



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
PETITION NO. 4 OF 2015

DAVID NGUGI ELIJAH.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF EMBU.....1ST RESPONDENT

THE SECRETARY, EMBU COUNTY GOVERNMENT.....2ND RESPONDENT

R U L I N G

1. This is the application dated 25/6/2015 seeking that the court prohibits the respondent from requiring the petitioner to hand over House No. 9 in Blue Valley, the respondents and their agents be restrained by court from interfering with the petitioner's quiet possession and occupation of the said house until the application and petition are heard and determined.
2. The application is supported by the affidavit of David Ngugi stating that he was served with a notice on 30/6/2015 by the 2nd respondent directing him to hand over House No. 9 at Blue Valley.
3. Upon inquiring from the secretaries office he was vaguely informed that somebody was interested in occupying the said house. The respondent declined to give him ample time to organize himself notwithstanding that the action was in excess of their powers. He was never granted a fair hearing before the respondent. He has lived in the said house for over 35 years and should be given priority over the unknown county government employee. The applicant argues that the respondents' allegation that there is acute housing shortage of employees is a flimsy excuse and that he stands to suffer irreparable loss if the order sought is not granted.
4. In the replying affidavit sworn by the Country Secretary of the 1st respondent, it was stated that the 1st respondent inherited all the assets from the former Embu Municipal Council including house number 9 Blue Valley. On 30/4/2015 the petitioner was served with two months notice and was required to hand over vacant possession of the said house. The notice clearly gave the reasons for the eviction. The house is designated for occupation by the employees of the 1st respondent and the petitioner has not explained why he continues to occupy the house yet he is not an employee. The respondent has not violated any rights of the petitioner as adequate notice was given.
5. The 1st respondent argues that it is entitled to terminate the tenancy in accordance with the lease agreement. The unlawful occupation was discovered during an audit that the petitioner is not an employee of the 1st respondent yet he has been occupying the house while the respondent continues to suffer acute housing shortage. The 1st respondent intention is to recover all its assets and refurbish them

for purposes of allocating them to their needy employees. No public participation is required before the 1st respondent can allocate houses to its employees.

6. In a supplementary affidavit, the petitioner stated that that the 1st respondent's houses are occupied by both employees and non employees. The respondents have not annexed other notices given to other tenants. The other tenants have reliably informed the applicant that they have not been served with notices. He was also reliably informed that some officials of the 1st respondent want to evict him from the house so that they can give the house to someone else. The respondent has never made a resolution affecting its stakeholders without involving them and the general public.

7. Both parties filed written submissions.

8. The applicant/petitioner stated that he is a businessman and has been occupation of the said house for over 35 years. The 1st respondent has a responsibility of utilizing tax payers' money appropriately, providing housing, water for the benefit of the public especially the residents of Embu County. The applicant's rights have been grossly violated as he has been discriminated on the basis that he is not a employee of the 1st respondent. Any projects affecting the public must be subjected to public participation. Article 39, 40 and 47 of the Constitution guarantee the petitioners right to reside in any part of the republic.

9. Section 20 of the Urban Areas and Cities Act No. 13 and Section 6(6) of the County Government Act require that board of cities and municipalities must involve the residents of the county in decision making. The 2nd respondent did not annex any documents indicating that there was a resolution requiring the petitioner to hand over the house. The petitioner's tenancy is therefore being terminated arbitrarily.

10. The respondents submitted that the petitioner was served with two months notice dated 30/4/15. The petitioner obtained the tenancy during his employment in the civil service and the tenancy became void upon termination of his employment. Section L.11 (1) of the Civil Service Code of regulations requires an officer to vacate his quarters not later than 60 days from the date he ceases duty. The extension is allowed only on condition that the officer pays the market rent for the quarter.

11. The County conducted public participation concerning its housing policy at Kangaru Girls High School and Embu Social Hall as evidenced by annexure DNN1 and DNN2. The petitioner did not even require notice as his tenancy ended a long time ago. The petitioner relies on Article 27 of the constitution which provides for equality and freedom from discrimination. This must however be balanced with Article 24(d) which provides for the need to ensure enjoyment of rights and freedoms of individuals.

12. The petitioner can only allege discrimination if the houses were being sold and he was not given priority. It's unfair for the 1st respondent to spend tax payers money renting houses for its employees while the petitioner illegally holds the house. The 1st respondent is the rightful owner of the property and has the right to terminate the tenancy in accordance to the lease or tenancy agreement. The 1st respondent is under no duty to perform public participation to make decisions regarding assignment of houses to its employees.

13. The principles of granting an injunction were restated by the court of appeal in the case of **GEORGE GITAU WAINAINA VS KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2015] eKLR** the court cited the case of **GIELLA V CASSMAN BROWN CO LTD [1973] EA 358** where it was held that in order to grant an injunction, the court must be satisfied that;

- *the applicant has established a prima facie case with a probability of success*
- *the applicant stood to suffer irreparable loss which could not be compensated by an award of damages*
- *if the court is in doubt, the application would be determined on a balance of probability*

14. The applicant in his supplementary stated that he is a business man. He is therefore neither a civil servant nor an employee of Embu County. The applicant has also not rebutted the fact that he ceased to

be a civil servant a long time ago. It is not in dispute that the house in dispute belongs to Embu County.

15. The applicant acquired tenancy in his capacity as a civil servant and has since retired. It is not in dispute that Civil Service Regulations require that an officer who retires by virtue of his employment should vacate the house within two months after retirement. The applicant did not vacate the house as required and neither did he acquire new tenancy in another capacity.

16. The respondent wants its house back and has given two months notice which is adequate notice for the applicant to look for another house. The argument that the respondent has leased (about) 500 houses to both employees and non-employees does not aid the applicant. It has not been demonstrated that the respondent has discriminated against the applicant by asking him to vacate the house.

17. In the case of **GEORGE GITAU WAINAINA VS KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2015] eKLR** the court cited the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] eKLR** where it was held that

"a prima facie case in civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to 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"

18. The applicant has not demonstrated that he has a right over the house. In view of the fact that the 1st respondent is the rightful owner of the house in dispute and the applicant is not a civil servant or an employee of the 1st respondent, the applicant has not demonstrated that there exists a right which has been apparently infringed by the respondents. In absence of this proof, the applicant has not demonstrated a *prima facie* case to justify granting the orders sought.

19. The applicant must show that if the orders sought are not granted, he is likely to suffer irreparable loss. Other than stating that he has been an occupant of the said house for a period of over 35 years, the applicant has not demonstrated that he will suffer irreparable loss and that the same cannot be compensated by way of damages. If there is any damage likely to be suffered may be compensated by way of damages.

20. If the court is in doubt, the application should be determined on a balance of probability. This principle was explained in the case of **FILMS ROVER INTERNATIONAL VS CANNON FILM SALES LIMITED [1986] 3ALL ER 772** cited in the case of **GEORGE GITAU WAINAINA VS KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2015] eKLR** (supra) where the court held that in granting an injunctive relief:-

"a fundamental principle of...that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to be 'wrong' "

21. The balance of convenience in this application does not tilt in favour of the applicant. There is no injustice likely to be suffered by the applicant in the event that the orders sought are refused.

22. From the foregoing analysis, I find that the applicant has not satisfied this court on the requirements of granting an injunction. This application lacks merit and is hereby dismissed with costs to the respondent.

23. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF SEPTEMBER, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Ndorogo for petitioner'

Ms. Muriuki for Kinyua Njagi for respondents