REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 39 OF 2019 (OS)

OUMA PETER ODANGA...........................1ST APPLICANT

CLEMENTINA ANYANGO ABANGI..... 2ND APPLICANT

- VERSUS -

EMMANUEL MACHIO ODANDO ....RESPONDENT

R U L I N G

1. The applicants have moved the court vide a notice of motion dated 17th October 2019 under Section 3A, 18 and 63(e) of the Civil Procedure Act seek orders;

> **1. That this suit – Busia HC ELC No. 39 of 2019 and Busia HC ELC No. 146 of 2016 between Emmanuel Machio Odanga versus Peter Ouma Odanga & Clementina Anyango Abangi be and are hereby consolidated.**
>
> **2. That upon granting prayer (1) above, directions be given accordingly.**
>
> **3. That pending the hearing and determination of the two consolidated suits, a restriction be placed/registered on LR. No. Bunyala/Bulemia/208.**
>
> **4. That pending the hearing and determination of the two, consolidated suits, status quo be maintained - the use and occupation of L.R. Bunyala/Bulemia/208 by the applicants be maintained.**
>
> **5. That costs be provided for.**

2. The motion is premised on the affidavit of Peter Ouma Odanga and of the following grounds;

> i. That the subject matter and the parties in the two cases are the same.
>
> ii. That both suits are pending and are yet to commence hearing.
>
> iii. That it is to avoid conflicting decisions.
>
> iv. That the reliefs sought shall meet ends of justice.

3. The 1st applicant deposed that the subject matter in this case and Busia ELC No. 146 of 2016 is LR. No. Bunyala/Bulemia/208 between the same parties. That the respondent has filed a replying affidavit in the former case. That both suits are pending hearing. That it is imperative to preserve the subject matter L.R. No. Bunyala/Bulemia/208 by registering a restriction pending hearing and determination of this suit. That the reliefs sought meets the ends of justice.

4. The respondent filed grounds of opposition stating thus;

> 1. That the application has been made as an afterthought and is a clear abuse of the court process and the law.
>
> 2. That the application is without any merit.

3. That the applicants are not entitled to orders sought in view of Section 24 of the Land Registration Act 2012 and as such the respondent avers that there is already illegal restriction/caveat registered on the suit land in favour of the 2nd applicant.

4. That no valid grounds have been given to warrant the orders sought as there is an order of this court restraining and evicting the applicants all together on the suit land and is still in force as it has never been set aside and/or varied.

5. That it is imperative that litigation must come to an end, and numerous applications by the applicants are made with sole intention to further delaying, this matter and is an act of malice.

6. That the said application lacks merit and the same ought to be dismissed with costs.

5. In submissions, the applicants stated that it is not in dispute that they are in possession. That the subject matter in this suit is the same as ELC 145 of 2016. The respondents submitted that the applicants herein had the option to file a counter-claim in 146 of 2016 instead of filing a fresh suit which amounts to abuse of court process. He also said there already exists a restriction registered on the suit title for the benefit of the applicant. That the applicants are seeking an order of injunction through the back door. In rebuttal, the applicants stated that a claim for adverse possession cannot be brought by way of a counter-claim. He urged the court the grant all the orders.

6. To begin with, a counter-claim is considered as a suit under the Civil Procedure Rules. Order 7 rule 3 of the Rules states thus;

> "**A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such setoff or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.**"

7. The applicants have not stated which law precludes a party from bringing a claim for adverse passion by way of counter-claim. In several precedents, the courts have determined claims for adverse possession brought as a defence or a counter-claim. For instance, the Cases of;

> ***Waballa Vs Okumu (1997) LLR 609 (CAK); Gulan Mariam Vs Julius Charo Karisa Civil Appeal No. 26 of 2015*** where the claim was raised in the defence. The Court of Appeal in rejecting the objection to the procedure stated the law as follows;

> **"Where a party like a respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. …… Be that as it may, whether it was erroneous to sanction a claim of adverse possession pleaded only in the defence, we refer to the Case of Waballa Vs Okumu where the claim for adverse possession was in the form of a defence in an action for eviction. The court in upholding the claim did not fault the procedure. The decision in the case above was also referred by the Court of Appeal in the Case Cheron (K) Ltd Vs Harrison Charo Wa Shutu (2016) eKLR dismissed an appeal that faulted the decision of the Environment and Land Court allowing a claim for adverse possession raised in a defence."**

8. The applicants admit the parties and subject matter in this suit are the same as those in ELC Case No. 146 of 2016. The case No. 146 of 2016 was definitely filed earlier and it is admitted that it is pending hearing. Filing a new suit while well aware of the pendency of a similar suit is definitely an abuse of the court process. Asking the court to consolidate the two is equivalent to asking the court to validate the abuse. I refuse to misuse the discretion given under Section 3A of the Civil Procedure Act to perpetuate an abuse such as this by granting the orders of consolidation.

9. In respect to the prayer for a restriction, there already exists a restriction placed on the title on 30th October 2014. Court Orders are not to be given in vain. The restriction placed on the title has been in existence for more than 4 years. The applicants have not stated that they have received a notice from the Land Registrar notifying them that the same is likely to be removed. In asking the Court to issue a new restriction 5 years later without laying any basis is asking the Court to issue an order in vain.

10. In summary, I find all the prayers sought in the motion dated 17/10/2019 to be without merit. Consequently, the motion is dismissed with costs to the respondent.

Dated, signed and delivered at BUSIA this 15th day of April, 2020.

A. OMOLLO

JUDGE