



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
OF KISII**

Civil Case 56 of 2009

GEORGE MIRUKA PLAINTIFF

VERSUS

ROBERT ONTONYE alias NYAMIRA DEFENDANT

RULING

The Applicant/Plaintiff **George Miruka** filed this suit seeking that the Respondent/Defendant be evicted from his parcels of land **WEST KITUTU/MWAKIBAGENDI/1930** and **1931**. He claimed that the Respondent had since 12th February, 2009 unlawfully entered into the parcels, erected a house thereon, and is cultivating the same. With the plaint was filed, under Certificate of Urgency, a Chamber Application under **Order 39 rules 1** and **2** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act** seeking interlocutory injunction against the Respondent, his agents, and or servants from trespassing upon the parcels. The application was opposed by the Respondent who filed a Replying Affidavit.

The Applicant was represented by **Mr. Sagwe** and the Respondent by **Mr. Anyona**. I have considered their submissions.

The prayers in the Plaint did not include one for injunction. The request for interlocutory injunction can therefore not be granted (**Southern Credit Banking Corp. Ltd. vs. Charles Wachira Ngando, HC (Milimani) CC No.1780 of 2000**). Further, the Supporting Affidavit shows that the Respondent has gone into occupation of the disputed parcels and is using them. An interlocutory injunction can only be issued where a Respondent has not yet taken possession of the land. It is granted to prohibit a Respondent who is threatening to enter the land (**Yego v. Tuiya & Another [1986] KLR 726**). Where, like in this case, the Respondent is already occupying of the disputed land it is a mandatory injunction that should be sought, if the intention is that, pending the resolution of the case, he vacates the land.

The Title Deed annexed to the Supporting Affidavit shows the Applicant is a joint owner of parcel 931 with one **Evans Omariba Miruka**. The Replying Affidavit raised the issue that the Applicant is registered jointly with other people in respect of the lands. The Applicant has no authority to bring this suit without involving **Evans** and these other people.

The Respondent has complained that the Applicant and other people fraudulently got the parcels and others during the succession cause in respect of the Estate of the late **Sunya Otieri**. He is at liberty to go back to the succession court to seek revocation of the grant. This is not the forum for such complaint.

I dismiss the application with costs.

Dated and Delivered at Kisii this 22nd day of **June 2009**

A. O. MUCHELULE

JUDGE

22. 6. 2009

Before A. O. Muchelule Judge

Mongare c/c

M/s Asati for Mr. Anyona for applicant

Court: Ruling in open court.

A. O. MUCHELULE

JUDGE