



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Civil Case 95 of 2009

VIOLET MERAB SONGA 1ST PLAINTIFF

EUGINE HARRY SONGA 2ND PLAINTIFF

EUNICE JEANETTE SONGA 3RD PLAINTIFF

V E R S U S

TATULI MBASU 1ST DEFENDANT

MATHEW SAMAKI 2ND DEFENDANT

R U L I N G

In their chamber summons dated 5th June, 2009, the applicants are seeking an order of injunction against the respondents restraining them from disposing of the property known as title No. **KAKAMEGA TOWN/BLOCK III/270** and particularly the buildings erected thereon. The application is supported by the affidavit of Violet Merab Songa sworn on 5th June, 2009.

Mr. Mutubwa, Counsel for the applicants submitted that the applicants owns an adjacent plot where they have built seven residential maissonnetes since 1991. Part of the development has encroached on the respondents property. The applicants contend that they are entitled to adverse possession on the encroached portion as they have been in occupation peacefully since 1990. The respondents tried to interfere with the peaceful occupation in 2009.

Counsel for the applicants further contended that the applicant will suffer irreparable damage if restraining orders are not granted. The property is their source of livelihood and it is necessary that the property be preserved. The balance of convenience tilts in favour of the applicants. Counsel relied on the cases of :-

1. *Giella v Cassman Brown & Company Limited (1973) EA 358.*
2. *Alikman v Muchoki (1984) KLR 353*
3. *Joseph Mbugua Gichanga v Co-operative Bank of Kenya Limited*
4. *Ndinga v Okelo (2004) KLR*

5. *Mansukhlal Shantilal Patel v Brian Hume Naylor & Others Civil Appeal No. 10 of 2000 (unreported)*

6. *The Limitation of Actions Act (Cap.22) of the Laws of Kenya*

7. *The Civil Procedure Act and Rules*

Mr. Fwaya, counsel for the respondents opposed the

application. Counsel submitted that the applicants have not fulfilled the conditions for the granting of injunctions. The applicants admit that their buildings have encroached on the respondents' land. This shows that applicants are tress-passers and will not be able to establish a prima facie case. Being tress-passers they are not entitled to damages.

From the supporting affidavit of the 1st applicant, the applicants are the administrators of the late Dan Oyallo Songa. The deceased bought plot No. **Kakamega Municipality/Block III/94** in 1991 and developed rental properties thereon. The applicants became registered as owners in 2007. The property measures approximately 0.2914 Hectares.

The respondents on the other hand are the registered proprietors of plot No. **Kakamega Town/Block III/270** measuring 0.08 Hectares. This is a leasehold interest from the County Council of Kakamega from 1st August 1996. The respondents acquired their interest in 2009 from the previous leasee, Boniface Shibira.

The applicants' property was developed in 1991. The basis of the Originating summons is adverse possession and ownership by dint of sections 27 and 30 of the Registered Land Act among other claims. The requirements for granting of injunction orders are well established. The applicant contends that they have been in occupation since 1991. The developments are their source of livelihood and would suffer irreparable damage if demolished.

The basis of the contention that the applicants' properties has encroached on the defendants properties is a survey done by the Western Province Provincial Surveyor who made his report on April, 2009.

I will not dwell on the issue whether the plaintiff has established a prima facie case against the defendant. However, I do note that the applicants cannot be dismissed as mere tress-passers. Before the survey was done, none of the parties knew about the encroachment. I do find that it is proper to restrain the respondents herein from demolishing, wasting or alienating part of the applicants' property that is alleged to have encroached on the respondents' property. It is important to preserve the property before the case is fully heard and determined. The applicants will suffer irreparable damage if the properties are damaged and or wasted before the suit is heard. Moreso, the title of the respondents is being challenged by another party who alleges that it was acquired irregularly.

I do therefore grant the application dated 5th June, 2009 in terms of prayer 4. An order of injunction shall issue restraining the defendants/respondents jointly and severally, whether by themselves or through their agents, servants, employees or any other person claiming through or under them from wasting, damaging, alienating, selling, entering or remaining upon, removing and or disposing of the property known as title number **Kakamega Town/Block III/270** and all the buildings erected thereon and particularly those standing on portion of the said property and described as covering the area measuring E-f2=7.0m, f2-f1=30, 5m f1-d19=11.3m and d19-E=31.7 pending the hearing and determination of the suit.

Costs of the application shall follow the outcome of the suit.

Delivered, dated and signed at Kakamega this 12th day of November, 2009

SAID J. CHITEMBWE

J U D G E