



IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 396 OF 2013(O.S)

CHARLES OMOKE ONSASE APPLICANT

VERSUS

VINCENT MOSETI (Sued as the legal and personal administrator of the estate of the late Chrisantus Okumu Ongeru –deceased) RESPONDENT

RULING

1. What I have before me is the application that was brought by the applicant by way of Notice of Motion dated 20th May, 2014 for the following orders:
 - a. Spent
 - b. **This honourable court be pleased to order that this suit be consolidated with and/or heard together with Kisii HCCC No. 115 of 2009.**
 - c. **Consequent upon grant of prayer (b) above this honourable court be pleased to give such directions as are expedient as to the prosecution of the applicant’s claim**
 - d. **Costs hereof be provided for.**

The application is supported by the affidavit of the applicant sworn on 20th May 2014. The application was brought on the grounds that; the respondent has filed a suit against the applicant namely, Kisii HCCC No. 115 of 2009 seeking a mandatory injunction to compel the applicant to vacate all that parcel of land known as **LR No. West Kitutu/Bomatara/3166**(hereinafter referred to as “**the suit property**”) and to demolish all the structures that the applicant has erected on the said property. In the suit, the respondent has claimed that the applicant is trespasser on the suit property having entered thereon unlawfully and without the consent of the respondent in August 2008. The applicant has filed a statement of defence in that suit in which the applicant has denied the respondent’s claim. The applicant has contended that he has occupied the suit property as of right since the year 1974. The respondent’s suit (Kisii HCCC No.115 of 2009) is part heard and is pending further hearing.

2. The applicant has on his part brought this suit by way of Originating Summons for a declaration that the applicant has acquired a portion of the suit property measuring 0.6 ha. by adverse possession having occupied the same for a period of over 30 years. The applicant has also sought an order that the applicant be registered as the proprietor of the said portion of the suit property. It is the applicant’s contention that since the applicant and the respondent are litigating over the same subject matter in this suit and in Kisii HCCC No. 115 of 2009, it is only reasonable that the two suits be consolidated and heard together so that all the issues in controversy between the parties are raised, tried and determined once and for all. The applicant has contended that if the two suits are heard and determined separately, there is a possibility of the court arriving at conflicting decisions. The applicant has contended that he will suffer serious prejudice if this suit is not consolidated with or heard together with Kisii HCCC No. 115 of 2009 as he will not be able to raise the claim he has raised herein in the said suit and as such Kisii HCCC No. 115 of 2009

may be decided against him an outcome that would lead to his eviction from a portion of the suit property which he has occupied with his family since 1974. It is on account of the foregoing that the applicant has sought the reliefs prayed for in this application.

3. The applicant's application was opposed by the respondent. In his replying affidavit sworn on 16th June 2014, the respondent contended that the applicant's application has been brought late in the day. The respondent contended further that the applicant's suit herein is an afterthought and that the same has been brought with the sole aim of derailing the hearing of Kisii HCCC No. 115 of 2009. The respondent contended further that Kisii HCCC No. 115 of 2009 has been heard partly and the respondent has already closed his case. The respondent contended that the applicant has not explained the delay in the filing of this suit. The respondent contended further that the applicant will suffer no prejudice if this suit and Kisii HCCC No. 115 of 2009 are heard and determined independent of each other.
4. On 16th June 2014, I directed that the applicant's application be argued by way of written submissions. The applicant filed his written submissions on 23rd June 2014 while the respondent filed his submissions on 3rd July 2014. I have considered the applicant's application together with the affidavit filed in support thereof. I have also considered the respondent's replying affidavit in opposition to the application. Finally, I have considered the respective submissions by the advocates for the parties. It is at the discretion of the court whether to make an order for consolidation. Applications for consolidation are normally considered during case conference under Order 11 of the Civil Procedure Rules, 2010. The court can nevertheless entertain such application at any time provided sufficient reasons are given therefor. What the court considers in applications for consolidation are; whether the suits sought to be consolidated involve the same parties and the same subject matter and, whether the suits raise the same or related issues such that if the court was to try the suits jointly the parties would rely on the same evidence thereby saving the court's time and expense for the parties involved. The court will also consider if any prejudice or injustice would be occasioned to any party if the consolidation is ordered.
5. There is no dispute that the applicant and the respondent are both involved in this suit and in Kisii HCCC No. 115 of 2009 and that the two suits concern the same subject matter. There is also no dispute that if the suits are heard together, the parties would rely on the same evidence because the issues raised in the two suits are the same. There is no doubt therefore that consolidation of the two suits would save on judicial time. At the same, all issues in dispute between the parties would be determined once and for all. As I have stated above, these are not the only factors which, the court considers in applications of this nature. The court would also consider whether it would be just to make the order and further, if any party to the suits sought to be consolidated is likely to be prejudiced. The respondent has objected to the consolidation sought herein on the grounds that the order has been sought late in the day and that if the same is granted, it would lead to the delay in the hearing and disposal of Kisii HCCC No. 115 of 2009 that is partly heard and in which the respondent's case is already closed.
6. The respondent's contention that the application herein has been brought late in the day and that the applicant is guilty of indolence is not without basis. The applicant has not given any explanation why he did not file this suit as soon as Kisii HCCC No. 115 of 2009 was instituted by the respondent for his eviction from the suit property. I am in agreement with the respondent's contention that the respondent will be prejudiced if this suit is consolidated with Kisii HCCC No. 115 of 2009. I can see no reason that would justify the re-opening of the respondent's case in Kisii HCCC No. 115 of 2009 to accommodate this suit. The applicant has not given any explanation why this suit was not brought until after the closure of the respondent's case in Kisii HCC No. 115 of 2009. In the circumstances, I am not satisfied that the applicant has made out a case for the consolidation of this suit with Kisii HCCC No. 115 of 2009.
7. The applicant's application had sought an alternative prayer. In the alternative prayer, the applicant sought an order that this suit be heard together with the Kisii HCCC No. 115 of 2009. If this prayer is granted, the two cases would be heard side by side or one after the other. The respondent seems not to have raised any objection to this alternative prayer. The respondent did not take any issue with it in his replying affidavit or written submissions. In the absence of any objection from the respondent, I would allow the alternative prayer in the Notice of Motion application dated 20th May, 2014 and order that this suit shall heard together with Kisii HCCC No. 115 of 2009. The court files for the two suits shall be put together and the cases shall be heard one

after the other with Kisii HCCC No. 115 of 2009 being heard first followed by this suit. The respondent shall have the cost of the application.

Delivered, signed and dated at KISII this 25th day of July, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Aoga h/b for Nyamurongi for the applicant

N/A for the respondent

Mr. Mobisa Court Clerk.

S. OKONG'O

JUDGE