



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CAUSE NO. 17 OF 2017**

**JOSEPH TOBIKO KELEMPU.....1ST PLAINTIFF**

**VERSUS**

**COOPERATIVE MANAGEMENT COMMITTEE OF EMPARNAT FARMERS DAIRY**

**COOPERATIVE SOCIETY LIMITED.....DEFENDANT**

**RULING**

The application before this court is a notice of motion dated the 7th February, 2017 brought pursuant to section 1A, AB, 3,3A and 63 of the Civil Procedure Act and Order 40 Rules 1& 2 and Order 51 of the Civil Procedure Rules.

The Plaintiff is seeking for the following prayers:

1. spent

2. spent

3. THAT a temporary injunction be issued restraining the defendant, it's agent or servants or members or anybody claiming from it from trespassing, alienating, damaging, or in any way interfering with the Plaintiff/Applicant's peaceful occupation of plot no. 1556 and 1557 Business IL Bissil Trading Centre, pending the hearing and determination of this suit.

The application is premised on the following grounds:

- i. That the Plaintiff is the owner of plot no. 1556 and 1557 Business IL Bissil Trading Centre.
- ii. That the Defendant or its agent have encroached on the aforementioned plots and erected temporary structures.
- iii. That the Plaintiff has been in possession from 2005 to date.
- iv. That the Plaintiff stands to suffer irreparably.

The application is supported by the affidavit of JOSEPH TOBIKO KELEMPU who is the Plaintiff. He states that he is the owner of plots no. 1556 and 1557 Business IL Bissil Trading Centre and has been in possession of the said plots from 2005 and paid rates. He avers that the Defendant has no genuine claim to the suit parcels of land. He states that on 4th February, 2017 the Defendant's members and agents encroached on the suit parcels of land, built temporary structures thereon and started selling milk. The

Plaintiff contends that his structure and fence was destroyed and he incurred losses. The Plaintiff annexed copies of the Letter of Allotment from OL Kejuado County Council dated 5th October, 2005, Property Search Certificate, Certificates of Official Search, receipts showing payment of land rates and a letter from the National Land Commission where he had lodged a complaint.

The Defendant opposed the application and filed a replying affidavit sworn by REBECCA MUGIE who is the Secretary to the Defendant. She averred that they have never encroached on plots 1556 and 1557 respectively. She stated that the Defendant was allocated Plot No. 48 IL Bissil Trading Centre for its 400 members to use for the communal benefit of selling and marketing milk. Further that after the allotment, the County Surveyor placed beacons on the said Plot No. 48 IL Bissil Trading Centre on 22nd July, 2016. She avers that on 24th July, 2016 the Defendant/Respondent's members deposited fencing and construction materials on the said plot only for the Plaintiff/Applicant to stake a claim that he was the owner of the plot. That despite requesting the Plaintiff to meet with them at the County Land Board he declined. Further that their representatives went to the County Land Board over a letter they received from the National Land Commission where the Plaintiff had lodged a complaint claiming ownership of the suit land but on 11th August, 2016 the Plaintiff failed to appear for the proposed meeting to resolve the issue. They were then authorized by the said County Land Board to proceed with their activities at the Plot No. 48 IL Bissil Trading Centre. She avers that the said plots are allotment and are subject to the terms and conditions contained in the Letter of Allotment and also consent of the County Land Management Board.

The application was canvassed by way of written submissions from both the Plaintiff and Defendant.

### **Issues and determination**

The court has considered the materials presented and arguments canvassed by the respective parties in respect to the Notice of Motion dated 7th February, 2017 and analyzed that the following are the issues for determination:

- whether the Plaintiff is the lawful owner of plots no. 1556 and 1557 Business IL Bissil Trading Centre
- Whether the Defendant has encroached on the Plaintiff's plots.
- Whether the Defendant is in lawful occupation of Plot No. 48 IL Bissil Trading Centre.

From the Applicant's arguments within the written submission, it is not in dispute that he was allocated plots no. 1556 and 1557 Business IL Bissil Trading Centre in 2005. Further that as at 2016 the Certificate of official Searches conducted at the County Lands Office, annexed to the supporting affidavit reveal that the Plaintiff is the owner of the two plots. The receipts exhibited by the Plaintiff show that he paid Land rates from 2005 until 2016. The Defendant on the other hand has produced a Letter of Allotment issued by the County Government of Kajiado on 12th July, 2016; A Survey Report from the Survey Department where it was recommended that the Defendant be allocated site 48; and a map showing site 48. Both parties have documents to prove their claim.

The threshold of granting interlocutory injunction were settled in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358** where the court held inter alia that for an injunctive order to be granted the Applicant has to demonstrate it has prima facie case with a probability of success, and it stands to suffer irreparable loss or injury which cannot adequately be compensated in damages. If the court is in doubt, it should decide the application on a balance of convenience.

Bearing this principle in mind, it is upon this honourable court to interrogate whether the applicant has demonstrated a prima facie case with a probability of success at the trial. First I must say know from a legal stand point that letters of allotment are not documents of title. This position is affirmed by Kimondo J. in **Stephen Mburu & 4 Others vs Comat Merchants Ltd & Anor [2012] eKLR** when he had this to say on whether a Letter of Allotment amounts to title to land;

*“... from a legal standpoint, a letter of allotment is not a title to property. It is a transient and*

***[is] often a right or offer to take property”***

Although the Plaintiff was issued with a Letter of Allotment sometime on 5th October 2005 for plots 1556 and 1557 IL Bissil Business Centre respectively, condition No. 2 in the said letter stated that the council may repossess (without compensation) any plot that remains undeveloped 2 (two) years after allocation. In the case at hand, the Plaintiff has failed to demonstrate whether he developed the two plots and only alleged that his fence was brought down.

It is also evident from the receipts annexed to the Plaintiff's supporting affidavit that he ceased paying for the land rates and rent in 2016. Secondly, the Plaintiff has not indicated whether he has been undertaking business on the suit parcels. The Defendant on the other hand has stated that its members' are selling and marketing milk on the suit parcel, which position is also confirmed by the Plaintiff. From the foregoing, it is clear that the Plaintiff will not suffer any irreparable injury if the order sought is denied.

From the documents presented, the plot numbers for both the Plaintiff and Defendant are different, the issue of determining the real owner of the suit parcels cannot be handled by way of affidavit evidence and must proceed to full trial.

The upshot is that the Plaintiff has failed to establish a prima facie case that would warrant granting of the orders of injunction. If there was a wrong, the Plaintiff can be compensated by way of damages. The notice of motion dated 7th February, 2017 is not merited and is consequently dismissed entirely with costs.

**Dated signed and delivered in open court at Kajiado this 2nd day of May, 2017.**

CHRISTINE OCHIENG

JUDGE

**REPRESENTATION:**

Itaya for plaintiff

Mucha for defendant

Court Clerk Mpoye