



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Case 37 of 2012**

**LAIKIPIA UNIVERSITY COLLEGE**

**APPLICANT**

**VERSUS**

**REGISTERED TRUSTEE OF CHILD WELFARE SOCIETY OF  
KENYA..... RESPONDENT**

**RULING**

By a Notice of Motion dated 24/10/2012 the applicant, Laikipia University College seeks the following orders:

1. That pending the hearing and determination of this suit an order of injunction do issue restraining the Respondent either by itself, its agents servants, employees or anybody claiming either in or under its names from in any manner whatsoever entering, depositing materials, staying or in any manner interfering with the applicant's plot otherwise allotted to it by the Commissioner of Lands vide the Letter of Allotment No. 209163/E1/71;
2. That pending the hearing and determination of this suit an order of inhibition be made and issued to inhibit any and all dealings relating to the Applicant's plot issued to it by the Commissioner of Lands vide the Letter of Allotment No. 209163/E1/71;
3. That costs of this application be provided.

The grounds which the application is premised are found in the body of the application and a supporting affidavit sworn by Professor Francis Lelo, the Principal of the applicant, on 24/10/2012.

The applicant's case is that on 20/01/2010 they applied to Municipal Council of Nyahururu to be allocated a plot within the municipality to establish a town campus; that the Municipal Council and the District Development Committee held a meeting which approved the application and the proposed development plan. Subsequently, the Commissioner of Lands allotted the applicant the suit land vide Letter of Allotment No.209163/E1/71 dated 19/7/2012. On 18/10/2012, the respondent encroached on the suit land and erected a perimeter fence. The applicant depones that if the orders are not granted the substratum of this suit shall be lost and the Applicant will suffer irreparable loss and damage.

Irene Mureithi, the managing trustee of the respondent swore a replying affidavit on 6/11/2012. She strenuously opposed the application on behalf of the respondent and gave a background account on the ownership of the suit land. She deponed that the Commissioner of Land allotted the suit land to the respondent vide Letter of Allotment No. 25011/XXXII on 16/3/1999; That the respondent paid the

requisite fees demanded by the Commissioner and took possession of the suit land; On 29/6/2012, the Municipal Council of Nyahuru wrote a letter to the respondent informing them that council had approved establishment of a campus on the suit land. Being aggrieved with the decision, the applicant instituted judicial review proceedings No.65 of 2012 against the Commissioner of Lands, Minister for Lands and Settlement and the Municipal Council of Nyahuru: That the applicant trespassed and destroyed the perimeter fence and buildings erected.

I have considered the application, affidavits sworn in support of each of the rival parties. Being an application for temporary injunction, the strictures enunciated in the famous **Giella V Cassman Brown & Company Limited (1975) EA 358** and later in the **Kenya Commercial Finance Company Limited V Afraha Education Society (2001) 1 EA 8** must be satisfied.

First, the applicant must show that he has a *prima facie* case with a probability of success, secondly, it must be demonstrated that the applicant might suffer irreparable injury if the injunction is not issued and thirdly, should the court be in doubt, it will decide the application on a balance convenience. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the appellant has a *prima facie* case.

In considering whether the applicant has established a *prima facie* case, I shall not dwell into the merits of the case but merely look to see whether the applicant's right has been violated by the respondent. In support of its case, the applicant exhibited a Letter of Allotment dated 19/7/2012 for a plot measuring 2.1 hectares. The applicant accepted the conditions of the allotment and this is clearly shown by payment of the requisite transactions fees which include; land rent, conveyance fees, registration fees, stamp duty and approval fees. The applicant therefore satisfied all the conditions in the letter of allotment.

Similarly, the respondent exhibited a Letter of Allotment dated 16/3/1999 for a plot measuring 6.04 hectares. The respondent also paid the requisite transactions fees but for the Survey Fees. It therefore also satisfied the conditions required for the allotment of the land by the Commissioner.

The anxiety over the matter was attempted to be resolved by the Municipal Council of Nyahuru through a letter dated 19/6/2012, addressed to the respondent. They purported to approve the use of the land by the applicant and offered alternative parcels of land to the applicant. As a result of the double allotment, it is incumbent upon the court to interrogate further the time lines of the allotment to establish priority ownership and whether there was repossession.

It is with no doubt that the date of the respondent's letter of allotment precedes the applicant's allotment. This is further supported by the payment receipts exhibited by both parties.

If there had been repossession of the suit land from the respondent, the Council ought to have complied with **Section 39 (1) of Trust Land Act** which states that:-

**if, in respect of land which is held under a lease granted under this Act-**

**(a) any rent is at any time in arrears for a period of twenty-one days after it first became due;**  
**or**

**(b) there has been any breach of any of the lessee's covenants;**

**the Council may serve on the lessee a notice specifying the rent in arrears, or the covenant or condition broken, or the unlawful possession, as the case may be, and the Council may, at any time after thirty days from the service of the notice, bring proceedings for the recovery of the land in the Resident Magistrate's Court, if the value of the land falls the limits of that court's civil jurisdiction, and to the High Court if it does not.**

There is no evidence that the Council attempted to repossess the plot. Contrary to this, the letter dated 29/6/2012 affirms to me that the suit land had been "earmarked for activities of Child Welfare Society"

(the respondent). For these reasons, the applicant has therefore failed to demonstrate that it has a *prima facie* case with a high likelihood of success.

As to whether the applicant will suffer irreparable injury if the injunction is not issued, Counsel for the applicant submitted that the respondent had begun depositing building materials with intention to commence construction. As this is an allotment, the true value of the land cannot be ascertained. The Commissioner has indicated that there are alternative parcels of land within the municipality. If this is the case, then the applicant will not suffer irreparable injury.

I do further note that the respondent has erected structures on the suit land and is in occupation of the same. The orders sought by the applicant would therefore amount to evicting the respondent from suit land pending the hearing and determination of this suit. This is not the intention of an interlocutory relief.

To this end, the applicant has failed to meet the threshold for grant of interlocutory relief, in the result I decline to grant the orders sought in its application.

**DATED and DELIVERED this 15<sup>th</sup> day of MARCH 2013.**

**L N WAITHAKA**

**JUDGE**

**PRESENT:**

M/S Mureithi holding brief for Mr Ndegwa Wahome for Applicant

Mr Mulindi holding brief for Mr Mbaabu for the Respondent

Stephen Mwangi Court Clerk

**L N WAITHAKA**

**JUDGE**