



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**Civil Case 132 of 2012**

**WICLEYS NDONGA .....1<sup>ST</sup> APPLICANT**

**WALTER GODIA ONGERE.....2<sup>ND</sup> APPLICANT**

**PETER SINGA ONGERE.....3<sup>RD</sup> APPLICANT**

**JESSE AUMA ONGERE.....4<sup>TH</sup> APPLICANT**

**SOLOMON ONGERE.....5<sup>TH</sup> APPLICANT**

**~VERSUS~**

**AINEA ALIMA ONGERE.....RESPONDENT**

**RULING**

The Applicants are the sons of the Respondent. They filed this suit by way of originating summons for the determination that they have become entitled to 4 acres of the Respondent's land parcel W. Bukusu/S.Mateka/3089 by adverse possession by virtue of their having had peaceful, quiet, continuous and uninterrupted occupation and possession of the same for a period of over 12 years since 1977. Their case is that the family originally hailed from Gambogi where the Respondent had 3 acres of ancestral land. The Respondent sold the land and in 1977 came to buy W. Bukusu/S. Mateka/3089 which measured 6 acres. He settled the Applicants on 4 acres of the land on which they planted trees and cultivate maize. They have built permanent residential houses thereon. The improvements run to Ksh.3,000,000/= worth. It is alleged that now that the Respondent sold the ancestral land at Gambogi he holds the disputed land in trust for himself and for the Applicants.

The suit was brought because the Applicants claimed that the Respondent is in the process of transferring the suit land to a third party. With the suit was an application under Order 40 rule 1 of the Civil Procedure Rules and section 68 of the Land Registration Act as read with Article 159 of the Constitution of Kenya 2010 to have an inhibition registered on the title and for the Respondent to be restrained from either evicting the Applicants or interfering with their occupation of the land until the suit is heard and determined. The suit was filed through David Were advocate.

The Respondent filed a replying affidavit through M/s J. O. Makali & Co. advocates to deny that he bought the suit land from funds from the sale of ancestral land. He stated that the Applicants are five of his 8 children and lived on the suit land under his permission. However, they are all adults and, except for the 1<sup>st</sup> Applicant, have each bought own parcels where they live. The 1<sup>st</sup> Applicant has refused to move out and has forcefully built on the suit land. He stated that he has since sold the suit land and used funds from the transaction to buy land parcel W.Bukusu/S.Mateka/2494. He has allowed the buyer of the suit land to occupy it. He denied that he held the suit land in trust for the Applicants.

I agree with Mr. Makali that for the Applicants to be granted an interlocutory injunction they have to demonstrate that they have a *prima facie* case that will probably succeed; that they will irreparably suffer if the injunction is not granted; and that the balance of convenience is in their favour (**Giella v. Cassman Brown Co. Ltd [1973] EA 358**)

The suit land is in the name of the Respondent who, *prima facie*, is entitled to indefeasible claim to

it by virtue of the registration. The suit has been brought under Order 37 rule 7 for a declaration that the Applicants have become entitled by adverse possession. It is not in dispute that now that the Applicants are children of the Respondent they are on the land by virtue of that relationship. Their occupation of the land cannot therefore be said to be adverse to the claim by the Respondent. The consequence is that they have not demonstrated a *prima facie* case.

The Applicants did not swear a supplementary affidavit to deny that, except for the 1<sup>st</sup> Applicant, they no longer stay on the suit land. They did not deny that the Respondent has since sold the suit land to a third party to whom he has granted possession. An order to inhibit the title or to injunct the Respondent, and all those acting under him, would affect the rights of the buyer without affording him a hearing.

In conclusion, the application has no merits and is dismissed with costs.

Dated, signed and delivered at Bungoma this 2<sup>nd</sup> day of October, 2012.

**A. O. MUCHELULE**  
**JUDGE**