



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII**

Civil Case 213 of 1999

SAMWEL TIRIMBA ONCHIRI & 2 OTHERS PLAINTIFFS

VERSUS

ONCHIRI OGORO)

DAVID OGOTI RAGIRA) DEFENDANTS

RULING:

The applicants' application dated 13th July 2005 had several prayers but the main one, which was argued by Mr. Mokuia is the prayer to have this case consolidated with Kisii HCCC No.303 of 1997. All the other prayers were abandoned.

It was submitted that the parcel of land which is the subject of this suit is the same as the one in Kisii HCCC No.303 of 1997. In that suit judgment was entered by consent and a portion of 4.4 acres transferred to the 2nd respondent. This portion is the one the applicant is seeking in this suit. Mr. Mokuia submitted that the two suits be consolidated for proper adjudication of issue in this suit.

The application was opposed. Mrs. Asati submitted that HCCC No.303 of 1997 was concluded in 1998 and the decree therein executed in 1999. The parties in that suit now live each in his own portion of land. The suit is therefore not pending.

Further it was stated that the applicant in this application was not a party in that suit. He applied to be enjoined as a party and his application was rejected.

I have considered the application. Indeed courts have powers to order consolidation of suits pending before it. Order 11 rule 1 C.P.R. states:

“Where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved the court may either, upon the application of one of the parties, or on its own motion, at its discretion, and upon such terms as it deems fit –

(a) order a consolidation of such suits, and

(b) direct further proceedings in any of such suits be

stayed until further order.

The provisions of the rule are very clear. The suits must be pending before the same court. The suits must have the same or similar questions of law or fact. In this case both parties are in agreement that HCCC No.303 of 1997 was concluded in 1998 when a court judgment was entered. Thereafter in 1999 the decree in that suit was executed. There is therefore nothing pending in that suit.

That suit is not pending and as such the court cannot order it be consolidated with this suit. The application therefore fails on that score.

The applicant annexed the plaint in HCCC 303 of 1997 to this application. I have looked at the prayers in that suit and those in this suit. They are not similar. The plaintiff in that suit who is the 1st defendant in this suit sought the registration of the defendant in that suit in parcel No.574 of 4.4 hectares to be declared a nullity and the registrar to rectify any anomaly. In this suit the plaintiff/applicant seek court to declare that 1st defendant holds parcel No.574 in trust for him. The two prayers are clearly not similar.

As submitted the decree in HCCC 303 of 1997 was executed in 1999. The land was submitted and two parcels resulting therefrom registered. The applicant states he was evicted from the land though he is a son of 1st defendant. He filed this suit in 1999 and only this year after a period of over six years did he bring this application seeking consolidation. There was no explanation why it took him that long. As submitted by Mrs. Asati he is guilty of laches.

From the above therefore I find the application has no merit and the same is dismissed with costs.

Dated this 25th January 2006.

KABURU BAUNI

JUDGE