



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO.222 OF 2014**

**SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA) LTD T/A**

**SOLACE LIFESTYLE AND WELLNESS RESORT.....PLAINTIFF**

**=VERSUS=**

1. **MARIO RASHID**
2. **MUSA MOHAMED**
3. **BADI MOHAMED**
4. **OMAR MOHAMED**
5. **ANASTACIA KAHAMA**
6. **NZUKI MIUNDE**
7. **BENSON THINGU**
8. **ALI OMAR ALI**
9. **RUTH SYOMBUA**
10. **VERONICA NDUKU**
11. **MUEMA KASANDUKU**
12. **DOMITILA NDUNGE**
13. **MWANZIA**
14. **MBEVO**
15. **MBITHE**
16. **VINCENT KITUKU**
17. **COUNTY GOVERNMENT OF KILIFI.....DEFENDANTS**

**R U L I N G**

**Introduction:**

1. The Application before me was filed by the Plaintiff and is dated 27<sup>th</sup> November 2014. In the Application, the Plaintiff is seeking for the following reliefs:

(a) There be an order of temporary injunction restraining the 1<sup>st</sup> to the 16<sup>th</sup> defendants by themselves, their servants, agents and/or employees from further developing, building and or erecting further unauthorised and illegal development along the beach and shoreline next to, abutting adjoining and/or adjacent to the plaintiff's plot no. 19 Watamu or from further developing, building and/or erecting further illegal and unauthorised structures over the

**plaintiff's easement of a right of way over plot no. 42 Watamu pending the hearing of this application interpartes and thereafter pending the hearing and final determination of this application.**

**(b) That there be a temporary prohibitory injunction restraining the 1<sup>st</sup> to the 16<sup>th</sup> Defendants by themselves, their agents, servants, and/or employees from occupying, using, managing and/or operating all those illegal structures and developments built along the beach and shoreline next to adjacent, adjoining, and /or abutting the plaintiff's plot no. 19 Watamu and from further occupying, using, managing and/or operating the erected illegal structures over the plaintiff's right of easement over plot no. 42 Watamu pending the hearing of this application interpartes and thereafter pending the hearing and final determination of this suit.**

**(c) THAT there by an order of mandatory injunction compelling the 1<sup>st</sup> to the 16<sup>th</sup> Defendants to demolish, destroy, remove and/or take away all those illegal and unauthorised developments on the shoreline and beach next to adjacent, adjoining and/or abutting the Plaintiff's plot No. 19 Watamu and those built and/or developed on the plaintiff's easement of a right of way over plot No. Watamu and/or alternatively the Plaintiff be ordered to demolish the same at the cost of the 1<sup>st</sup> to the 16<sup>th</sup> Defendants and/or that the 17<sup>th</sup> defendant do demolish and/or remove the same pursuant to its powers under the County Government Act.**

2. The Application is premised on the grounds that the Plaintiff is the registered proprietor of plot number 19 Watamu on which it has developed a church and a touristic hotel known as Solace Lifestyle and Wellness Resort; that the Plaintiff is also a proprietor of an easement of a right of way over plot number 42 Watamu and that the 1<sup>st</sup> to the 16<sup>th</sup> Defendants have erected illegal sheds and structures on the beach and shoreline next to plot number 19 and plot 42 Watamu.

3. The Plaintiff's manager deponed that despite the relevant authorities being notified about the illegal structures constructed by the Defendants, they failed to act.

4. It is the deposition of the Plaintiff's manager that the Plaintiff being the proprietor of plot number 19 Watamu is exclusively entitled to the riparian and contiguous beach and shoreline frontage next to, adjacent, abutting or adjoining plot number 19 and to the exclusive proprietorship of the right of way of easement over plot number 42 Watamu.

5. The Plaintiff's manager deponed that the illegal establishments have destroyed the beach frontage environment and that the Defendants are scattering thousands of bio-degradable and non-biodegradable debris to the sea.

#### **The Defendants' case:**

6. The 1<sup>st</sup> Defendant swore a Replying Affidavit on his behalf and on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 8<sup>th</sup> Respondents.

7. According to the 1<sup>st</sup> Defendant, they are members of Watamu Beach Volunteer Group and carry on beach business at Watamu beach.

8. It is the deposition of the 1<sup>st</sup> Defendant that they have been trading in the disputed area which does not belong to the Plaintiff for many years; that they entered into an agreement with the Plaintiff to develop the disputed area in the year 2008 and that they have been recognised and allowed by KWS, the local administration and the Municipal Council of Malindi to use the disputed area.

9. According to the Defendants, they have been licenced to carryout their business and have even installed electricity and water to serve their members and that in the year 2008, the current issue was resolved between them and the Plaintiff.

10. The 17<sup>th</sup> Defendant's Chief Officer deponed that the disputed land is riparian land and is therefore not for the exclusive use of the Plaintiff.

#### **Submissions:**

11. The Plaintiff's advocate submitted that under Article 70 of the Constitution and Section 3 of the Environment Management and Co-ordination Act, the Plaintiff is entitled to a clean and healthy environment.

12. The Plaintiff's advocate submitted that the 1<sup>st</sup> to 16<sup>th</sup> Defendants are in unlawful occupation of both the beach land forming the Plaintiff's hotel and in contravention of the easement rights of the Plaintiff.

13. The 17<sup>th</sup> Defendant's advocate submitted that the Plaintiff has not proved that it is the owner of plot number 19 Watamu; that a transfer document is not prove of ownership and that consequently the Plaintiff does not have locus standi to institute this claim.

14. Counsel submitted that a mandatory order need not be given at an interlocutory stage in the absence of special circumstances.

#### **Analysis and findings:**

15. The Plaintiff's complaint in the Plaint and the current application is that the Defendant's developments on the beach and shoreline abutting plot number 19 Watamu and those erected on the easement of a right of way over plot number 42 Watamu are illegal, wrongful and unlawful.

16. The Plaintiff has annexed on the Affidavit the Transfer document of plot number 19 and the grant of right of way over plot number 42 Watamu dated 10<sup>th</sup> August, 1995. The said transfer and grant of right of way was registered on 13<sup>th</sup> August 1965 as CR 11605 and 11608 respectively.

17. Having registered the transfer in respect of plot number 19 Watamu and the grant of right of way over plot number 42, the Plaintiff's rights over the two parcels of land crystallised.

18. Unless and until the said transfer and grant of right of way are set aside by the court, the Plaintiff's rights over the two suit properties are protected by the provisions of Article 40 of the Constitution, the absence of a Certificate of Title notwithstanding.

19. In any event, the Defendants' case is not that they own the two parcels of land. There case is that they have been allowed by the KWS and the 17<sup>th</sup> Defendant to use the shoreline to carryout their business. Consequently, the issue as to whether the Plaintiff has the locus standi to institute this suit does not arise.

20. In any event, pursuant to the provisions of Article 70 of the Constitution and Section 3 of the EMCA, any person can file a suit to enforce the right to clean and healthy environment. The person does not have to demonstrate that he has incurred loss or suffered injury.

21. The Defendants have not denied that they have put up structures fronting plot number 19 Watamu

and blocking the Plaintiff's easement rights over plot 42, Watamu. The Defendants contention is that the developments they have put up on the beach fronting the two parcels of land were authorised.

22. The only body that is authorised in law to approve developments, whether on private or public land, is the 17<sup>th</sup> Defendant.

23. The 1<sup>st</sup> to 16<sup>th</sup> Defendants have not annexed on their affidavit the approvals that they obtained from the 17<sup>th</sup> Defendant allowing them to put up structures of whatever nature on the disputed land. Consequently, unless and until the 1<sup>st</sup> to 16<sup>th</sup> Defendants produce the approved plans from the 17<sup>th</sup> Defendant, any structures that have been put up on the disputed land remain, prima facie, illegal.

24. Although the 1<sup>st</sup> Defendant has deponed that the Plaintiff allowed the Defendants to develop the disputed area, the handwritten agreement of 25<sup>th</sup> July 2008, annexed on the Replying affidavit shows the contrary.

25. In any event, KWS does not have the legal mandate to authorise development of over public land.

26. The totality of the evidence before me shows that the Plaintiff has established a prima facie case with chances of success.

27. Indeed, the Plaintiff has shown that unless the land fronting plot number 19 Watamu is planned, the Plaintiff's right to a clean and healthy environment may pursuant to Article 70 of the Constitution be infringed upon by the Defendants, thus causing irreparable harm that may not be compensated by way of damages.

28. The Plaintiff is therefore entitled to a prohibitory injunction. Considering that evidence will have to be called during trial to show if the structures that are standing on the disputed land were ever authorised at all, I shall not grant an order of mandatory injunction at this stage.

29. For those reasons, I allow the Application dated 27<sup>th</sup> November 2014 in terms of prayer numbers 3 and 5.

Dated and delivered in Malindi this **20<sup>th</sup>** day of **November** 2015.

**O. A. Angote**

**Judge**



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