



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 24 OF 2015

GETRUDE AWINJA (suing as the personal representative of the
estate of **DANIEL OCHIEL**).....**PLAINTIFF**

- VERSUS -

COUNTY GOVERNMENT OF BUSIA.....**1ST DEFENDANT**

THE HON ATTORNEY GENERAL.....**2ND DEFENDANT**

RULING

1. The Applicant filed the present application dated 23.3.2021 under Sections
2. 1A, 1B of the Civil Procedure Act, Order 11 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules for orders:
 - a. Spent;
 - b. That the Honourable Court be and is hereby pleased to order consolidation of this case ELC No. 24 of 2015 together with BUSIA ELC NO. 32 OF 2013 (James Kuria Wairagu & 11 others vs. Transition Authority & Another);**
 - c. The costs of this application be provided for.**
3. The Application was supported by the affidavit of EVERLYNE TERESA MBINGI dated 25th March, 2021 and the following grounds;
 - a. That the above case herein concerns the same subject matter and same cause of action as BUSIA HC ELC Case No. 32 of 2013 (James Kuria Wairagu & 11 others vs. Transition Authority & Another) which is encroachment/trespass of the Busia Airstrip Land which is slated for hearing on the 12th of April, 2021 and
 - b. That the grant of this application is necessary to facilitate the efficient and expeditious disposal of the suit filed herein.
4. The Respondent opposed the application by filing grounds of opposition dated the 30th of June, 2021 and on the Replying Affidavit of GETRUDE AWINJA OCHIEL:
 - a. That the cause of action and the suit premises in the instant suit is different from the cause of action and suit premises in Busia ELC No. 32 of 2013.
 - b. That granting the said orders sought would prejudice the Respondent as the suit in Busia ELC No. 32 of 2013 has substantially proceeded and survey on the disputed property already conducted which exercise did not involve the suit parcel.
 - c. That the consolidation of the two suits will delay the expeditious disposal of Busia HC ELC No. 32 of 2013 as the survey process will have to be conducted afresh and all parties who have testified to be recalled for purposes of determining the Respondent's claim;
 - d. That the subject of the present suit borders on the establishment of an AP camp on the Respondent's parcel of land which cause of action is specific on the Respondent's parcel of land and the Respondent's intends to enjoin the National Police Service and the Ministry of Interior and Coordination to the instant suit hence consolidation the same with Busia HC ELC No. 2013 would cloud the

issues for determination;

e. That the intended amendment is likely to remove the County Government of Busia from the instant suit as the County Government of Busia does not deal with the establishment of a police post and/or compulsory acquisition of land to be used by the National Government;

f. That there is no basis therefore for grant of the orders sought as the two suits are unrelated both in terms of the parties of the suit and the parties thereto;

5. The parties agreed to canvass the application by way of written submissions. The Applicant filed its submissions on the 27th of July, 2021 stating that the subject matter of the cases was similar as they all involved the land duly acquired by the Government, reserved and utilized for the Busia Airstrip and which land is in issue in both suits. The Applicant averred that considering the high number of claimants in the suit and in light of the extent of encroachment of the Busia Airstrip land there is need to consolidate the two cases with a view to alleviate multiplicity of suits hence, save time, cost and expedite due determination of case. That ELC No. 32 of 2013 had a total of 12 claimants and ELC Petition No. E001 of 2021 has 22 claimants. The Applicant submitted further that in ELC Petition No. 001 of 2021, the Court granted the Applicant's prayer that read in part "...30 days window to enjoin in this suit any parties with interests on Busia Airstrip Land...". That this therefore affects all claims with regards to Busia Airstrip Land including the instant suit.

6. The 2nd Defendant filed their submissions on the 22nd of July, 2021. While relying on the case of **Stumberg & Another vs. Port Geither 1970 E.A 323** they submitted that none of the parties have demonstrated any sufficient undue advantage or disadvantage that may arise or is likely to suffer. That the subject matters in both ELC No. 32 of 2013 and the instant suit is a subdivision, or creation from the same land, claimed as airstrips the issues of law, facts and issues of the determination likely to be the same, then the wheel of justice tilts into issuing an order for consolidation. They supported the application for consolidation.

7. The Respondent did not file any submissions to the application.

8. This Court is called upon to determine whether the application meets the threshold for granting an order for consolidation of this instant suit with ELC Case No. 32 of 2013. Order 11 Rule 3 (1) (h) provides thus:

"With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—

(a)-----

(h) Consider consolidation of suits;"

9. In the case of **Korean United Church of Kenya & 3 Others vs Seng Ha Sang (2014) eKLR** the Court held that:

"consolidation of suits is done for purposes of achieving the overriding objective of the Civil Procedure Act, that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action."

10. In the case of **Law Society of Kenya vs. The Centre for Human Rights and Democracy, Supreme Court of Kenya, Petition No. 14 of 2013**, the Supreme Court of Kenya had this to say about consolidation of suits:-

"The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it"

11. The Civil Procedure Rules mandates Courts to consider consolidation of suits and in so doing, to be guided by the following:

a. Do the same question of law or fact arise in both cases?

b. Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction?

c. Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party?

12. The Respondent opposed this application on among other grounds that the suit land does not comprise part of the "Airstrip land" that is being litigated upon in Busia ELC Cause No. 32 of 2013. Further, ELC Petition No. 1 of 2021 stayed ELC No. 32 of 2013 pending hearing and determination of the petition. Some of the Respondents in the Petitions are the Plaintiffs in ELC Case No. 32 of 2013. Both the Petition and the ELC case relate to various parcels of land and subdivisions of what was referred to as the airstrip land.

13. The Applicant avers that the Plaintiff's parcel forms part and parcel of the airstrip land. On the title deed annexed to the Plaintiff's/Respondent's list of exhibits dated 25th of February, 2015, entry number 4 is a restriction on the dealings on the land until the Busia Airstrip case is finalized. This places the subject matter of the current suit that is LR No. SOUTH TESO/ANGOROMO/1494 under the order issued in petition No. 1 of 2021.

14. ELC No. 32 of 2013 has already proceeded for hearing substantially but the Plaintiffs are yet to close their case. As at the time of arguing this application, no survey report had been filed in the former suit. Secondly, the Plaintiff in this case has not made an application to amend to add the parties mentioned in their response to the application. This court can only make a determination based on the parties currently before it. The applicant herein is also the defendant in ELC Case no. 32 of 2013. Although plaintiffs in ELC 32 of 2013 each of hold distinct titles for each of their parcels yet they brought the suit jointly against the defendant herein. I do not see any prejudice if an order for consolidation is made.

15. It is however prudent to note that the suit land falls under the purview of the Busia Airstrip land which activities on any of the subdivisions of the land have been stayed by order of the Court in Petition No. 1 of 2021 and subsequently stayed proceedings in ELC case No. 32 of 2013. In view of the foregoing, the application is granted. Each party to bear their costs

DATED, SIGNED & DELIVERED AT BUSIA THIS 24TH DAY OF FEBRUARY, 2022

A. OMOLLO

JUDGE