



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. CASE NO. 336 OF 2013**

**DAHIR MOHAMED BURALE..... PLAINTIFF/APPLICANT**

**VERSUS**

**MUNICIPAL COUNCIL OF MAVOKO....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ST. JOSEPH'S CATHOLIC CHURCH....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 8<sup>th</sup> March 2013 in which the Plaintiff/Applicant is seeking for orders of a temporary injunction restraining the Defendants from evicting the Plaintiff or trespassing, charging, alienating, subdividing or from dealing with the parcels of land known as L.R. Nos. 26699/29/12 and 26699/29/13 (hereinafter referred to as the “suit properties”) pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks for costs of this Application to be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Dahir Mohamed Burale, sworn on 8<sup>th</sup> March 2013 in which he averred that by an Allotment Letter dated 22<sup>nd</sup> November 2007, the 1<sup>st</sup> Defendant allocated to him the suit properties. He produced copies of the two allotment letters. He however also stated that he bought the suit properties from one Reverend Maschak Sami Ngutu. He added that after the said allocation, he went into occupation of the suit properties. He then averred that it has now come to his attention that the 3<sup>rd</sup> Defendant purportedly issued to the 2<sup>nd</sup> Defendant an allotment letter in respect of the same parcel of land on 16<sup>th</sup> November 2010 much later after he was allocated the suit properties. He further stated that the 3<sup>rd</sup> Defendant’s action was illegal, fraudulent and amounts to a violation of his entitlement to the suit properties. He further stated that the 2<sup>nd</sup> Defendant has threatened to evict him out of the suit properties necessitating him to file this suit.

The Application is contested. The 2<sup>nd</sup> Defendant filed the Replying Affidavit of Monsignor Alfons Mondiu sworn on 17<sup>th</sup> April 2013 in which he averred that he is the Diocesan Vicar-General of the Catholic Diocese of Machakos Registered Trustees under whose jurisdiction the 2<sup>nd</sup> Defendant falls. He

further averred that the Plaintiff did not disclose to the Honourable Court all the material particulars relating to the suit properties. He stated further that on 30<sup>th</sup> August 2010, representatives of the 2<sup>nd</sup> Defendant made an application to the 3<sup>rd</sup> Defendant the Commissioner of Lands requesting to be allocated the parcel of land known as L.R. No. 26699/29 (the “property”), a public utility plot, for the purposes of constructing a nursery school and related church developments for the benefit of the community. He produced a copy of that letter. He further stated that on 16<sup>th</sup> November 2010, the 2<sup>nd</sup> Defendant received an allotment letter from the 3<sup>rd</sup> Defendant allotting them the property. He produced a copy of the allotment letter. He further stated that the property was initially owned by the Numerical Machining Complex who surrendered the same to the 3<sup>rd</sup> Defendant for the use as public utility plots. He stated that this raises doubt as to the circumstances of allocation of the suit properties to the Plaintiff. He further confirmed that the 2<sup>nd</sup> Defendant paid all the required allotment fees after which the 3<sup>rd</sup> Defendant issued to the 2<sup>nd</sup> Defendant a title document for the property a copy of which he produced. He also confirmed that the 2<sup>nd</sup> Defendant has been using the property for the purpose of worship and community public utility and has already procured the construction of a nursery school, a multipurpose hall, one guard house and a septic tank after obtaining all the required planning and construction approvals from the 1<sup>st</sup> Defendant. He emphasized that the 3<sup>rd</sup> Defendant has all the records to show that the 2<sup>nd</sup> Defendant is the rightful and registered owner and proprietor of the property and is in possession of a validly issued title deed but further stated that the allotment made to the Plaintiff was irregular as the Plaintiff has failed to produce any title deed to the suit properties. He further added that the Plaintiff had failed to produce any approvals from the relevant authorities authorizing the developments he had made on the suit properties.

The issue that I have to determination in this Application is whether I should grant to the Plaintiff the orders of temporary injunction he seeks against the Defendants. In deciding whether to grant the temporary injunction sought after by the Plaintiff, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

**“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

Has the Plaintiff made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

**“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

Looking at the facts of this case, the Plaintiff has based his claim to ownership of the suit properties by producing to this court two letters of allotment. The letter of allotment dated 22<sup>nd</sup> November 2007, which is in respect of Unsurveyed Plot No. 26699/29/12, is in his name and is signed by one Tubmun A.K.O. Otieno who is named as the Town Clerk of Mavoko Municipal Council. The other letter of allotment dated 24<sup>th</sup> August 2007, which is in respect of Unsurveyed Plot No. 26699/29/13, is in the name of one Reverend Mashack Sami Ngutu. This latter letter of allotment is also purportedly signed by one Tubmun A.K.O. Otieno who is named as the Town Clerk but the letter is not on a letterhead. Further the signatures on both letters of allotment differ though they are both signed by the same person. While the Plaintiff states that he bought the latter plot from the named Reverend Mashack Sami Ngutu, no sale agreement is annexed. Both letters of allotment produced by the Plaintiff indicate that “the final letter of allotment will come from the Commission of Lands after subdivision scheme is finalized”. No such letters of allotment

from the Commissioner of Lands have been produced by the Plaintiff in respect of the suit properties. Further, no title deeds in respect of the suit properties were produced by the Plaintiff to this court. On the other hand, the 2<sup>nd</sup> Defendant, which has also laid claim over the property has produced to this court the letter of allotment issued by the 3<sup>rd</sup> Defendant together with the title deed in respect of the property. In this scenario, it is quite clear to me that the Plaintiff's claim to the suit properties is weak owing to the documents of ownership he has produced as contrasted to the 2<sup>nd</sup> Defendant's claim which is supported by nothing less than a title deed to the property. In the circumstances, I find that the Plaintiff has failed to establish a prima facie case with high chances of success at the main trial.

Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

**“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”**

In light of the foregoing, I hereby dismiss the Plaintiff's Application. Costs shall be in the cause.

**SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup>**

**DAY OF SEPTEMBER 2014.**

**MARY M. GITUMBI**

**JUDGE**