



**REPUBLIC OF KENYA**

**High Court at Embu**

**Civil Case 50 of 2012**

EMBU DISTRICT CO-OP. UNION .....PLAINTIFFS/APPLICANT

VERSUS

COUNTY COUNCIL OF EMBU..... 1<sup>ST</sup> DEFENDANT/RESPONDENT

KENYA POWER & LIGHTING LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT

**R U L I N G**

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This is the Notice of Motion dated 29/3/2012 and brought under Order 40 rule 1 Civil Procedure Rules for the following orders;

- 1. Temporary injunction be issued against the Defendants' agents from demolishing two (2) permanent houses in plot No.1498 Embu town or interfering with the said plot in any way pending the hearing and determination of the application herein and thereafter pending the hearing of the suit.**
- 2. That the 2<sup>nd</sup> Respondent be ordered to restore electricity supply in the two (2) permanent houses in the plot No.149 Embu town pending the hearing of the application herein and thereafter pending the hearing of the main suit.**

The same is grounded on two reasons and these are that the Respondents have intimated that they will demolish the two houses on plot No.1498, which houses belong to the Plaintiff.

Secondly the 2<sup>nd</sup> Respondent had disconnected power to the two houses for no good reason.

The application is supported by the affidavit of Luka Murithi the Plaintiff's manager. The 2<sup>nd</sup> Defendant filed grounds of opposition dated 18/4/2012 and filed on 23/4/2012. The main ground is that the 2<sup>nd</sup> Defendant is the registered proprietor of the land L.R. Embu/Municipality/1498.

A replying affidavit was filed by the 1<sup>st</sup> Defendant through its clerk. He states that the plot in issue is public land and was never allocated to the Plaintiff. The 1<sup>st</sup> Defendant also denies allocating the 2<sup>nd</sup> Defendant with the said plot. The 2<sup>nd</sup> Defendant also filed a replying affidavit by Maina Buku the Senior Property Officer in which she explains how the 2<sup>nd</sup> Defendant came to own the property in question.

All Counsels agreed to dispose of the application by written submissions. In his submissions Mr. Mugambi for the Plaintiff/Applicant submitted that the title by 2<sup>nd</sup> Defendant was illegally acquired as the 2<sup>nd</sup> Defendant was not involved. He further states that the 2<sup>nd</sup> Defendant arbitrarily disconnected electricity from the two (2) houses. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondents relied on the submissions filed by Mr. Wahome for 2<sup>nd</sup> Defendant/Respondent. They submit that the Plaintiff had not produced any document to confirm being an allottee and owner of the houses complained of. And further that what was issued was a Temporary Occupation Licence to Embu Coffee Co-operative Union who is not the Plaintiff.

The 2<sup>nd</sup> Defendant also submits that there is no contract between the Plaintiff and the 2<sup>nd</sup> Defendant. And that the Plaintiff is not privy to the contract between it and its customers, and has not satisfied the conditions set out in Order 1 rule 8 and 12 Civil Procedure Rules for filing a representative suit.

I have considered all the material presented herein plus the submissions. The Plaintiff/Applicant has come before this Court for one main order of temporary injunction barring the 2<sup>nd</sup> Defendant from demolishing its two houses built on plot land parcel Embu/Municipality/1498. From the affidavits filed herein it has been revealed that both the Plaintiff/Applicant are claiming ownership of this plot. The Plaintiff/Applicant says as Embu Coffee Co-operative Union the 1<sup>st</sup> Defendant allocated this plot to it in 1956 and even allowed it to construct houses for its staff. It therefore put up the two houses. However the 1<sup>st</sup> Defendant has all along acted reluctantly when asked for a lease.

The case of the 2<sup>nd</sup> Defendant is that they are the registered owners of the plot. A certificate of lease issued in 2010 was produced. And they are simply utilizing what is theirs. The 1<sup>st</sup> Defendant through its clerk in the replying affidavit states that as far as it is concerned the plot in issue is public land and the Council has never allocated it to any one let alone the Plaintiff and/or the 2<sup>nd</sup> Defendant.

From the photographs produced herein I can see two permanent houses plus several electric poles and wires on the plot in issue. The principles for issuing an injunction were enunciated in the case of **GIELLA -VS- CASSMAN BROWN [1973] E.A. 353**. And they are;

- 1. The Applicant must establish a *prima facie* case with chances of success.**
- 2. The Applicant must show that if the order is not issued it will suffer irreparable harm which can't be compensated in monetary sum.**
- 3. If 1 & 2 fails then the Court would look at the balance of convenience.**

Assuming that the Embu Coffee (Co-operative) Union Limited is the same as the Plaintiff, I do find that they were issued by the Embu Local Land Board with Temporary Occupation Licences in respect of unnumbered plots (L.M.1). It has not been shown to this Court that the plot in issue is an unnumbered plot or is among the unnumbered plot.

Secondly the 1<sup>st</sup> Defendant which is the one to allocate plot has through its clerk indicated that plot No.1498 is Public land and has **NEVER** been allocated to the Plaintiff herein. As it was alleged by the Plaintiff that they own the plot and the houses, it was the duty of the Plaintiff to prove that. The minutes (LM1) confirms there was approval for issuance of Temporary Occupational Licences on 5/7/1956. It is now 57 years and they have never been registered as the owners. There must be a real good reason why this has not been done. On the other hand the 2<sup>nd</sup> Defendant has produced a certificate of lease issued to

the 2<sup>nd</sup> Defendant on 28/7/2010. (K/535(K)VI) and a registration of the lease (K/535(K)V. At this preliminary level the Court is not digging into the evidence to determine who the owner of the plot is. That will be for the trial Court. Before this Court is a certificate of lease issued to the 2<sup>nd</sup> Defendant after compliance with all conditions after the issuance of the letter of allotment dated 9/6/2006 K/535 (k)/1. The Plaintiff does not have any letter of allotment save for the extract of minutes approving the issuance of Temporary Occupational Licences. For sure the Occupation can not remain temporary for 57 years. I stand guided by the case of **DR. JOSEPH N.K. ARAP NGOK -VS- JUSTICE MOIYO Ole KEIRWA & 4 OTHERS CIVIL APPLICATION NO. NAIROBI 60/97** where the Court stated;

**“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter of allotment and actual issuance thereafter of the title document pursuant to provisions held”.**

The Plaintiff has submitted that the documents by the 2<sup>nd</sup> Defendant were fraudulently obtained. That is a matter of evidence which will be dealt with by the trial Court. My finding on the first principle is that the Plaintiff having failed to prove ownership *prima facie*, the Court can't stop the 2<sup>nd</sup> Defendant from doing what it deems fit with its property.

Coming to the 2<sup>nd</sup> principle its clear that no value has been attached to the two houses. The Plaintiff will also have to prove that it is the one that put up the houses. It has not been shown that if there was to be any compensation by the responsible party they would be unable to compensate. It is the position in law that in cases of double allocation (which is yet to be proved) the appropriate remedy is damages. Ref: **AMRITAL -VS- CITY COUNCIL OF NAIROBI [1982] KLR 75.**

The electricity bills produced herein are for persons who are not parties to this suit. They are not represented by the Plaintiff/Applicant as is envisaged in Order 1 rule 8 Civil Procedure Rules. Orders cannot therefore be issued to benefit them.

In the circumstances I find the application dated 29/3/2012 to lack in merit and I dismiss it with costs. I also find that this matter concerns ownership/title to land which this Court does not have jurisdiction to hear. The land being within the centre of Embu town must be of high value.

Secondly the issues involved would call for hearing of the matter by the Environment & Land Court. I therefore transfer the matter to Kerugoya High Court (ELC) for hearing and determination, as the value exceeds the Chief Magistrate's jurisdiction.

Right of appeal explained.

**DATED AND DELIVERED AT EMBU 16<sup>TH</sup> THIS DAY OF APRIL 2013.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of;**

**M/s Nyaga for Plaintiff/Applicant**

**Njue – C/c**