



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 171 OF 2014

RASSENDYLL KECHA NDIEMAAPPLICANT

VERSUS

HON. BERNARD MASAKA SHINALI1ST RESPONDENT

ROBINSON CHESIRO NGEIYWA 2ND RESPONDENT

STANSLUS MUTAI KONES 3RD RESPONDENT

R U L I N G

1. The applicant **Rossendyll Kecha Ndiema** brought a Notice of Motion dated 5/1/2015 against three respondents namely **Hon. Bernard Masaka Shinali, Robinson Chesiro Ngeiywa** and **Stanlus Mutai Kones** seeking injunction orders restraining them from evicting him from **L.R. No. Trans-Nzoia Kipsoen/11**. The subject matter of this application is L.R. No. Trans-Nzoia Kipsoen/11 (suit land) which is registered in the name of the first respondent Hon. Bernard Masaka Shinali. The second and third respondents are brothers and are administrators of the estate of their late father **John Ndara Kones**.
2. The suit land changed from **John Ndara Kones** to **Ben Nicodemus Omambia Mogaka**, then to **Agricultural Finance Company** and finally to **Hon. Bernard Masaka Shinali**. The applicant contends that he was invited to the suit land by the late John Ndara Kones in **1993** and that he has been on the suit land peacefully for over 21 years now. He contends that he has acquired **30 acres** of the suit land by adverse possession. He further contends that the respondents are threatening to evict him from the suit land and that some of his houses have been demolished by the respondents. He now seeks orders of injunction to restrain the respondents from continuing with the eviction.
3. The applicant's application is opposed by the first respondent through a replying affidavit sworn on 28/2/2015 and filed in court on 2/3/2015. The first respondent contends that the second and third respondents had filed Kitale **HCCC No. 129 of 2014** in which they are litigating on behalf of the applicant and that therefore this present suit is res judicata. The first respondent further contends that the application herein has no chance of success as the applicant has no chance of succeeding in his suit. The first respondent contends further that the suit land has been a subject of a number of litigation dating back to **2004** and therefore the issue of the applicant acquiring the land by way of adverse possession does not arise
4. The applicant is seeking orders of injunction against the respondents. The principles for grant of interlocutory injunction were set out in the celebrated case of **Giella -vs- Cassman Brown & Co. Ltd 1973 EA 358**. Firstly an applicant has to demonstrate that he has a prima facie case with

probability of success. Secondly, an injunction will not normally be issued unless otherwise the applicant might suffer loss which will not be compensated in damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

5. In the instant case, the applicant is claiming that he has acquired 30 acres of the suit land by way of adverse possession. He claims that he was invited to the suit land by the late John Ndara Kones in 1993. In other words he was a licensee of John Ndara Kones. The position in law is that a licensee cannot claim adverse possession. This then follows that the applicant has no prima facie case with probability of success. John Ndara Kones died in 2008. The applicant could not claim any adverse possession as at the time John Ndara Kones died because he was on the land as licensee.
6. In any case John Ndara Kones had transferred the suit land to Ben Nicodemus Omambia Mogaka who obtained title in 1994. In 2004 John Ndara Kones filed a case against among others Ben Nicodemus Omambia Mogaka. John Ndara Jones died in 2008 before the case could be concluded. His sons who are the second and third respondents were substituted in his place. The pleadings in that case of 2004 show that John Ndara Kones had leased **36.57 acres** of the suit land to Ben Nicodemus Omambia Mogaka for a period of **10 years** with effect from **1994**. If the averments in the plaint in that suit are anything to go by, the lease was to expire in 2004. The lease was for the entire suit land. Where then does the applicant come in? The applicant claims that he entered the land in 1993 at the invitation of the late John Ndara Kones. This cannot be possible because if he was in possession of 30 acres since 1993 there is no way John Ndara Kones would have again leased 36.57 acres to Ben Nicodemus Omambia Mogaka. The applicant is not being candid on the whole issue. There may be some truth that the second and third respondents who have filed **ELC No. 129 of 2014** are litigating on his behalf as claimed by the first respondent.
7. The second and third respondents have not replied to the applicant's application as well as the originating summons itself. They know what is happening. No one has occupied the suit land peacefully since 2004. There have been a number of suits filed and threats to evictions by the lawfully registered owners of the suit land. I find that in the circumstances the applicant has not demonstrated that he has a prima facie case with probability of success. An injunction cannot therefore issue in his favour. The applicant's application is hereby dismissed with costs to the first respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this **27th** day of **July, 2015**.

E. OBAGA

JUDGE

27/7/2015

In the presence of Mr. Wafula for First Respondent.

Court Assistant – Winnie.

E. OBAGA

JUDGE

27/7/2015