



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**LAND CASE NO.237 OF 2015**

**SUSAN AWINO**

**OWILI.....PLAIN  
TIF**

**VERSUS**

**JAMES F.M.**

**NJUGUNA .....1<sup>ST</sup>  
DEFENDANT**

**ROBERT STANLEY KIAMA.....**

**..... 2<sup>ND</sup> PLAINTIFF**

**LAND REGISTRAR KISUMU .....**

**.....3<sup>RD</sup> DEFENDANT**

**THE HONUORABLE ATTORNEY GENERAL.....**

**.....4<sup>TH</sup> DEFENDANT**

**RULING**

**1. Susan Awino Owili**, the Plaintiff, filed the notice of motion dated 15<sup>th</sup> September 2015 for temporary injunction order restraining **James F.M. Njuguna** and **Robert Stanley Kiama**, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively, from entering into, remaining in, trespassing upon or in any other manner interfering with her use and occupation of **Kisumu/ Manyatta B/1318**. She also prays for a restriction order over the said land and costs. The application is based on the eight grounds on the notice of motion and affidavit of **Susan Awino Owili** sworn on 15<sup>th</sup> September 2015. The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant through the 1<sup>st</sup> Defendant’s grounds of opposition dated 7<sup>th</sup> December 2015, replying and further affidavit sworn on 13<sup>th</sup> February 2016 and 27<sup>th</sup> April 2016. It is also opposed by Robert Stanley Kiama through the replying and further affidavit sworn on 8<sup>th</sup> December 2015 and 29<sup>th</sup> January 2016.

2. The 2<sup>nd</sup> Defendant also filed the notice of motion dated 27<sup>th</sup> April 2016 seeking for among others to have an estate management firm appointed to manage the premises on **Kisumu/Manyatta B/1318**, an order for Plaintiff to account for the rent collected from 15<sup>th</sup> January 2015, vacant possession, permanent injunction, leave to amend his statement of defence and striking out of the Plaintiff’s suit for being an abuse of the courts process and failing to disclose a cause of action. The notice of motion is opposed by the Plaintiff through her replying affidavit sworn on 8<sup>th</sup> June 2016.

3. The parties appeared before the court on 16<sup>th</sup> May 2016 when directions were given among them that the two applications be heard together on the 11<sup>th</sup> July 2016. On that day, the court heard the Plaintiff in person and Mr. Njuguna, learned counsel for both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, on the two applications.

4. The issues for determination are as follows:

a) Who between the Plaintiff and the 2<sup>nd</sup> Defendant should remain on the suit property pending the hearing and determination of this suit.

b) Whether the 2<sup>nd</sup> Defendant has made a case for appointment of an estate management firm to collect rent of the premises on the suit land.

c) Whether the 2<sup>nd</sup> Defendant should get leave to amend his statement of defence.

d) Who meets the costs of each of the application.

5. The court has carefully considered the ground on each of the two applications, affidavit evidence by the parties and oral submissions by both sides and come to the following conclusions;

a) That the Plaintiff and 1<sup>st</sup> Defendant have had other court cases between them including **Kisumu CM Children's case NO.6 of 2006** and **Kisumu H.C. Misc. Civil Application No.165 of 2009** where orders allowing the Plaintiff to stay on the house on the suit property among others were issued.

b) That land parcel **Kisumu/Manyatta B/1318** was registered in the names of 1<sup>st</sup> Defendant on 12<sup>th</sup> April 1991. That the Plaintiff had lodged a caution on the suit land register on the 1<sup>st</sup> September 2010 which was later withdrawn on the 18<sup>th</sup> March 2015 which is the same date the property was transferred and registered in the name of the 2<sup>nd</sup> Defendant.

c) That in view of the finding in (a) and (b) above it is obvious that the transfer of the suit land from the name of the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was done without having the court order in **Kisumu H.C. Misc. Civil Application No.165 of 2009** dated 26<sup>th</sup> January 2010 lifted. That the Plaintiff right drawn from the court order to use the land continued to be in force despite the change of ownership.

d) That even though the 2<sup>nd</sup> Defendant is the registered proprietor of the suit land, his title is under challenge and in view of the existing court order authorizing the Plaintiff to remain on the land, it is only fair that the Plaintiff do continue utilizing the suit property pending the hearing and determination of this suit.

e) That the permanent, mandatory injunction and management orders sought by the 2<sup>nd</sup> Defendant in the notice of motion dated 27<sup>th</sup> April 2016 are incapable of being considered at this stage as there is no existing suit by the 2<sup>nd</sup> Defendant on which they could be based. That it is only after his prayer for leave to amend his statement of defence to introduce a counter claim that the 2<sup>nd</sup> Defendant would have an existing suit on which such interlocutory prayers could be grounded.

f) That it is only fair that the 2<sup>nd</sup> Defendant be allowed to amend his statement of defence to introduce a counter claim to enable the court deal and determine all the issues relating to land parcel **Kisumu/Manyatta B/1318** between the parties exhaustively.

g) That the 2<sup>nd</sup> defendant has not established in what manner the Plaintiff's suit can be said to be wanting in cause of action or that it is an abuse of the court process. That all the parties should instead direct their energies to complying **with Order 11 of Civil Procedure Rules** so as to have

the main suit heard and determined without undue delay.

6. That flowing from the foregoing the court find that the Plaintiff has established a prima facie case for issuance of temporary injunction orders as prayed in her notice of motion dated 15<sup>th</sup> September 2015. That the 2<sup>nd</sup> Defendant has partially succeeded in his notice of motion dated 27<sup>th</sup> April 2016 and for that matter, the costs in both applications should be in the cause. That the court therefore issues the following orders;

a) That pending the hearing and determination of this suit, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, either acting by themselves or agents are hereby restrained from interfering with the Plaintiff's use and occupation of land parcel **Kisumu/Manyatta B/1318**.

b) That the 2<sup>nd</sup> Defendant is hereby granted leave to file and serve an amended statement of defence introducing a counterclaim within the next 30 days.

c) That all the parties herein do file and serve their list of documents, witness statements and generally, comply with **Order 11 of Civil Procedure Rules** within the next 60 days.

d) That the costs in respect of the notices of motion dated 15<sup>th</sup> September 2015 and 27<sup>th</sup> April 2016 be in the cause.

e) It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OCTOBER 2016**

In presence of;

Plaintiff Present

Defendant 1<sup>st</sup> and 2<sup>nd</sup> Defendants present

Counsel Mr. Odhiambo for Njuguna for 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**26/10/2016**

26/10/2016

S.M. Kibunja J.

Oyugi court assistant

Plaintiff present

1<sup>st</sup> and 2<sup>nd</sup> Defendants present

Mr Odhiambo for Mr Njuguna for 1<sup>st</sup> and 2<sup>nd</sup> Defendants

The Plaintiff present in person.

Court: Ruling dated and delivered in open court in presence of the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Mr Odhiambo for Njuguna for 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

26/10/2016