



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 121 OF 2014 (FORMERLY HCC 57 OF 2010)**

**ROSALIA AKUMU MAUDA** (suing on her behalf and as the Leg.

Representative of the estate of **PETER MAUDA** ..... **PLAINTIFF**

**VERSUS**

**1. ALLOYS P. J. MAUDA**

**2. LESTER WILLIS OWINO**

**3. FREDRICK MAUDA**

**4. TOBIAS MAUDA OCHIENG**

**5. CHARLES EKESA MAUDA** ..... **DEFENDANTS**

**RULING**

1. For determination is the notice of motion application dated 11/6/2019 brought under the provisions of Section 3A & 63(e) of the Civil Procedure Act and Order 11 rule 3 (1) (h) of the Civil Procedure Rules. The applicant prays for orders;

**(a) That the case filed herein as ELC No. 121 of 2014 and ELC No. 12 of 2019 be consolidated and set down for hearing and final disposal.**

**(b) That in the alternative to prayer (a) above, the evidence to be led in this case be applied for determination of ELC No. 12 of 2019.**

**(c) That costs be in the cause.**

2. The application is supported by the grounds listed on its face to wit;

**1. That both cases concern both parties and cover the same subject matter but required different modes of institution as per the rules of procedure.**

**2. That the consolidation process is necessary for a conclusive and fair determination of the dispute.**

**3. That there shall be no prejudice to the respondent if the application is allowed.**

3. The application is supported further by the applicants' affidavit filed on 11/6/2019. Ms Rosalia deposed that after filing a claim for adverse possession, there was discovery of additional evidence. That on advice from her advocates on record she also filed ELC Case No. 12 of 2019 by way of plaint in compliance with requirements of procedure. She deposed that since the two suits are related and same evidence shall be used, it is only fair that they be consolidated and heard as one case for a conclusive determination. That in the event that the consolidation is not possible she requested that her evidence in this case be applied for determination of ELC case No. 12 of 2019.

4. The application is opposed by the Defendants. The defendants filed grounds stating as follows;

**1. That the application lacks merit.**

2. *That the parties and the subject matter in the 2 cases are not the same.*
3. *That the Respondents stand to be prejudiced.*
4. *That the application is designed to delay the finalization of this suit.*
5. *That the cause of action and the reliefs sought in the two cases are different and cannot be consolidated.*
6. *That the witnesses in the two cases are different and the evidence of one cannot apply to another case.*
7. *That the same of the Respondents are now deceased.*
8. *That the application is an abuse of the court process.*

5. The advocates agreed to prosecute the application by way of filing written submissions which submissions I have read. The two suits were indeed filed by the applicant. In Originating Summons case No. 121 of 2014 she sued 5 defendants while in the plaint No. 12 of 2019 she has sued one defendant. The applicant's justification for filing two suits is because one set of her claim for trust and the second set for adverse possession cannot be brought under the same file. Yet she goes ahead to ask the court to consolidate the two files and have them heard together. She has made an alternative prayer that if the order for consolidation is not granted then the evidence led in 121 of 2014 be applied to determine ELC case No. 12 of 2019.

6. If the two claims cannot be brought either by plaint or originating summons then why apply to consolidate them after filing and or request the evidence in one to be applied to determine the other? The plaintiff by her own pleadings has demonstrated to the court that the two suits can indeed be in one file hence the bringing of a second suit amounts to abuse of court process. Annexure "RAM 2" is a draft amended plaint annexed to the supporting affidavit and it introduces two additional defendants. The proposed amendment also introduces additional pleading of facts to paragraph 6 as follows;

"6. The plaintiff lawfully and subsequently took full possession, control and occupation of plot No. Bukhayo/Mundika/1032 which on the outside existed as one single undivided plot and she physically moved in and started living in her houses and the plot in the year 1994 and exclusively occupied it uninterrupted and peacefully from then to the date exclusive of the defendant to date hereof and therefor also entitled to claim the whole plot of Bukhayo/Mundika/1032 and its subdivided and undermarked portion of Bukhayo/Mundika/2627 by virtue of adverse possession".

In the prayers sought, prayer cc) pleads thus;

"In the alternative to prayers a, b & c the plaintiff be declared to have acquired ownership and title to a portion of land measuring 0.12 Hectares by virtue of adverse possession being land parcel No. Bukhayo/Mundika/2627 and the defendant be ordered to sign all the relevant documents for consent and transfer of 0.012Ha forming Bukhayo/Mundika/2627 to the plaintiff and in default thereof the Deputy Registrar of the Court be empowered to sign on the defendants' behalf."

7. In the amended originating summons (ELC Case No. 121 of 2014), the plaintiff pleaded the issue of trust in paragraph 4, 9 and 11. She further raised the question in paragraph 5 & 6 of the originating summon whether the respondents registration over parcel No. Bukhayo/Mundika/2627 was void for want of Land Control Board consent. From the applicant's pleadings, the issues raised in the latter suit are also captured in the former suit. Although the Respondents argue in ground 2 that issues in dispute and parties in the two cases are not the same, the argument is misplaced as the original title Mundika/1032 and the resulting subdivisions being Mundika/2626 and 2627 is what is being claimed in both suits. Secondly even if one case has only one defendant, whichever case proceeds and if this court were to make a determination, that determination would affect the Respondents in originating summon No. 121 of 2014 and ELC Case No. 12 of 2019. Consequently in asking the court to consolidate the two suits and or hear them separately is akin to asking the court to make legal an obvious abuse of court process (filing duplex suits over the same subject matter) and contravening the provisions of Section 6 of the Civil Procedure Act.

8. I am therefore not persuaded that there is merit in the motion dated 11<sup>th</sup> June 2019. My reasoning is supported by the holding in the decision of the Court of Appeal at *Malindi Abud Abdalla Omer & 28 others Vs Kenya Ports Authority & Salaries & Remuneration Commission (2018) eKLR* where that court while striking out a case for being abuse of the court process said thus;

**"The only thing we should concern ourselves with in this appeal is whether the appellants were prejudiced by the striking out of their suit. Were they left without a remedy? The answer is a resounding no. They did not stand to lose anything ... instituting two suits over the same cause of action cannot be judicious use of court's time. It is an abuse of the process of the court which must be frowned upon."**

9. In conclusion, the application is dismissed with costs to the defendants/respondents.

**Dated, signed and delivered at BUSIA this 23<sup>rd</sup> day of January, 2020.**

**A. OMOLLO**

**JUDGE**