



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE NO. 207 OF 2013**

**DELILA NANYAMA WABUYELE..... PLAINTIFF/APPLICANT**

**VERSUS**

**JAIRUS KHAEMBA SABUNI ..... 1ST DEFENDANT/RESPONDENT**

**JOHN KARIUKI NJUGUNA .....2ND DEFENDANT/RESPONDENT**

**RULING**

1. The application for ruling is the one dated 5<sup>th</sup> December 2013 in which the plaintiff/applicant is seeking temporary orders of injunction to issue against the defendants/respondents restraining them from interfering in any way with the land parcel no. E. Bukusu/S.Kanduyi/1152, pending the hearing and determination of this suit. The applicant claims she is the registered owner of the suit land and the 2<sup>nd</sup> respondent is intent on constructing permanent structures on it. She has cited case law of **Giella Vs. Cassman Brown and Mrao Ltd. vs. American Bank (K) Ltd & 2 others [2003] eKLR** in support her case.

2. The application is opposed by the respondents and each of them has filed affidavit in reply. The 1<sup>st</sup> respondent lay claim to the suitland as purchaser and has narrated in his affidavit how he acquired the same. He later sold the land to 2<sup>nd</sup> respondent who is currently carrying out developments on the land. The 2<sup>nd</sup> respondent annexed copies of photographs of a house under construction and a sale agreement between him and the 1<sup>st</sup> respondent.

3. From the pleadings filed, it seems there are two title deeds in the possession of both parties. The 2<sup>nd</sup> respondent in his document annexed as **JKN – 4** which is a letter dated 6<sup>th</sup> September 2011 issued by the executive officer of the court stated the applicant's title was recalled and destroyed by the court. The applicant denied ever being summoned to court in respect to her title or the same being destroyed. Further in paragraph 17 of the supplementary affidavit, the applicant deposed that the 1<sup>st</sup> respondent was registered pursuant to an order of the court vide Bungoma CMC Land case no. 37 of 2002. In paragraph 20, she says the 1<sup>st</sup> defendant having obtained title to the suit property through fraud has no clean title to pass to a 3<sup>rd</sup> party. The applicant is thus aware that the 1<sup>st</sup> respondent obtained his title using a court order. It is not open for this court at this stage to question the legality or otherwise of the order used to secure the second title. However on the face of it, it is clear the applicant's title was canceled and whether the title she holds is valid can only be determined at the full hearing of the case.

4. In the circumstance of this case, there is a prima facie case put forward by the applicant. However to decide on whether the grant of the injunction is merited, I will consider on whose favour the balance of convenience tilts and also the nature of the loss whether it can be compensated by way of damages. As at 2<sup>nd</sup> July 2013, the records show the 2<sup>nd</sup> defendant is the registered owner of the suit property (copy of certificate of official search annexed as *jkn-3*). He already commenced development on the plot with a house on the lintel level. In my humble view, the balance of convenience tilts in favour of the 2<sup>nd</sup> respondent who is already in possession and is carrying out development. Secondly from the agreement annexed, the value of the suit property is easily discernable and if the plaintiff's suit succeeds then damages payable to her is quantifiable. For the reasons stated, I find this application without merit but order each party to bear their

respective costs.

**DATED** and **DELIVERED** at Bungoma this 30<sup>th</sup> day of October 2014.

**A. OMOLLO**

**JUDGE.**