



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**ENVIRONMENT & LAND COURT**

**LAND CASE NO.17 OF 2015**

**JESIKA ACHOLA AKO..... APPLICANT**

**VERSUS**

**PAUL BETA AYO.....RESPONDENT**

**RULING**

1. **Jesika Achola Ako**, the Applicant, filed the Notice of Motion dated 7th January 2015 praying for injunction orders pending the hearing and determination of this application and suit. The Applicant has already obtained temporary injunction order exparte on 2nd February 2015 pending the interpartes hearing. The application is based on two grounds on the Notice of Motion and supported by the affidavit sworn by **Jesika Achola Ako** on 27th January 2015.
2. The Respondent, **Paul Beta Ayo** opposed the application through his replying affidavit sworn on 16th March 2015.
3. The parties counsel appeared before the court on 19th June 2015 and agreed to have the application dealt with through written submissions. The Respondent's written submissions dated 5th June 2015 was filed on 25th June 2015. No submissions have been filed by the Applicant and after several mentions the court fixed a ruling date for the application.

4. The main issues for determination are as follows:

- a) Whether the applicant has established a prima facie case with a possibility of success for temporary injunction at this interlocutory stage.
- b) Who pays the costs.

5. The court has considered the grounds on the notice of motion, the affidavit evidence by both parties and the submissions by the respondent and come to the following conclusion:

A) That the applicant became the registered proprietor of **Kisumu/Ojola/606** on 18th January 2014 and got a title deed issued to her on 23rd July 2014. This is the information discerned from the copy of the certificate of official search and title deed annexed to her affidavit.

B) The Respondent had filed a restriction on the title on 30th September 2014.

He has also challenged the Applicant's title on the ground of fraud among others in his replying affidavit, defence and counterclaim. That notwithstanding, this court is obliged to take the Applicant as the owner of the suit land by virtue of the copy of the certificate of title issued in her

favour by the Land Registrar until successfully challenged in accordance with Section 26 of the Land Registration Act No.3 of 2012 which states:

***" 26. (1) The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer on 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, assessment, 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 certificates or title has been acquired illegally unprocedurally or through a corrupt scheme."***

C) That flowing from the finding in "B" above, and the Applicant having established that she is the registered proprietor of the said land, has come within the first principle of the classic case of **Giella – V- Cassman Brown Company Limited** [1973] 358 and ordinarily is entitled to have the Respondent enjoined from interfering with the suit land pending the hearing and determination of the suit land. However, noting that the Respondent's deposition, that he has been in possession of the suit land for years and has some developments on it, and further noting that deposition has not been rebutted the developments should remain intact in view of the counterclaim he has filed against the Applicant.

6. That having found as above the Notice of Motion dated 27th January 2015 is granted in terms of prayer 3 with costs in the cause with a rider that the developments elected on the suit land by the Defendant remain intact pending the hearing and determination of the suit and counterclaim.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

Dated and delivered this **28th day of January 2016**

In presence of;

Applicant Absent

Respondent Present

Counsel Mr Kavuku for Defendant

M/S Aliongo for Onsongo for Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**28/1/2016**

28/1/2016

**S.M.Kibunja J**

Oyugi court clerk

Defendant present

Mr Kavuku for Defendant

Mr M/S Aliongo for Onsongo for Plaintiff.

Court: Ruling delivered in open court in presence of the Defendant, Mr Kavuko for Defendant and M/S Aliongo for Onsongo for plaintiff.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**28/1/2016**