



LEONORA NERIMA KARANI..... 1ST APPLICANT

JUMA KARANI 2ND APPLICANT

APPLICANT
GEORGE KARANI..... 3RD

VERSUS

WILLIAM WANYAMA NDEGE RESPONDENT

RULING

The Respondent, **WILLIAM WANYAMA NDEGE**, is the Plaintiff in BUSIA PMCC No. 353 of 2006. He sought and was granted an interlocutory injunction against the applicants herein on 26th February 2009. By the said injunction, the applicants herein are;

“restrained from erecting structures, farming, cultivating and/or doing any act which will interfere with the value and composition of L.R. NO. BUNYALA/BUKOMA/1433 pending the hearing and determination of this suit interparties.”

The applicants have now moved this court, by way of a notice of Motion dated 4TH March 2009. Through that application, the applicants are asking this court to stay execution of the injunction orders which were made by the learned Resident Magistrate, on 26th February 2009.

When the application came up for hearing, the advocate for the respondent did not attend court, although he was duly served.

Furthermore, the respondent did not file any replying affidavit, nor did he attend court on the scheduled date.

In effect, the facts deponed to by the 1st applicant herein, are uncontroverted. The said facts are as follows;

(a) The 1st applicant filed a claim for adverse possession in 1997. The said claim was BUSIA HCCC NO. 40/1997 (O.S.)

(b) After a full hearing, the High Court dismissed the claim. However, the 1st applicant did not get to know of the dismissal of her claim, until much later.

(c) The 1st applicant applied to the Court of Appeal, for leave to appeal out of time. She also sought an order for stay of execution.

(d) In a ruling delivered on 14th June 2007, Waki, J.A granted leave to the applicant to appeal out of time.

In his ruling, the learned Judge observed as follows;

“It is evident that the applicant was anxious to get on with her appeal once she knew about the judgement against her. She took an active part in nudging her advocates to action. In the circumstances, I would not visit the sins of her advocates on her. More importantly there are special circumstances which militate against locking out the applicant from agitating her claim further. The portion in dispute was evidently occupied by her in 1977 and she not only cultivated but built and buried her deceased husband there as late as 1996.”

In the result, the Court of Appeal expressed the view that, as the 1st applicant herein had remained in possession of the disputed land;

“I see no prejudice that will be suffered by the respondent if the status quo remains pending the final resolution of the dispute. The pain of waiting for that decision may perhaps be ameliorated by an award of costs in the application.”

This court has been told that although the appeal was still pending before the Court of Appeal, the respondent filed another case, being Busia PMCC No. 353/2006. It is in that new case that the learned Resident Magistrate has issued an interlocutory injunction against the applicants herein.

There is absolutely no doubt whatsoever that if the interlocutory injunction is enforced, the 1st applicant (and the other applicants herein) will be restrained from erecting structures, farming or cultivating on the suit land. That means that the ***status quo*** would have been upset, notwithstanding the ruling by the Court of Appeal.

In the event, and in order to give effect to the orders made by the Court of Appeal in Civil Application No. 21/2007 (which is otherwise known as No. KSM 1/2007), I now do hereby order that there shall be a stay of execution in Busia PMCC No. 353 of 2006 until the appeal herein is heard and determined.

The costs of this application are awarded to the applicants.

Dated, Signed and Delivered at Kakamega, this 29th day of April, 2009.

FRED A. OCHIENG

J U D G E