



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Civil Suit 179 of 2009**

**DAVID ONDIMU
KOMBO.....
...PLAINTIFF/APPLI
CANT**

-VERSUS-

- 1. JOSHUA
NYAMBOKI**
- 2. WILFRIDA
MORAA BOSIRE**
- 3. CHARLES OMARI**
- 4. SIMON MOMANYI**
- 5. DANIEL MBULA**
- 6. PENINA
NYABOKE**
- 7. FREDRICK
MOGERE**
- 8. MOSES
NYAMWEYA**
- 9. SALOMA
M.MEKENYE**
- 10. JUSTUS
NYAKUNDI
NYASIMI**
- 11. WILSOM
MIRANDA**
- 12. SILAS O. AYUSA**
- 13. FRANCIS
ONYANGO.....**

RULING

The plaintiff is the registered proprietor of the leasehold interest in Kisii Municipality/Block 111/351. He alleged that on or about 1/9/2009 the defendants trespassed upon the land and begun erecting temporary structures thereon and also digging trenches on substantial portion of the plot. The intrusion was without permission or authority, he alleged. The suit was brought for eviction and permanent injunction. Filed along with the suit was an application for temporary injunction under *Order 39 rules 1 and 2 of the Civil Procedure Rules, and sections 3A and 63(e) of the Civil Procedure Act and sections 27 and 28 of the Registered Land Act*. He obtained an *ex parte* order. When the application came for *interparte* hearing it was met with a preliminary objection by the 2 nd, 3rd and 10 th defendants. Their grounds were that:

- a) the suit was incompetent and fatally defective.
- b) the court lacked jurisdiction to hear and determine the suit; and that (c) the suit is an abuse of the process of the court.

The 3rd defendant had filed a replying affidavit in which he alleged that all the defendants were tenants of the plaintiff who had allowed them to erect kiosks on the plot for their businesses and for which they were paying rent. Their case is that they were tenants within the meaning of Landlord and Tenant (*Shops, Hotels and Catering Establishments*) Act (*Cap.301*), and therefore that if the plaintiff had any grievance against them he should have taken them to the Business Tribunal and not bring them to this court. This is the basis of grounds (a) and (b) of the objection.

Ground (c) can be dealt with quite quickly. The plaintiff is owner of the land and alleges the defendants have without his authority or permission entered thereon in an act of trespass. The suit, on the face, raises an issue that should go to trial as it gives the plaintiff his cause to complain.

The plaintiff is saying the defendants are trespassers on his plot. The defendants are saying they are tenants, legally permitted by the plaintiff to be on the plot. The court will have to hear the parties to be able to decide one way or the other. In other words, it is not common ground that the defendants are tenants of the plaintiff. As was held in the East African Court of Appeal case of *Mukisa Biscuit Company Ltd .V. West End Distributors [1969]EA 696*,

“.....a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.....”

Where counsel is relying on facts that are in dispute he cannot raise a preliminary objection. That disposes of grounds (a) and (b).

In short, the objection is not sustained and is dismissed with costs.

Dated, signed and delivered at Kisii this 16th Day of November, 2009.

A.O.MUCHELULE

JUDGE

16/11/2009

16/11/2009

Before A.O.Muchelule-J

Mongare court clerk

Mr. Kaburi for appellant

COURT: Ruling in open court.

A.O.MUCHELULE

JUDGE

16/11/2009