

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Civil Case 84 of 2001

ISAAC NJUKI NYAGA.....PLAINTIFF

VERSUS

FESTUS NJUE NYAGA.....1ST DEFENDANT

JEMIMAH WANGECHI.....2ND DEFENDANT

RULING

The Plaintiff/Applicant filed the plaint dated 10/8/2001 seeking inter alia eviction orders against the two defendants. The 2 defendants then filed a defence and counter-claim dated 27/9/2001 in which counterclaim they claimed Title to land Parcel No. **NGARIAMA/NGIRIAMBU/1540** by way of adverse possession. The matter was heard by Hon Justice Khaminwa who found in favour of the defendants and dismissed the plaint. She ordered the plaintiff to transfer the land in question to the defendants within 30 days of the Judgment.

Being aggrieved by that ruling, the Plaintiff filed the application for stay dated 6/11/2007. That application is the subject of this ruling. He seeks an order for a stay of execution to avoid his appeal being rendered nugatory. The same is supported by his affidavit dated 6/11/2007 and opposed by the 1st defendant vide his replying affidavit dated 25/1/2008.

I have considered the said application, the grounds on which it is premised, the rival affidavits and the law applicable. With tremendous respect to **Justice Khaminwa**, this is one case which I can say has overwhelming chances of success. In that case therefore, the land in question should not be transferred until the appeal, which the applicant has already filed before the Court of Appeal is heard and determined. I say the appeal is good because of 2 points- Firstly, because adverse possession can only run against a registered owner and secondly, that adverse possession cannot be claimed by way of counter-claim but only by way of originating summons. There is vast case law in support of these two points. It is nonetheless not my place to go into them in detail . This being the case, I will allow the application in question and make no orders for deposit of security given the circumstances of the case. The land in question should not therefore be interfered with and the status quo obtaining as at the time the Judgment was delivered should be maintained.

Costs of this application to abide by the outcome of the appeal.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 30th day of June 2009

In presence of:-Mr. Kariithi, Plaintiff and 1st defendant in open court.