



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO. 166 OF 2014

SHERI NAURIA.....PLAINTIFF/RESPONDENT

-VERSUS-

STEPHEN EKIRAPA.....DEFENDANT/APPLICANT

RULING

1. The application for determination before me is a motion on notice dated 22nd June, 2018 and filed on 25th June, 2018. The applicant – **STEPHEN EKIRAPA** – is the defendant in the suit herein. The respondent – **SHERI NAURIA** – is the plaintiff. The application is expressed to be brought under Order 51 Rules 1,4 and 10 (2) of Civil of Procedure Act (sic) and Civil Procedure Rules together with all other enabling provisions of law. It is essentially an application seeking consolidation of this suit with another – ELC NO 151 of 2013, Busia - for the alleged reason that similar questions of fact and law will arise in both matters.

2. The application has three prayers, one of which – prayer 2 - should not be a prayer but a ground in support of the application. It is necessary, for the sake of clarity, to set out the prayer. It is as follows:

Prayer 2: That the consolidation of the cases will save on court's time and will be expeditious way of resolving the dispute between the parties.

It is clear that though stated to be a prayer, no order is sought. It is merely expressing a position.

The proper prayers for determination are two - prayers 1 and 3 – and I proceed to set them out herein *Ipsissima Verba*:

Prayer 1: That this suit herein be consolidated with BUSIA HIGH COURT ELC NO 151 of 2013 which is still pending before this court in which similar questions of law and facts are involved, particularly L.R NO SOUTH TESO/ASINGE/614

Prayer 3: That costs of this application be provided for.

3. The application is anchored on grounds, inter alia, that similar questions of facts and law will arise in both matters; that consolidation will save on courts time and will expedite the matter; that the respondent stands to suffer no prejudice if consolidation is allowed; and that the interests of justice will be served. The supporting affidavit that came with the application merely reiterated the grounds.

4. The respondent filed a response by way of a replying affidavit dated 26th June, 2018 filed in court on the same date. She denied that there is similarity between this suit and **ELC NO 151 OF 2013** and averred that the subject matter in this suit is land parcel **NO SOUTH TESO/ASINGE/1680** while the subject matter in the other suit is land parcel **NO SOUTH TESO/ASINGE/614**. She also pointed that there are parties in ELC NO 151/2013 who are not parties in this suit and were not even served with this application. The applicant was accused of seeking to delay this suit and the application herein is allegedly meant to achieve that purpose.

5. According to the respondent, the other suit was filed earlier than this one. It has never been heard and she has even filed an application to have it dismissed for want of prosecution. This suit itself is partially heard, with only one witness remaining on her side. The timing of this application was said to be aimed at frustrating further hearing.

6. The application was canvassed by way of written submissions. The applicant's submissions were filed on 13th June, 2019. The submissions reiterate the substance of the application and then cited two cases for guidance. The two cases are **LAW SOCIETY OF KENYA VS THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY & 12 OTHERS (2014)eKLR** and **BENSON G. MUTAHI VS RAPHAEL GICHOVI MUNENE RABUTU & 4 OTHERS.**

7. The respondent's submissions were filed on 4th July, 2019. It was submitted that it is not true to say that the same questions of law and facts will arise in the two matters. The respondent said the subject matters are different, with parcel no. 1680 being the subject matter for this

suit while parcel no. 614 is for the other matter. She is the plaintiff in this matter and a defendant in the other. The parties in the other suit were said to have been left out in this application yet they are entitled to participate in it since this suit is sought to be consolidated with their suit.

8. I have considered the application, the response by the respondent, and the rival submissions. As pointed out earlier, this suit is partially heard. The respondent has made commendable efforts to have it proceed. The other suit, though filed earlier, has never been heard. The respondent has even filed an application for its dismissal. The applicant is one of the plaintiffs in the other suit. He now seeks to consolidate this active suit to one that is apparently dormant in order that the two may be heard together. In my view, that is not fair. It seems to me clear that if the two suits are consolidated, the problems that have delayed the hearing of the other suit will inevitably become problems that can delay this suit itself.

9. The timing of the application for consolidation is also questionable. The applicant participated in the hearing of this suit and so far six (6) witnesses have been heard on the respondent's side. The respondent is in fact clear that only one witness is remaining to testify on her side. She is also clear that she procured the availability of some witnesses with considerable difficulty. If this suit is consolidated with the other one, it is bound to start afresh and procuring witnesses by the respondent may pose a challenge. The applicant should have made his application earlier. Better still, the application would be more suitably placed in the other suit as the other parties would easily get a chance to participate. It is also in fact the other matter, not this one, that was filed earlier. The applicant in this case is wrong to think that he can unilaterally decide for the other parties that a case they don't know should be consolidated with their case. Their say on the issue is absolutely necessary.

10. I have also looked at the complaints in the two suits. I am not persuaded that similar issues of law or facts will arise. The earlier suit is mainly targeted at the first defendant, one **OMONGAISE ETYANG ETWANI**, who is accused of selling land to the other defendants, the respondent herein included, while earlier having sold the same land to the plaintiffs in that case, the applicant herein included. The land parcel involved is NO 614. In this suit itself, the respondent has sued the applicant for trespassing onto her land parcel no.1680. She is not interested in the other parties. She is not interested in land parcel NO 614. Besides, the applicant herein has not provided the nexus, if any, between parcel no. 1680 and 614. He has left it to court to do guesswork.

11. When all is considered, consolidation of the two suits will not serve the interests of justice and it will obviously prejudice the respondent if allowed. I therefore make a finding that the application filed is completely unmeritorious. I dismiss it forthwith, with costs.

Dated and signed at Kericho this 16th day of June, 2020.

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A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 25th day of June, 2020.

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A. OMOLLO

JUDGE