



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 11 of 2009

JOSEPH MBAYA ----- PLAINTIFF/RESPONDENT

VERSUS

HERMAN LUVANDALE LUVASI -----DEFENDANT/APPLICANT

R U L I N G

The Applicant herein by his Chamber Summons dated 28th January, 2008 is seeking orders that Butali SRMCC No. 167 of 2007 be stayed pending the hearing and determination of his Originating Summons. The applicant is also seeking costs.

Miss. Andia, learned counsel for the applicant submitted that the subordinate court lacks jurisdiction to determine the suit pending before it as the Plaintiff in that suit is seeking an eviction order. The hearing by the Butali Court is a waste of time as issues would again have to be determined by the High Court. The jurisdiction to evict someone from land is vested on the High Court.

Mr. Manyoni, counsel for the respondent opposed the application. He relied on the replying affidavit of the respondent, Herman Luvandale Luvasi sworn on 17th February 2009. Counsel submitted that the applicant's application lacks merit and is brought in bad faith and that the lower court has not issued any eviction orders.

The Plaintiff before the Butali Resident Magistrate's court in Civil Case No. 167 of 2007 is the respondent herein. The plaintiff is seeking both orders of injunction and eviction of the defendant from land parcel NO. KAKAMEGA/BUSHU/1201. Interim orders were granted in favour of the plaintiff on 21st December, 2007. The applicant has not explained why it took him over one year to file the Originating Summons herein together with the application for stay of proceedings. It has not been indicated by both parties whether the applicant filed a defence in the lower court matter and whether the applicant did submit himself to the jurisdiction of the Butali Court.

In his Originating Summons dated 28th January, 2009, the applicant is claiming ownership of the suit property, namely plot NO. KAKAMEGA/BUSHU/1201 by way of adverse possession. This being the case, it is clear that even if the Butali Court makes a decision, still this court will have to determine the applicant's claim of adverse possession.

For purposes of solving both parties claims, I do not see it fit to stay the proceedings before the Butali Court. I

hereby invoke the Provisions of Section 18 of the Civil Procedure Code and have Butali Resident Magistrate's court civil case No. 167 of 2007 transferred to this court for determination. Both the applicant's claim for adverse possession and the respondent's claim for injunction and eviction shall be heard simultaneously. The Butali Court civil case No. 167/2007 shall be consolidated with the applicant's Origination Summons. In the meantime the orders granted by the Butali Court shall still remain in force. The applicant herein shall bare the costs of this application. It is so ordered.

Delivered, Dated and signed at Kakamega, this 1st day of October, 2009.

SAID J. CHITEMBWE

J U D G E