



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

CIVIL CASE NO. 4 OF 2009.

**STANLEY NASONGO OMALA.....APPLICANT**

**VERSUS**

**SYLVESTER OKUMU OKELLO.....RESPONDENT.**

**R U L I N G.**

**STANLEY NASONGA OMALA**, who is the defendant in this case, filed the notice of motion dated 22<sup>nd</sup> February, 2013 through M/S. Balongo & co. advocates praying for the following orders:

1. That Busia HCC. No. 9 of 2010 be consolidated and heard with HCC. No. 4 of 2009.
2. Costs of this application be in the cause.

The Application is based on the following grounds;

1. That both matters are pending before the court
2. That both cases raise similar questions of law and facts arising from the same transaction.
3. That would be a waste of the courts time and process to have the two suits heard separately while the subject and the parties are the same.
4. That consolidation of the two matters will not be prejudicial to the Respondent's case.

The Application is supported by the supporting affidavit of Stanley Nasonga Omala sworn on 22<sup>nd</sup> February, 2013 which more or less restates the four grounds set out hereinabove.

The application is opposed by the Sylvester Okumu Okello who is the plaintiff in this case, and hereinafter referred to as the respondent, through his replying affidavit sworn on 10<sup>th</sup> April, 2013 filed through M/S. Gacheche Wa Miano advocate . He among others avers:

1. That suit No. HCC. 4 of 2009 is partly heard and the pleadings already closed.
2. That Suit No. HCC. 9 of 2010 was filed almost one year after filing HCC. NO. 4 of 2009 contrary to the provisions of the Civil Procedure Act.
3. That HCC. No. 9 of 2010 and the current application are aimed at indirectly overturning the judgment in Nairobi HCC. No. 6695 of 1992.
4. That the application is a sham, incompetent, defective, mischievous, frivolous, vexatious and an abuse of the due process the court.

Mr. Jumba and Mr. Gacheche advocates appeared the court during the hearing of the application and each made extensive submissions on behalf of their respective clients.

The court has perused the application, the supporting and replying affidavits and annexures thereto and considered the submissions by the counsel and come to the following findings:

1. That HCC. NO. 4 of 2009 (this case) was filed by Sylvester Okumu Okello the (Respondent) against Stanley Nasonga Omala(applicant). The subject matter of this suit is land parcel Samia/Budongo/1790. The prayers are declaration that the defendant is a trespasser, eviction of the defendant and cost. The case makes reference to Nairobi HCC. No. 6695 of 1992.
2. That HCC. No. 9 of 2010 was filed by Stanley M.N. Omalawho is the applicant herein and is against Sylvester Okumu Okello (the Respondent) and the Attorney General. The subject matter of this case is land parcel No. Samia/Budongo/1790. The prayers in this case are orders removing the name of the Respondent from the title of the said land, injunction against the respondent and costs. The case also makes reference to Nairobi HCC. No.6695 of 1992.
3. That both the applicant and respondent are parties in the two cases sought to be consolidated. Both cases have the same subject matter being land parcel NO.Samia/Budongo/1790. The prayers in both cases are more or less the same as they relate to ownership and possession of the said subject matter.
4. That the prayers in HCC. NO. 9 of 2010 could reasonably have been dealt with in HCC. No. 4 of 2009 through a counterclaim instead of filing a fresh suit that offends the provision of section 6 of the Civil Procedure Act.
5. That HCC. 4 of 2009 is partly heard with the 1<sup>st</sup> witness who is the plaintiff having been stood down on 19<sup>th</sup> February, 2013 on application of his counsel.
6. That as the two cases are about the same subject matter, and both the applicant and the respondent appear in each of the cases the court is in agreement with the applicant that it is only fair that the two matters be consolidated at heard together to avoid a situation where the court would arrive at different decisions if they were heard separately. The consolidation will also allow the court save time.

From the foregoing, the court finds that the application dated 22<sup>nd</sup> February, 2013 has merit. However, the applicant being the one who filed HCC. No. 9 of 2010 instead of a counterclaim in the already existing HCC. 4 of 2009, will meet the costs of this application. The application dated 22<sup>nd</sup> February, 2013 is therefore allowed with costs to the respondent being met by the applicant in any event.

**S. M. KIBUNJA,**

**JUDGE.**

**19<sup>TH</sup> JUNE, 2013.**