



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 27 OF 2014 (FORMERLY HCC. NO. 87 OF 2011)

OSCAR PAUL MUTERE.....PLAINTIFF

VERSUS

1. BERNA NAUNGU MUTERE)

2. WADE PORTER)..... DEFENDANTS

3. CARLA PORTER)

R U L I N G

The 2nd and 3rd defendants hereinafter referred to as the 1st and 2nd Applicants filed the Notice of Motion dated 15.10.2013 praying for inter alia that Busia ELC. Case No. 46 of 2013 be consolidated with this case. The application was filed through M/S. Kowino & co. Advocates and is based on the following grounds set out on the face of the application.

- “ 1. That the said suit relates to the same subject matter that is Bunyala/Bulemia/422.
2. That the suits have the same parties as the Defendant and Plaintiff.
3. That the hearing of the said suit has not commenced.
4. That it is at the interest of justice to have the said suits consolidated, heard expeditiously and disposed.”

The application is also supported by the affidavit of Davies Kimori sworn on 15th October, 2013.

The Plaintiff/Respondent did not file any replying papers to the application but his counsel, Mr. Jumba submitted on matters of the law. Mr. Onyango advocate for the Applicants also made his submissions.

I have carefully considered the grounds on which the application is based, the contents of the supporting affidavits and its annexures plus the submissions by both counsel and find as follows:-

1. That this suit was commenced by originating summons dated 8th, December, 2011 while Busia ELC. Case No. 46 of 2013 was commenced through plaint dated 5th June, 2013.
2. That Oscar Paul Mutere is the Plaintiff in this case while in Busia ELC. No. 46 of 2013, he is

- named as the 2nd Defendant.
3. That Wade Porter, and Carla Porter, both trustee of Living Faith International are named as 2nd and 3rd Defendants in this case while the Plaintiff in Busia ELC. Case No. 46 of 2013 is Living Faith International, Africa Divine Registered Trustee which the court takes to be the same body as Living Faith International in this case.
 4. That Berna Naungu Mutere appears in both suits as the 1st Defendant.
 5. That the subject matter in both suits is Land Parcel Bunyala/Bulemia/422.
 6. That other than the consent order entered between the Plaintiff and 1st Defendant in this case of 18th February, 2013 to the effect that the 1st Defendant in this case had admitted the Plaintiff's claim, the two matters are still pending hearing in this court.
 7. That this case having been initiated through originating summons, the 2nd and 3rd Defendants could not have lodged their claim while filing their reply unlike if the suit had been commenced through a plaint. As such it would be erroneous to say the mere existence of this case makes the issues raised in Busia ELC. No. 46 of 2013 res judicata. The Defendants in Busia ELC. case No. 46 of 2013 could have applied to have that suit stayed pending the hearing and determination of this suit. No such step has been taken and the Plaintiffs in Busia ELC. Case No. 46 of 2013, who are also the 2nd and 3rd Defendants in this case, have taken the step of asking the court to consolidate the two matters for hearing.
 8. That the consent order of 18th February, 2013 between Plaintiff and 1st Defendant did not amount to a settlement or compromise of the Plaintiff's case against the 2nd and 3rd Defendants. As such the Plaintiff could still have gone ahead to fix the case down for hearing as against the 2nd and 3rd Defendants but it appears he has not done so.
 9. That it is fair and just that the two matters be consolidated so that they could be heard at the same time thereby enhancing efficiency and timely resolution of the dispute.

For reasons set out above, the court finds that the application dated 15th October, 2013 has merit. The application is allowed in terms of prayers 1,2, and 4.

Orders accordingly.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED IN OPEN COURT ON 7TH DAY OF APRIL, 2014.

IN THE PRESENCE OF;

JUDGE.