



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**Civil Case 72 of 2008**

**MICHAEL ANDREW OCHIENG ::::::::::::::::::::::::::::::: PLAINTIFF**

**V E R S U S**

**DANIEL NYONGESA MASIKA ::::::::::::::::::::::::::::::: DEFENDANT**

**R U L I N G**

The application before me is for an interlocutory injunction to restrain the defendant from constructing any building or any other structures, on the suit property, **L. R. NO. NDIVISI/MUCHI/2670**.

The plaintiff is the son to **PETER ONYACH ATIENO**, who is the registered proprietor of the suit property. The said Peter Onyach Atieno passed away on 5<sup>th</sup> March 2002. Subsequently, the plaintiff applied for and was granted a limited grant of letters of administration *ad litem*. The said limited grant was limited to the purpose of enabling the plaintiff to file suit on behalf of the estate of the estate of the late Peter Onyach Atieno.

It is the plaintiff's case that the defendant had trespassed onto the suit property, and had demolished structures which were on that property. After the demolition, the defendant is said to have embarked upon construction, using the foundations of the buildings which he had earlier demolished. In the light of those developments, the plaintiff moved to court and has asked this court to restrain the defendant from continuing the construction on the suit property.

In answer to the assertion that he was a trespasser onto the suit property, the defendant contends that that is totally inaccurate.

Whilst admitting that he did demolish some structures and also that he was in the process of putting up new structures, the defendant nonetheless emphasized that he was doing so, on his own property. His said property is **L. R. NO. NDIVISI/MUCHI/2837**.

The defendant has exhibited the title deed for that parcel for land, which shows that he was the registered owner thereof, since 19<sup>th</sup> May 1999.

The defendant also exhibited the judgement in **DANIEL NYONGESA Vs. DAVID OUMA & 3 OTHERS, BUNGOMA HCCC.NO.85 OF 2004**. By that judgement, the defendants in that case were ordered to vacate parcel No.2837 within 30 days, from 2<sup>nd</sup> February 2006, failing which they would be forcefully evicted.

As the defendants in that case did not comply with the order requiring them to vacate the land, they were evicted.

According to the defendant herein, the only structures which he demolished were those which used to be occupied by the defendants in **HCCC. NO. 85 OF 2004**. Therefore, the defendant completely denies having trespassed onto the suit property as alleged or at all.

He says that both the demolition of the structures, and the construction of new structures, were being undertaken on

parcel **No.2837**.

In an endeavour to show that the property upon which he was putting up a building belonged to him, the defendant exhibited a mutation form dating back to **March 1989**. If the said mutation form is accurate, it would imply that the suit property (**parcel No. 2670**) did not even share any boundary with the defendant's property (**parcel No.2837**).

The plaintiff submitted that the defendant could not rely on that mutation form because he was not the Registrar of Lands.

Notwithstanding that criticism which he leveled against the defendant, the plaintiff sought to rely on another mutation form, which is dated **June 1988**. Surely, the plaintiff cannot have it both ways: he cannot ask the court to accept the mutation form which he has exhibited whilst rejecting the mutation form exhibited by the defendant, just because the defendant was not the Registrar of Lands. If the mutation form exhibited by the defendant were to be rejected on that basis, the mutation form exhibited by the plaintiff would also be rejected on the same basis, because the plaintiff is not the Registrar of Lands.

Having given due consideration to all the material currently before the court, I find and hold that the plaintiff has not established a prima facie case with a probability of success. I say so because the plaintiff has not demonstrated that the defendant was not utilizing his own property.

In order to satisfy the court that the defendant was trespassing on the suit property, the plaintiff ought to have, at the very least, presented evidence from a qualified surveyor, to decipher the two sets of mutation forms.

The plaintiff told the court that he had already asked the Registrar of Lands to visit the land in dispute. However, the registrar is said to have asked for an order of the court before he could visit the property.

By taking that step, the plaintiff appeared to have been acknowledging that there was need for him to obtain more tangible proof, so as to establish whether or not the defendant was trespassing onto the suit property. As that information is not yet available to this court, I hold that the plaintiff has not established a prima facie case with a probability of success.

Meanwhile, as the defendant insists that he was only putting up structures on his own property, it would not be right to restrain him from continuing to develop the said property.

In the result, the application before me is rejected. It is dismissed, with costs to the defendant.

*Dated, Signed and Delivered at Kakamega, this 5<sup>th</sup> day of February 2009*

**FRED A. OCHIENG**

**J U D G E**