

IN THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 172 OF 2003

NELSON MWANZIA KIVUVANI.....PLAINTIFF

V E R S U S

CITY COUNCIL OF NAIROBI.....DEFENDANT

R U L I N G

By Chamber Summons dated 25.2.2003 the Applicant seeks an order of injunction under Order 39 Rule 1(a) 2, 2A 1, 3(2) 3 to restrain the Defendant or its agents/servants from evicting the Plaintiff from the suit premises or from quiet possession and enjoyment thereof. The Plaintiff is an allottee of LR No. 209/13539/211 House No. 143 (186/79) Joseph Kangethe Road Nairobi having on 8.6.94, paid standing premium of Kshs.1,110,000/- as was demanded in the letter of allotment. He also paid other amounts amounting to about Kshs.112,000/- and settled in the premises, but on 24.2.2003 he was served with a notice dated 17.2.2003 asking him to vacate in 7 days because he was in rent arrears. He says he is proprietor and the demands are unwarranted and ought to be stopped but the Town Clerk Jack Mbugua in a replying affidavit of 12.3.2003 says that the minutes of the Council talking of the allotment were as a result of personal greed and self interest affecting all the three parties, the Council, the buyer and the vendor, that Section 144(6) of Cap 265 was not complied with and that the ministerial consent was not obtained for purposes of alienating the suit premises hence on realization the Council nullified the purported alienation. The parties have therefore, been notified.

Mr. Njagi counsel for the Defendant submitted further on this point saying that injunction cannot issue to protect the Plaintiff since the transaction is illegal.

Section 144(6) of Local Government Act Cap 265 provides that: - (Section 144(6)).

“Subject to the case of land acquired in pursuance of subsection (2) to the provisions of Land Acquisition Act, or to any written law replacing that Act, a local authority may with consent of the Minister –

(a) sell any land which it may possess and which is not required for the purpose for which it was acquired or being used; -

(b) exchange any land which it may possess for any other land either with or without paying or receiving any money for equality of exchange.”

This is a statutory provision and it shows that the council is authorized to sell but the Minister’s consent must be had. Where a power has been created like power created here to the Council to sell land, that power must be executed in the manner prescribed i.e. by consent of Minister. It is therefore unlawful to sell without that consent.

The question is whether injunction should issue. Relying on the authority of **GIELA V. CASSMAN BROWN LTD. 1978 EA** 358. I do not see that there is any prima-facie case. Plaintiff would not have a cause of action because of illegal basis of the transaction. It is policy of the law to support that which is legal. Besides, grant of temporary injunction is a discretionary jurisdiction and discretion cannot be exercised to defeat the operation of a statute.

If the Council misled the Plaintiff purchaser in any way whatsoever in entering into this transaction, I believe damages can compensate him. Otherwise, I think the balance of convenience is on supporting the statute and not illegality.

For these reasons, I decline to grant injunction and dismiss the application with costs.

DATED at Nairobi this 11th day of July 2003

A.I. HAYANGA

JUDGE

Read to Mr. Nyandoro for Plaintiff

No appearance for Defendant