel of land referenced in Title No. Kilifi/Jimba/439, which the applicant purports to own; and the costs of the application be in the cause.
3. The PO and the Grounds of Opposition deposit that *res judicata* bars consideration of the current suit and application because similar cases with the same cause and parties have already been decided by a competent court, making the earlier judgment binding. The applicant lacks legal standing because he is not the property owner; prior judgments have invalidated the relevant land titles. The plaintiff is accused of '*forum shopping*' for pursuing multiple suits over the same property after exhausting appeals. The plaintiff sued the wrong parties because the land was registered in the name of Ransa Company Limited, not the

defendants. The claim against the defendants is legally flawed and an abuse of the Court process.

4. The Court directed the parties herein to file submissions on the plaintiff's application and the defendants' PO, and to have them heard and disposed of together.
5. I acknowledge receipt of submissions from the parties' counsel with appreciation, as they went a long way toward resolving the issues raised in the pending motions for review.
6. Based on the materials placed before me, the issues I frame for the decision of this Court are whether the PO is sustainable, whether the Court should issue an injunction as pleaded by the plaintiff, and who should bear the costs of the motions.
7. Regarding the raised PO by the 1st and 2nd defendants, they assert that the application and suit dated 21st May 2025, as filed, violate the fundamental doctrine of *res judicata*. The doctrine of *res judicata*, as delineated in Section 7 of the Civil Procedure Act, Cap 21 of the Laws of Kenya, prohibits a court from hearing a suit or issue that has already been directly and substantially adjudicated in a prior case between the same parties or their privies, on the same cause of action.

This principle is intended to promote finality in litigation and to prevent multiple lawsuits concerning the same matter, which could potentially lead to conflicting judgments.

- 8.** They argue that the Court's attention is drawn to the Judgment delivered on 18th February 2014 and the Decree dated 4th March 2014. Under that Judgment, the Court revoked the title document pursuant to Title No. Kilifi/Jimba/439. Upon such cancellation, any subsequent transaction was deemed null and void. By a letter dated 25th March 2014, Hatibu Abdalla Juma, who supposedly sold the parcel of land to the Applicant herein, was ordered to surrender the title document to the Land Registrar for cancellation in accordance with the Court's Decree dated 4th March 2014. The title document annexed by the Applicant in his pleadings is null and void, as it ought to have been surrendered for cancellation almost twelve years ago. As it stands, neither Plot No. 671 Watamu nor Title No. Kilifi/Jimba/439 exists. Plot No. 671, Watamu, was subdivided some time ago, and the proprietary interest in the resultant portions was duly transferred to third parties. Even in the instant suit, the 1st and 2nd Respondents own Plot No. L.R

No. 758-Kilifi, Title No. CR. 64706, and not Title No. Kilifi/Jimba/439, as that Title Number no longer exists.

9. 1st and 2nd respondents highlight that the dispute pertains to the ownership of Plot No. 671, Watamu, and Title No. Kilifi/Jimba/439 commenced in the year 2004 and has dragged on over the years due to the applicant's unnecessary applications (without prejudice) in his fishing expedition in this Court. The Court, vide the Judgment of 18th February 2014, awarded proprietorship of the parcel of land in favor of Ransa Company Limited, which later transferred some interest to third parties.

10. From the proceedings of **Malindi HCC No. 36 of 2004**, as consolidated with **Malindi HCC No. 10 of 2005**, it appears that the applicant herein even initiated judicial review proceedings in 2008, before the suits were heard and determined on the merits. This clearly shows that the applicant herein never had any ownership interest in the parcel of land other than fishing expeditions undertaken to establish a nonexistent claim. The 1st and 2nd Respondents are the registered owners of Plot No. L.R No. 758-Kilifi, Title No. CR. 64706, among other pieces of land, but not Title No.

Kilifi/Jimba/439. As per the judgment of 18th February 2014 and the Decree of 4th March 2014, the Court declared Ransa Company Limited the legal or entitled owner of Plot No. 671, Watamu, after which Ransa Company Limited continued to utilize its property and sold portions thereof to third parties.

11. The 1st and 2nd respondents assert that they have no association or any form of connection with Ransa Company Limited. On what basis is the applicant bringing a suit against them? The relief sought by the plaintiff/applicant in the plaint dated 21st May 2025 does not pertain to the 1st and 2nd respondents, but rather to Ransa Company Limited, with whom the applicant has already engaged in litigation and a final decision has been rendered. The applicant should have returned to **HCC No. 36 of 2004, as consolidated with HCC No. 10 of 2005**, and filed an application therein to present his grievances.

12. The 1st and 2nd respondents contend that the suit against them is therefore an abuse of the Court process and ought to be struck out.

13. Conversely, the plaintiff submits that the defendants herein are the widow and daughter, respectively, of one of

the deceased directors of Ransa Company Limited (the late Omar Khamis Baleth), a necessary party to the instant proceedings. Ransa Company Limited filed **HCC No. 36 of 2004**, which was consolidated with **HCC No. 10 of 2005**, concerning L.R. No. 671, Watamu, CR. No. 23596/1, and Plot No. Kilifi/Jimba/439, seeking to cancel the title to Plot No. Kilifi/Jimba/439 (the suit properties herein). On 24th September 2004, the High Court, in **HCC No. 36 of 2004** as consolidated with HCC No. 10 of 2005, granted an interim order of injunction in favor of Ransa Company Limited, restraining the plaintiff herein from interfering with the ownership of L.R. No. 671 Watamu, CR. No. 23596/1, until the said consolidated suits were determined. In view of the foregoing, the plaintiff herein filed **Malindi Misc Application No. 924 of 2006**, which was transferred to Nairobi and re-designated Nairobi **Misc Application No. 7 of 2007 - Manca Francesco vs. Ransa Company & Others** - seeking orders of *mandamus* and **prohibition**.

14. On 31st October 2006, the Deputy Registrar, High Court of Kenya, sitting in Mombasa, endorsed a recorded Consent in the following terms:

"BY CONSENT The notice of Motion Application dated 19th October 2006 be and is hereby allowed in the following terms: -

(a) THAT orders of mandamus do issue directing the respondents either by themselves, their servants and/or agents to revoke and cancel all entries and record relating to grant No. CR. No. 23596/1 in respect of Plot NO. 671 Watamu.

(b) THAT an Order of Prohibition do issue prohibiting the respondents, their servants and/or agents from henceforth registering any dealings whatsoever in connection with Plot No. 671 Watamu CR No. 23596/1 which could in any manner prejudice the applicant's proprietorship right to Plot No. Kilifi/Jimba/439.

(c) THAT there be no orders as to costs."

15. The plaintiff submits that the above consent was presented to the court and duly adopted on 8th November 2006 as a Court Order in determining the **Judicial Review Case No. 924 of 2006**, thereby effecting orders of *mandamus* and *prohibition* - prohibiting any dealings and registrations that would otherwise prejudice the plaintiff's proprietorship rights to the suit property herein.

16. It is averred that the High Court's ruling in the judicial review proceedings, endorsing the Consent Order dated 31st

August 2006, was appealed before a three-judge bench of the Court of Appeal sitting in Nairobi. By a majority decision, the Court of Appeal upheld the High Court's ruling on 11th December 2015 and affirmed the Consent Order as the Court's order.

17. It is the plaintiff's submission that since 11th December 2015 to date, the said judgment of the Nairobi Court of Appeal remains unchallenged, and neither have the appellants therein complied with the court's suggested actions.

18. On 23rd March 2015, despite the existing Court Orders and determinations prohibiting Ransa Company Limited (its servants and agents) from registering any dealings whatsoever in connection with L.R. No. 671 Watamu CR. No. 23596/1, the said parcel of Plot No. 671 was nevertheless subdivided, and a portion of the subdivision was registered as L.R. No. 758 (Original No. 671/5) in the name of Ransa Company Limited.

19. On December 20, 2019, this parcel of the subdivision known as L.R. No. 758 was transferred to the defendants herein, hence the instant suit. It is the plaintiff's submission

that the proceedings in **HCC No. 36 of 2004**, as consolidated with **HCC No. 10 of 2005**, were brought by Ransa Company Limited as a separate entity from the defendants herein. Nevertheless, the defendants have not only failed to adduce evidence proving that they were the Directors of Ransa Company Limited during the proceedings in **HCC No. 36 of 2004**, as consolidated with **HCC No. 10 of 2005**, but have also failed to attach any Letters of Representation proving that Ransa Company Limited is a property of the Estate of the deceased husband and father to the 1st and 2nd defendants, respectively.

20. The plaintiff avers that, whereas in **HCC No. 36 of 2004**, **as consolidated with HCC No. 10 of 2005**, the cause of action concerned an ownership dispute over L.R. No. 671 Watamu, CR. No. 23596/1, and Plot No. Kilifi/Jimba/439, the instant suit and application present a claim that, despite existing court orders and determinations prohibiting Ransa Company Limited (its servants and agents) from registering any dealings whatsoever in connection with L.R. No. 671 Watamu, CR. No. 23596/1, the said parcel of Plot No. 671 was nevertheless subdivided, and a portion of the

subdivision was registered as L.R. No. 758 (Original No. 671/5) and transferred to the defendants herein - hence the present suit and application.

21. It is the plaintiff's submission that a distinct parcel of land known as L.R. No. 758, which was a subdivision of L.R. No. 671, Watamu, CR. No. 23596/1 was not a subject of **HCC No. 36 of 2004**, as consolidated with **HCC No. 10 of 2005**, and therefore the instant application and suit present a novel cause of action. In view of the above, the plaintiff urges that the defendants' plea of *res judicata* must fail.

22. The doctrine of *res judicata* in Kenya, enshrined in Section 7 of the Civil Procedure Act (Cap 21), bars courts from re-trying any suit or issue that has already been heard and finally decided by a competent court between the same parties under the same title. It prevents abuse of the court process, multiplicity of suits, and ensures finality in litigation, often referred to as "*one bite at the cherry*." The 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."

23. For the doctrine of *res judicata* to apply, the conditions are set out in the leading decisions of **Independent Electoral and Boundaries Commission (IEBC) v Maina Kiai & 5 Others [2017] eKLR** and **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR**. In the latter case, the Court held:

*"...the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see **Karia & Another v the Attorney General and Others [2005] 1 EA 83**).*

24. I have considered the averments regarding the former suit(s). **HCC No. 36 of 2004**, as consolidated with **HCC No.**

10 of 2005, relied upon by the 1st and 2nd defendants, was decided on the 18th day of February, 2014, by Meoli J., as follows:

“I hope I have said enough in the foregoing to demonstrate that the land upon which plot Kilifi/Jimba 439 was purportedly created was formerly Government land already alienated to the Plaintiff vide an RTA lease and therefore legally unavailable for adjudication; that the purported exercise was irregular and cannot withstand the 11 MALINDI H.C.C.C No. 36 OF 2004 sanction of Section 23 (1) RTA; that Manca Francesco in purporting to assert proprietorship over the said property not only wielded an inferior (and) dubious title but trespassed on the Plaintiff's land; and finally that this Court finds that with respect to the land parcel in question, only the Plaintiffs title is valid and indefeasible.”

25. The effect of those orders was the revocation and cancellation of the plaintiff's title, Kilifi/Jimba 439, as having been irregularly created and issued.

26. Conversely, the plaintiffs relied on **Misc Application No. 7 of 2007 - Manca Francesco vs. Ransa Company & Others** (the former suit), reported as **Ransa Company**

Ltd v Manca Francesco & 2 others [2015] KECA 139

(KLR), where the majority bench of the Court of Appeal, with Karanja and Mwera JJA agreeing. Koome JA (now CJ) dissenting, upheld a consent order entered by the parties and affirmed by Wendoh J's decision, which has already been set forth above.

27. The effect of the affirmed consent was the revocation and cancellation of all entries and records relating to Grant No. CR No. 23596/1 in respect of Plot No. 671, Watamu, and the registration of any dealings whatsoever in connection with Plot No. 671, Watamu, CR No. 23596/1, which could in any manner prejudice the applicant's proprietorship right to Plot No. Kilifi/Jimba/439.

28. It is these two conflicting decisions and emanating orders that have resulted in the current suit. The instant suit and application present a claim that, despite existing court orders and determinations prohibiting Ransa Company Limited (its servants and agents) from registering any dealings whatsoever in connection with L.R. No. 671, Watamu CR. No. 23596/1, the said parcel of Plot No. 671 was nevertheless subdivided and a portion of the subdivision

registered as L.R. No. 758 (Original No. 671/5), transferred to the defendants herein - hence the present suit and application.

29. Thus, a distinct parcel of land known as L.R. No. 758, which was a subdivision of L.R. No. 671, Watamu CR. No. 23596/1 was not within the scope of **HCC No. 36 of 2004**, as consolidated with **HCC No. 10 of 2005**. Therefore, the instant application and suit present a novel cause of action.

30. As noted above, there are now two parallel decisions: one from the Court of Appeal, **Judicial Review Case No. 924 of 2006**, limiting the revocation of the plaintiff's title, and another from the High Court, **HCC No. 36 of 2004**, as consolidated with **HCC No. 10 of 2005**, revoking it. This absurd situation appears to have arisen from multiple cases filed on the same issue in different Courts with competent jurisdiction, where the coordinate Courts are unaware of each other's pending cases.

31. Because we have two parallel decisions and orders, the parties are different, and the substratum of the suit property has long since changed as a result of those conflicting orders, *res judicata* may not apply here. One of the parties to

this suit must be misrepresenting the facts. A hearing will be necessary to determine which orders will prevail, particularly given the dissenting voice of Koome JA (now CJ) regarding the pending suits that persisted before the consent in the JR was filed, which has led to the confusion the parties are in.

32. Therefore, the PO fails for the reasons I have stated.

33. Regarding the application for an injunction brought under the Notice of Motion dated June 2, 2025, the plaintiff avers that, despite existing court orders and determinations prohibiting Ransa Company Limited (its servants and agents) from registering any dealings whatsoever in connection with L.R. No. 671 Watamu, CR. No. 23596/1, the said parcel of Plot No. 671 was nevertheless subdivided, and a portion of the subdivision was registered as L.R. No. 758 (Original No. 671/5), transferred to the defendants herein, who have since embarked on erecting permanent structures on the said suit property.

34. In view of the above, the plaintiff submits that it has a right to claim compensation for trespass and to seek a permanent injunction against the defendants. Accordingly,

the plaintiff has established a *prima facie* case with a high probability of success.

35. I did not see the averments in reply to this motion for an injunction, except for the PO, which has been dismissed.

36. Order 40 Rule (1) of the Civil Procedure Rules states as follows:

“Where in any suit it is proved by affidavit or otherwise

—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

37. The principles for the issuance of interlocutory injunctions were articulated in the well-known case of **Giella v**

Cassman Brown & Company Limited [1973] EA 358, reiterated in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**, where 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) allay any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. it is established that all the above three conditions and steps are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.”

38. A *prima facie* case is defined in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, where the Court of Appeal held as follows:

“The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted

unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the

pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

39. At the core of this matter, the applicant contends that his rights in the suit property have been infringed by the defendants, who have trespassed and are bringing building materials and erecting a perimeter wall despite the existence of lawful Court orders emanating from

40. On the other hand, as I have stated, there are conflicting decisions concerning the history of the suit property,

including a High Court decision revoking the title held by the plaintiff, resulting in the alteration of the initial title.

41. Given the scenario we have, and to preserve the substratum of the suit property pending a hearing on the merits to determine which of two decisions should stand, as one must have been obtained by misrepresentation, there lies the new cause of action. I will issue the following orders:

a) The PO dated 24th May 2025 is hereby dismissed because *res judicata* does not apply in this matter, as the parties and the suit property in the former suits are different and the former suits are at convergence.

b) On the motion dated June 2, 2025, the Court will grant the following orders:

- i. Defendants/Respondents are hereby restrained from ferrying construction materials and from continuing to construct a perimeter wall around the suit property and/or from building a permanent structure on the suit property, Kilifi/Jimba/439, until this matter is heard and determined.**
- ii. The OCS Watamu to ensure compliance.**
- iii. Costs to be borne by the respondents.**

Dated, signed, and delivered virtually in Nyeri on this 23rd day of April, 2026.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Kiema for the Plaintiff

Mr. Kazungu for the Defendants.

Dennis: Court Assistant -