

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 147 of 2005

RAPHAEL KULANKASH LEMPAA.....PLAINTIFF

VERSUS

CHARLES MARIOKO MURAYA.....1ST DEFENDANT

MOLO TOWN COUNCIL.....2ND DEFENDANT

THE ATTORNEY GENERAL REPUBLIC OF KENYA – SUED ON BEHALF OF
THE

P.S. MINISTRY OF LOCAL GOVERNMENT.....3RD DEFENDANT

RULING

On 19th May 2005 the plaintiff filed an application by way of chamber summons brought under order XXXIX rules 1 and 3 of the Civil Procedure Rules seeking an order to restrain the defendants from interfering in any way with the plaintiff's rights, possession and use of L.R. NO. 533/660 (hereinafter referred to as the "*suit premises*") situated in Molo township until the hearing and determination of a suit which he had filed against the defendants.

The application was made on the grounds that the plaintiff was the lawful owner of the suit premises and the defendant had given him notice to remove his building materials therefrom and vacate the same. In his affidavit in support of the application the plaintiff annexed a copy of **Grant No. I.R. 84265** in respect to the suit premises which he said was issued to him sometimes in the year 2000 and he had been in occupation of the same since then and had deposited building materials thereon ready to develop the property. He deposed that all the lawful steps were followed before he acquired the suit premises.

The plaintiff stated that on 12th May, 2005 the second defendant issued him with a notice to remove his building material from the suit premises following a directive which had been issued by the Ministry of Local Government and he feared that unless the court granted the orders as sought he stood to suffer considerable loss. The plaintiff stated that the defendants were alleging that the suit premises formed part of public utility land but he denied the said allegation.

The first defendant filed a replying affidavit to the plaintiff's application and stated that neither the plaintiff nor the chamber summons aforesaid disclosed any cause of action against him as he had neither claimed the suit premises nor visited the same and therefore urged this court to dismiss the plaintiff's suit against him.

The second defendant filed its replying affidavit through its Town Clerk Mr. Isaac Obede Kagia. Mr. Kagia deposed that the 2nd defendant did not allocate the suit premises to the plaintiff and that the revocation of the allotment of the suit premises was done through a directive from the Ministry of Local Government. He contended that the suit premises were public utility land and urged the court to disallow the plaintiff's application.

I have considered the plaintiff's application and the submissions as made by counsel for the applicant herein. The principals for granting interlocutory injunction were well stated in **GIELLA VS CASSMAN**

BROWN & CO. LTD. (1973) EA 358. An applicant has to first show that he has a prima facie case with a likelihood of success and that he stand to suffer irreparable loss unless the orders sought are granted. If the court is in doubt about the first two tests it will decide the matter on a balance of convenience. The applicant herein has annexed a copy of the Grant to the suit premises and other documents showing how the same was allocated to him. The second defendant in its letter dated 11th October 2002 and signed by D. O. Rogito who was then the Town Clerk stated that the suit premises was not an area that had been planned for public utility. The plaintiff also annexed minutes of the second defendant dated 8th October, 2002 which showed that the suit premises was not for public utility. The defendants have not filed any documents to show that the suit premises is indeed earmarked for public utility. In the absence of such evidence, I hold that the plaintiff has established a prima facie case with a likelihood of success. The plaintiff also stands to suffer loss if he is compelled to remove his building materials which are on site. Though in my view such loss cannot be termed as irreparable as he can be compensated for the cost of removing the same if it turns out that the suit premises were illegally allocated to him given that the defendants have not brought any evidence to challenge the plaintiff's averments. I see no basis of refusing the orders of injunction as sought by the plaintiff. However, I do not seem to understand the basis of the plaintiff's suit as against the first defendant. In paragraph 8 of the plaint the plaintiff averred that the first defendant has always attempted to have the suit premises allocated to himself and an allegation which had been denied by the first defendant. There is no averment in the plaintiff's affidavit in support of his application to link the first defendant to the allegations which he has made against him in the plaint. In the circumstances I agree with the first defendant that he has been wrongfully sued and I hereby strike out the plaintiff's suit against the first defendant and award costs of the suit to the first defendant.

The plaintiff's application dated 19th May, 2005 is granted as against the second and third defendants. The plaintiff will have the costs of the said application.

DATED, SIGNED AND DELIVERED at Nakuru this 10th day of March, 2006.

D. MUSINGA

JUDGE