



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 207 OF 2014.

1. PETER OMUKAGA OCHOM]

2. MICHAEL OKEMER OBARAZA].....
PLAINTIFFS/APPLICANTS

3. FREDRICK NAMAI OKEMER]

=VERSUS=

1. WENZELAU OCHUO]

2. CLEMENT ETYANG]

3. LEONARD WAWIRE PAUL].....
DEFENDANTS/RESPONDENTS.

4. PASCAL AMAIYA ODENYO]

5. THE LAND REGISTRAR BUSIA]

6. HON. ATTORNEY GENERAL]

R U L I N G.

PETER OMUKAGA OCHOM, MICHAEL KEMER OBARAZA and FREDRICK MAMAI OKEMER, hereinafter referred to as the 1st to 3rd Applicants filed the notice of motion dated 24th November, 2014 contemporaneously with the plaint of the same date for six prayers. Prayers 1, 2, and 4 have been spent through the Deputy Registrar's order of 24th November, 2014. The remaining prayers which are subject matter of this ruling are as paraphrased herein below;

1. Spent.
2. Spent.
3. That there be temporary stay of execution of the judgment in Busia ELC. No. 46 of 2014 pending the hearing and determination of this suit.
4. Spent.
5. That a temporary injunction do issue restraining the 1st to 4th Respondents from surveying and further interfering with the land register in respect of land parcel South Teso/Apokor/21.
6. Costs of this application be in the cause.

The Applicants have named **WENZELAU OCHOU, CLEMENT ETYANG, LEONARD**

WAWIRE PAUL, PASCAL AMANYA ODENYO, THE LAND REGISTRAR, BUSIA, and the **ATTORNEY GENERAL** as the 1st to 6th Respondent respectively and will be referred to as such hereinafter.

The Applicants have set out 11 grounds on the application. The Application is also based on the supporting and supplementary affidavit of the 1st Applicant sworn on 24th November, 2014 and 13th February, 2015.

The application is opposed by the 2nd to 4th Respondent, through the 2nd Respondent's replying affidavit, sworn in 22nd January, 2015. The 1st, 5th and 6th Respondents did not file any replying papers.

During the hearing, Mr. Osango and Murunga for the Applicants and Respondents respectively made their submissions.

ISSUES FOR DETERMINATION.

1. Whether the issues raised in this suit are res judicata in view of the court's decision in Busia ELC No. 46 of 2014 (Formerly HCC. No. 25 of 2010).
2. Whether the execution of orders in Busia ELC. No. 46 of 2014 will prejudice the Applicants' claim in this case.
3. Whether the Applicants have complied with the requirements set out in **Giella –vs- Cassman Brown** case that are precedent to the issuance of injunctive orders.

ANALYSIS OF THE EVIDENCE AND SUBMISSIONS.

1. That the Applicant's claim as shown in the plaint dated 24th November, 2014 is for a declaration that 1st to 4th Respondents are registered with land parcel south Teso/Apokor/21 as their trustees. They also pray that the Respondents be ordered to transfer the portions of land they occupy measuring about two acres to each of them as the 1st Respondent has failed to do so. The Applicants have disclosed in paragraph 5 of the supporting affidavit that they are sons to the 1st Respondent while the 2nd to 4th Respondents are their cousins. It is therefore very unlikely that the Applicants did not know of the existence of Busia ELC No. 46 of 2014 in which their father was the Defendant and the 2nd to 4th Respondents were the Plaintiffs.
2. That the Applicants' right to the suit land, South Teso/Apokor/21, is by virtue of being children of the 1st Respondent. The Applicants' entitlement can only be limited to the portion of land that belongs to their father. That portion has already been restated as a quarter share of South Teso/Apokor/21 through this court's judgment in **Busia ELC. No. 46 of 2014**. From the facts presented to this court, none of the parties in Busia ELC. No. 46 of 2014 has preferred any appeal or review application to the court's judgment.
3. That having found that the Applicants' claim or interest over South Teso/Apokor/21 is limited to what their father, the 1st Respondent, owns and considering this suit is not based on adverse possession by virtue of the pleadings filed the court finds no basis of issuing stay orders to the judgment of Busia ELC. No. 46 of 2014 as the Applicants have failed to satisfy any of the principles set out in **Giella –vs- Cassman Brown**, [1973] E.A.358.
4. That the Applicants' could have applied to be enjoined in Busia ELC. No. 46 of 2014 if they had any independent claim over the subject matter of the suit separate from that of their father, the 1st Respondent, but did not do so. The Applicants' interests and that of all those claiming from the 1st Respondent over the suit land has already been determined in Busia ELC. No. 46 of 2014. The 1st Respondent cannot be allowed to hide behind the Applicants who are his sons to defeat or delay the execution of a lawful court order by seeking for stay of judgment in Busia ELC. No. 46 of 2014 which was made on merit.
5. That the 2nd to 4th Respondent averred at paragraph 14 (a) (b) and (f) of their joint statement of defence, dated 14th January, 2015 that the Applicants' suit is res judicata and an abuse of the

courts process. The defence must have been served by the time the application was heard in view of the contents of paragraph 4 of the supplementary affidavit sworn by 1st Applicant on 13th February, 2015 and the submission by the Applicants' counsel that the suit is not res judicata. Even though the applicants were not parties in Busia ELC. No. 46 of 2014, their interests over the suit land are not independent of that of their father who was the defendant. The decision in the said case settled the interest of the Applicants' father to the suit land and unless this court's decision is varied by the Superior court in accordance with the law, this court cannot sit on appeal of its own decision as this would be contrary to Section 7 of the Civil Procedure Act. This suit is res judicata and therefore an abuse of the courts process.

6. That this court is enjoined under Article 159 (b) and (d) of the Constitution to ensure justice is not delayed and is administered without undue regard to procedural technicalities. In light of the foregoing, the court finds that;
 - a. That the application dated 24th November, 2014 is without merit and is hereby dismissed with costs.
 - b. The court further finds that the issues raised in the plaint dated 24th November, 2014 have already been decided on merit in Busia ELC. No. 46 of 2014 and the plaint is hereby struck out and suit dismissed for being res judicata with costs to the 2nd to 4th Defendants/Respondents.

It is so ordered.

S.M. KIBUNJA.

JUDGE.

DATED AND DELIVERED ON23RDTHIS DAY OF APRIL, 2015.

IN THE PRESENCE OF;.....ABSENTPLAINTIFFS/APPLICANTS

1ST & 4THDEFENDANTS/RESPONDENTS.

N/A.....COUNSEL FOR APPLICANTS

N/A.....COUNSEL FOR RESPONDENTS.

JUDGE.