



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**ELC CASE NO. 3 OF 2021**

**IN THE MATTER OF L.R. NO. SOUTH TESO/ANGOROMO/440**

**AND**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT**

**AND**

**IN THE MATTER OF LAND REGISTRATION ACT**

**BETWEEN**

**GEORGE IRUKAN JUDGE.....APPLICANT**

**= VERSUS =**

**AGGREY WANYONYI NABUTOLA.....RESPONDENT**

**RULING**

1. The Applicant brought an application dated 19<sup>th</sup> April 2021 under the Order 11 Rule 3 of the Civil Procedure Rules seeking for the following orders;

**a) That Busia CMC ELC NO. 80 of 2020 be and is hereby transferred to this court and consolidated with this case.**

**b) That costs of this application be in the cause.**

2. The application is supported by the grounds on the face of it inter alia and the affidavit of GEORGE IRUKAN JUDGE;

*i) That there exists BUSIA CM ELC NO. 80 OF 2020 between AGGREY WANYONYI NABUTOLA V. GEORGE IRUKAN JUDGE in which the plaintiff is seeking an order that a permanent injunction be issued restraining the defendant from trespassing, building, cultivation and or tilling on land parcel No. SOUTH TESO/ANGOROMO/6460.*

*ii) That the defence the plaintiff intends to raise is that of adverse possession and has filed the present suit to bring out that issue clearly.*

*iii) That the plaintiff has been in open and notorious possession of a portion measuring approximately one acre out of L.R. SOUTH TESO/ANGOROMO/6460 since December 1998 to date.*

*iv) That consolidation of the cases will be expeditious way of resolving the dispute between the parties.*

3. The Respondent filed a Replying Affidavit on 29<sup>th</sup> April 2021 deposing that the application is frivolous, vexatious and scandalous and an abuse of court process and cannot see the light of day. He stated that on 7/12/2020 he had filed a claim against the applicant herein vide Busia CMC ELC No. 80 OF 2020 seeking injunction and eviction orders over the suit land herein L.R. No. SOUTH TESO/ANGOROMO/6460. He deposed that the Chief Magistrates court has the jurisdiction to entertain the applicant's originating summons as set out in Section 26(3, 4) of the Environment and Land Court Act 2011 as read together with Section 7 and 9 of the Magistrates Act. He further stated that the applicant is moving left and right in the corridors of justice as he continues putting up houses because he was not issued with ex-parte injunctive orders.

4. The Respondent further raised a preliminary objection dated 30<sup>th</sup> April 2021 and filed in court on 11<sup>th</sup> May 2021 impleading that

**a) The current suit is frivolous and vexatious, and an abuse of the due process of this Honourable Court.**

**b) The applicant's suit offends Section 6 of the Civil Procedure Act.**

5. The parties agreed to dispense with the hearing of the Preliminary Objection and Application by way of written submissions. The Applicant filed his submissions on 9<sup>th</sup> June 2021 stating that Order 11 Rule 3(h) of the Civil Procedure Rules gives the court the power to consider consolidation of cases and that consolidation of the two cases will enable the court to have the entire spectrum of the dispute, as such inconsistencies and or different decisions will not be experienced in the same set of facts. He relied on the decision in **LAW SOCIETY OF KENYA VERSUS CENTER FOR HUMAN RIGHTS & DEMOCRACY & 12 OTHERS (2014) eKLR**.

6. The Respondent filed his submission on 17<sup>th</sup> June 2021 submitting that the present originating summons is sub-judice as provided under Section 6 of the Civil Procedure Act since the applicant was at liberty to file a counter-claim in Busia CMC ELC 80 OF 2020. He relied on the decision in **PATRICK NDEGWA MUNYUA VERSUS BENJAMIN KIIRU MWANGI & ANOTHER (2020) eKLR**.

7. First, I shall deal with whether or not the preliminary objection is merited. In the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** A preliminary objection per Law J.A. was stated to be thus: -

*“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”*

8. It is not in dispute that there is another suit being BUSIA CMC ELC 80 OF 2020 where the Respondent has prayed for an injunction and eviction orders against the Applicant over the same property being L.R. SOUTH TESO/ANGOROMO/6460. Save for the issue of adverse possession, the subject matter and the parties in the two matters are the same. **Section 6 of the Civil Procedure Act** provides as hereunder:

*“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”*

9. The rationale for this principle was stated in in **Kampala High Court Civil Suit No. 450 Of 1993 - Nyanza Garage vs. Attorney General** in which the Court held that:

*“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”*

10. In **Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR**; the Court opined that:

*“It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases.”*

11. For a suit to be found sub judice, certain conditions must be met as was enumerated in the case of **Republic v Registrar of Societies - Kenya & 2 others Ex-Parte Moses Kirima & 2 others [2017] eKLR** where Odunga J held as follows:

*“32. Therefore, for the principle to apply certain conditions precedent must be shown to exist:*

*a) First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit;*

*b) proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title;*

*c) and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”*

12. If the two matters were to be decided independently then the outcome of either i.e. suit in the Chief Magistrates' court may affect the outcome of the suit in this court. The Applicant has admitted that the issues in the two suits are similar but has distinguished that in a suit where the cause of action is adverse possession can only be filed in the High Court by dint of Section 38 of the Limitations of Actions Act. The respondent argues that the Chief Magistrates' Court has jurisdiction to hear and determine adverse possession matters and that the applicant is at liberty to file a counterclaim and plead adverse possession. He added that the subject matter being L.R. SOUTH TESO/ANGOROMO/6460 is valued at Kshs.6,000,000/= which is well within the pecuniary jurisdiction of the Chief Magistrates' Court.

13. The question of jurisdiction of the magistrate's court to hear and determine claims under adverse possession is still a grey area. The Applicant's fears were founded in bringing his claim before the court whose jurisdiction on claims under section 38 of Cap 22 is clearly legislated. I am therefore not persuaded that the current suit offends the provisions of section 6 of the Civil Procedure Act.

14. It is safe therefore to find that the preliminary objection is unmerited and is hereby dismissed. The court finds that the application seeking to transfer suit is merited to allow for determination of both claims at the same time by the same judicial officer. The order for consolidation of CMC ELC 80 of 2020 and this suit is granted with an order that each party shall meet their respective costs of the application and the Preliminary Objection.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 28TH DAY OF OCTOBER 2021.**

**A. OMOLLO**

**JUDGE**