



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**ENVIRONMENT & LAND COURT CASE NO.3 OF 2013**

**ROSE MUREWE OMWARE.....PLAINTIFF**

**VERSUS**

**MARIKUS OTIENO SEWE.....1<sup>ST</sup> DEFENDANT / APPLICANT**

**DAVID OTIENO NYASIO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

**Marikus Otieno Sewe**, the Applicant filed the notice of motion dated 20<sup>th</sup> April 2015 praying for **David Otieno Nyasio**, the Respondent, to be enjoined from working on land parcel **South Ugenya/Ruwe/83** pending the hearing and determination of this suit. The application is based on the eight grounds marked (i) to (Viii) and supported by the affidavit of Marikus Otieno Sewe sworn on 20<sup>th</sup> April 2015. In both the application and supporting affidavit, the Applicant has described himself as the plaintiff, while the amended plaint dated 31.3.2015 that enjoined him into this suit has Rose Murewe Omware as the plaintiff while the Applicant is the 1<sup>st</sup> Defendant.

The application is opposed by David Otieno Nyasio, the Respondent through the grounds of opposition dated 6<sup>th</sup> May 2015 filed through his advocate which set out six grounds .

The application came up for hearing on 24<sup>th</sup> September 2015 and the Applicant, Mr Abande for the Respondent and the plaintiff presented their submissions.

The issue for determination is whether the Applicant has made a case for issuance of interlocutory injunction against the Respondent.

The court has considered the grounds on the application, supporting affidavit, grounds of opposition and rival verbal submissions. The court has also perused the pleadings and noted the following;

- (a) That this suit was commenced through the plaint dated 3<sup>rd</sup> January 2013. The plaint has Rose Murewe Omware as the plaintiff. Joseph Onyunde Owino and David Otieno Nyasio are the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively.
- (b) The 2<sup>nd</sup> defendant entered appearance and filed defence dated 12<sup>th</sup> February 2013 through M/S N.O. Sumba & Co. Advocates.
- (c) That Joseph Onyumbwe Owino, the 1<sup>st</sup> Defendant filed his defence dated 1<sup>st</sup> March 2013.

(d) That the plaintiff then filed the notice of motion dated 13<sup>th</sup> May 2014 to substitute Joseph Onyumba Owino who died on 15<sup>th</sup> July 2013 with Marikus Otieno Sewe, the applicant. The application was allowed on 25<sup>th</sup> June 2014.

(e) The Applicant, then filed an amended defence dated 1<sup>st</sup> August 2014 on 2/9/2014 and a further amended defence of the same date filed in court on 5<sup>th</sup> January 2015.

(f) That an amended plaint dated 31<sup>st</sup> March 2015 was failed on 1<sup>st</sup> April 2015.

(g) An amended defence for 2<sup>nd</sup> Defendant dated 6<sup>th</sup> May 2015 was failed through his advocates.

The court has found it necessary to set out the details documents filed and by which party so as to clarify that the Applicant herein is the 1<sup>st</sup> Defendant and not the Plaintiff as the filed papers seems to suggest.

The court has taken note of the contents of the certificate of official search for land parcel South Ugenya/Ruwe/83 filed with the plaint and the defence dated 1<sup>st</sup> March 2013. It shows David Otieno Nyasio was registered with the suit land on 2<sup>nd</sup> April 2003. The court has also taken note of the copy of title deed in the 2<sup>nd</sup> Defendant's /Respondent's list of documents which shows that David Otieno Nyasio was registered as proprietor of the suit land on 3. 4.1998 and title deed issued on the same date. Though the contents of the title deed and the certificate of official search seems to differ on the date the 2<sup>nd</sup> Defendant/Respondent was registered as proprietor, it is not disputed that the Respondent has been in possession of the suit land for some years. The Applicant has not disclosed why he would want the Respondent restrained from using the land without the full hearing of the suit taking place. As the Respondent appears to be the one registered with the title to the suit land, the court find that the Applicant has failed to establish a case for issuance of injunctive orders at this stage.

The Application dated 20<sup>th</sup> April 2015 is therefore without merit and is dismissed with costs to the Respondent/1<sup>st</sup> Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**21/10/2015**

Dated and delivered this **21<sup>ST</sup> day of OCTOBER 2015**

In presence of

Plaintiff present

Defendant/Applicant present

2<sup>ND</sup> Defendant/Respondent absent

Counsel Mr Abonde for Musumba for 2nd defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**21/10/2015**

21/10/2015

S.M. KIBUNJA J.

Oyugi Court clerk

Plaintiff present

1st Defendant present

Mr Abande for Musumba for 2nd defendant

Court: Ruling delivered in open court in presence of the Plaintiff, 1<sup>st</sup> Defendant and Mr Abande for Musumba for 2nd defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**21/10/2015**