REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL SUITS NOs.154 & 180 of 2009

JOHNSTONE OGADA VIKIRU……..…….PLAINTIFF

VERSUS

NATHAN KADUKA.....……RESPONDENT

R U L I N G

1. Before me are two Applications; one is dated 5th may 2010 and the other is dated 22nd March 2010. I will deal with the one dated 5th May 2010 first because, it seeks inter-alia, the consolidation of HCCC No.154 of 2009 and HCCC No.180 of 2009. The Applicant in that regard is one Nathan Kaduka and it is his case that the two suits are similar in nature and were filed with regard to the same subject matter.

2. I will quickly dispose of that issue by stating that in HCCC No.154 of 2009, the plaintiff is one, Nathan Kaduka (hereinafter, "Kaduka") and the defendant is one, Johnstone Vikiru (hereinafter, "Vikiru". The claim made in that suit is that because land parcel number Kakamega/Bugunda/2069 is ancestral land, a declaration to that effect should be made and further, that the registration of the land in the names of Mathew Vikiru Kihanga and subsequently to Johnstone Ogada Vikiru, should be cancelled.

3. In HCCC Case No.180 of 2009, the plaintiff is one, Johnstone O. Vikiru and the Defendant, one Nathan Kaduka. The complaint by Vikiru is that Kaduka entered Land Parcel No.Kakamega/Bugonda/2069 in 2001 without lawful cause and that an order of eviction should be issued forthwith. In that suit, the latter claimed to be the sole registered proprietor of the land.

4. To my mind, to hear the two suits separately would be an abuse of the court process. I say so because the two have the same parties and the dispute revolves around the same property. Further it would be best that the dispute between the parties should be resolved at one hearing and not in separate hearings. Consolidation is the only way to ensure that fact, and so I will grant the order in that regard.

5. Turning to the application dated 22nd March 2010, it seeks orders that the Defence filed in HCCC No.180 of 2009 be struck out for reasons that the Defendant, Nathan Kaduka failed to file and serve it within time. Further, that the same was filed in violation of order VIII Rule 1(2) of the Civil Procedure Rules.

6. In his response as contained in a Replying Affidavit sworn on 28th April 2011, Kaduka defined that the Application was lacking in merit because the Memorandum of Appearance and statement of Defence were filed properly and later served by registered post on 18th January 2010 and therefore, the Application was misguided and was ill-advised.

7. What is the issue in contest? That although a statement of Defence was filed and served, the same should be struck from the record under order VI Rules 3 and 9 of the Civil Procedure Rules. Further, that the same is an abuse of court process if Order VIII Rule 1(2) is applied to the matter.

8. Order VI Rules 3 and 9 of the Civil Procedure Rules are irrelevant to the present proceedings and their invocation was in error. On the other hand, Order VIII Rule 1(2) provides as follows;

(2) **"Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fifteen days after he had entered an appearance in the suit and serve it on the plaintiff within seven days from the date of filing the defence"**

9. A casual reading of the above Rule would show that there is no power to strike out a pleading for the reasons given by the applicant. Even if such a power could be inferred from the Rules, it is unclear to me why the Applicant has chosen this cause of action when in fact a statement of Defence has been filed and served before any interlocutory judgment could be entered against the Defendant. Order IX A Rule is the Rule that deals with non-appearance and default of defence either within time or at all. Striking out is not a procedure known to me in those circumstances.

10. Striking out in any event is a drastic measure and should only be taken when it is absolutely necessary to do so. I do not see that this is a case where I should invoke such an order.

11. In any event, once I have consolidated the twin suits, it would a travesty of justice to strike out a statement of defence in one suit while another is existing and before directions can be taken on who will be the Plaintiff and Defendant in the consolidated suit.

12. Returning to the Application dated 5th May 2010, an order of inhibition is sought to stop any dealings in the suit land and in the circumstance of this case, and before all the issues in contest are determined, there is need to preserve the suit land and so such an order is warranted.

13. In conclusion, I shall make the following orders in determining the two Applications;

(i) HCCC No.154 of 2009 and HCCC No.180 of 2009 are hereby consolidated and proceedings shall continue in HCCC No.154 of 2009.
(ii) An inhibition shall issue directed at the Land Registrar, Vihiga District stopping any dealings in the land register, in respect of land parcel No.Kakamega/Bugonda/2069.
(iii) The Application dated 22nd March 2010 is dismissed.
(iv) Each party will bear its own costs.

14. Orders accordingly.

I. LENAOLA
JUDGE

DELIVERED, DATED AND COUNTER-SIGNED BY L. KIMARU, JUDGE AT KAKAMEGA THIS 13TH DAY OF JUNE, 2011

L. KIMARU
JUDGE