



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**CIVIL CASE NO. 22 OF 2003**

**JUSTO JORAMANA ACHIENG**

**(A.K.A. ) JOSTO OMANO ACHIENG).....PLAINTIFF**

**VERSUS**

**UGUNJA TOWN COUNCIL**

**MICHAEL ABUNGU OLALO.....DEFENDANT**

**R U L I N G**

This is an application by Justo Jaraman Achieng who is also known as Justo Omamo , the plaintiff, in this case , seeking an order of an injunction to restrain Ugunja Town Council and Michael Abungu Olola, the defendants from encroaching upon the plaintiff's plot No. 49 or interfering with its boundaries, or demolishing any structures the plaintiff has already erected thereon or destroying the plaintiff's pit latrines and the structures which are under dispute between the plaintiff and the 1st defendant pending hearing of this suit . The application is indicated to be brought under Order XXXIX rules 1 and 2 of CPR , and is supported by some grounds on the body of the summons and an affidavit of the plaintiff. Both defendants oppose the application. The 1st defendant relies on a replying affidavit of Otieno Jamba its town clerk sworn on 26th February 2003 while the 2nd defendant relies on his own replying affidavit sworn on 11th February, 2003.

Mr. Kopot submitted that it will be his client's case at the hearing that he is entitled as against both the defendants to damages for trespass and as against the 2nd defendant to an order directing him to vacate a portion of his plot which he was then occupying . He added that the two defendants acting in conspiracy had caused to be drawn a part development plan for Ugunja township whose result has been to alter the boundaries of the plaintiff's plot NO. 49 by taking off a portion of it and representing it as a portion of the 2nd defendant's plot and by purporting to call that portion part of plot NO. 60 . He added that it is the plaintiff's contention that plot NO. 60 is a creature of the 2nd defendant and that it does not exist in any plans or maps and that it is merely used as a vehicle for further fraudulent scheme against the plaintiff. Mr. Kopot submitted that the portion occupied by the 2nd defendant which is adjacent to the plaintiff's plot is a space which can only be occupied on temporary license issued by the 1st defendant:

According to Mr. Kopot if the 2nd defendant was allotted plot No. 60 in 1985 as alleged then the map dated 3rd April 1996 should have reflected it. He stated that by reason of encroachment the plaintiff will lose a portion of his plot where existing building and toilets have been constructed and that the said plot will lose its value. He claimed that unless the 2nd defendant is restrained he intends to encroach onto his plot as he has already brought sand to the site. He claimed that the loss of this portion of the plaintiff's plot is irreparable as there is no other place where toilets may be constructed. Mr. Kopot further contended that the deponent to the replying affidavit of the 1st defendant is irrelevant in that it referred to plot NO. 45 while the plaintiff's plot is No. 49 . He also contended that the 2nd defendant is occupying an open space as temporary licensee and not an owner of Plot No. 60 and does not stand to suffer any loss if the orders sought are granted. Mr. Kopot added that the plaintiff had given an undertaking as to the damages.

For the defendants Mr. Mandialo opposed the application and indicated that the plaintiff had not demonstrated that the conditions for a grant of temporary injunction as spelt out in the case of Giella Vs

Cassman Brown & Co. Ltd (1973) E.A. 358 have been met in this case. He contended that the plaintiff had not adequately demonstrated that he has a prima facie case with a probability of success and that there is no irreparable loss he may suffer if an injunction is not granted. According to Mr. Mandialo annexure JJO 4 is not complete as other plots are not shown, and that it has not been approved by the Commissioner of lands. Mr. Mandialo submitted that the plaintiff had come to Court with dirty hands as he was the one who was encroaching on plots No. 60 and 45.

It is not in dispute that the plaintiff is the leasee on plot No. 49 at Ugunja Township. It is also not denied that in his letter of 10th December 2002 the Siaya District Physical Planning Officer informed that Town Clerk Ugunja Township that the new structures belonging to the plaintiff were on plot No. 60 which belongs to the 2nd defendant. He claimed that it had been resolved that the plaintiff's structures be demolished. However both the defendants claimed that the plaintiff's property was plot No. 45. It appears that the plaintiff's assertions on his apprehensions were not challenged. The defendants have not put in any maps which would have challenged the plaintiff's claims.

In the circumstances I would grant an order of an injunction as prayed. The plaintiff has demonstrated that he has a prima facie case against the defendants with a probability of success.

The plaintiff has also shown that unless an order of injunction is granted the defendants would suffer an irreparable loss in that his buildings would be demolished and part of his said plot would be taken over by the 2nd plaintiff. The plaintiff will have the costs of this application.

DATED and delivered this 16th day of September, 2003

B.K. Tanui

JUDGE