



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KAKAMEGA**

**Civil Case 10 of 2008**

**JAFRED LUMBASI ..... PLAINTIFF**

**V E R S U S**

**SAMSON SHILACHIRA ..... DEFENDANT**

**R U L I N G**

The subject matter of the suit and of the interlocutory application before me currently is PLOT NO. 14, IKOLI MARKET.

It is the plaintiff's case that in 1994, the said plot was allotted to him, by the KAKAMEGA COUNTY COUNCIL.

He says that he took up possession of the plot and proceeded to build some houses thereon. The said housing units were let out by the plaintiff, as business premises.

However, on 16<sup>th</sup> January 2008, the defendant is said to have chased away the tenant who was occupying the premises. Thereafter, the defendant is said to have forcibly taken over possession of premises.

The actions of the defendant are said to be causing the plaintiff to suffer irreparable injury. It was for that reason that the plaintiff moved this court by a chamber summons, through which he was seeking an interlocutory injunction to restrain the defendant from interfering with the plaintiff's peaceful enjoyment of the suit property.

The defendant failed to file any replying affidavit or grounds of opposition. Also, he had not yet filed any defence to the substantive claim. Therefore, for all intents and purposes, the application was uncontraverted.

Notwithstanding the defendant's failure to respond to the application, I find that there is still an obligation on my part, to give due consideration to the matter. The necessity so to do stems from the fact that courts do not ever give orders simply as a matter of course.

In this case, the plaintiff has disclosed that the defendant took over the occupation of the suit property in January 2008. In effect, the plaintiff or his tenant were no longer in occupation of the property, as at the date when this suit was filed.

Indeed, it is for that very reason that the substantive prayer in the plaint was for eviction of the defendant.

As the defendant was in occupation, what the plaintiff wishes to achieve is the removal of the defendant from the premises. In other words, the plaintiff ought to have been seeking a mandatory injunction, to compel the defendant to vacate the suit property.

Instead, the plaintiff has asked for an interlocutory restraining injunction, which would stop the defendant from;

*“interfering with the applicant’s peaceful enjoyment of the property described as plot no.14 at Ikoli Market..”*

I am afraid that I cannot give a mandatory injunction couched in the nature of a restrictive or restraining injunction.

The plaintiff, by his own concession, is already not enjoying the use of the property. I cannot therefore be heard to give an order to stop the defendant from interfering with something which the plaintiff is actually not enjoying currently.

It is for that reason that I said that if the plaintiff had wished to have the defendant compelled to vacate the premises, he should have asked specifically for such an order.

Secondly, although this is an interlocutory application, the orders sought, if granted, would have determined the substantive suit. I say so because if the defendant is compelled to vacate the premises, so that the plaintiff can thereafter resume enjoyment and the use thereof, the substantive relief, (which was for the eviction of the defendant), would have been effectively granted. Yet the plaintiff has not demonstrated to this court why summary judgement ought to be granted in his favour.

Thirdly, although the plaintiff asserted that he stands to suffer irreparable loss that cannot be satisfactorily compensated in monetary terms, he did not satisfy me in that respect. I so say because the plaintiff disclosed that the business premises had been let out to a tenant, NATHAN I. KUTOTO. The said tenant used to pay rent to the plaintiff.

Therefore, if the tenant was no longer paying rent, I believe that that constitutes the loss being suffered by the plaintiff. In other words, it would appear that the losses are quantifiable in monetary terms. I therefore did not appreciate why the plaintiff was of the view that he could not be satisfactorily compensated in monetary terms.

For all those reasons. I decline to give the orders sought. However, as the defendant has not played any active role in the application, I order that the costs thereof be in the cause.

*Dated, Signed and Delivered at Kakamega, this 16<sup>th</sup> day of October 2008*

**FRED A. OCHIENG**

**J U D G E**