



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 77 OF 2018**

**BENARD GODWIN OSINYA** (Suing as personal And legal rep. of

MORICE A. OSINYA (Deceased) .....**PLAINTIFF**

**= VERSUS =**

**STANLEY SIKHINDU NAMACHI**..... **DEFENDANT**

**R U L I N G**

1. This ruling is on a Preliminary Objection raised by the Defendant vide a notice dated 16/11/2018 and filed on 11/12/2018. In the notice the Defendant avers that the suit herein is subjudice as the issues raised in it are the same issues raised in BUSIA ELC case No. 156/2017. The Defendant averred that this court therefore lacks jurisdiction to hear the matter. He further said that the suit is fatally defective and is also an abuse of the court process. He asked that the suit be struck out or dismissed with costs.

2. It is useful to appreciate the background and antecedents surrounding this matter. The disputants are **BENARD GODWIN OSINYA** as Plaintiff and **STANLEY SIKHINDU NAMACHI** as Defendant. The dispute between them relates to land parcel No. SAMIA/LUANDA/MUDOMA/1525. The Plaintiff in this matter is claiming ownership of the land from the Defendant who is the registered owner. The Plaintiff claims that the Plaintiff got himself registered as owner in a fraudulent manner.

3. But the Defendant had sued the Plaintiff earlier in case No. ELC 156 of 2017, Busia, claiming, *inter alia*, that the Plaintiff has illegally cut down trees, cultivated and even put up a house on the land. While the Plaintiff in this matter is seeking cancellation of the Defendant's title, the Defendant, who is Plaintiff in ELC NO. 156/2017, is seeking to evict the Plaintiff herein from the land and also permanently restrain him from going on with his illegal activities.

4. According to the Defendant in this matter, his suit in ELC No. 156/2017 raises the same issues as those raised by the Plaintiff in this suit.

5. I have looked at the two suits as filed. Even a very casual glance readily shows that the issues raised are not the same. While the Plaintiff in this matter is claiming ownership of the land from the Defendant, the Defendant himself, as Plaintiff in ELC No. 156/2017, is proceeding on the basis that he is the undisputed or unrivalled owner of the land and seeks, on that basis, to evict the Plaintiff in this matter. It is clear to me that each side has its own issues which clearly require judicial scrutiny and/or consideration.

6. In my considered view, the parties should be considering consolidation of the two suits, not dismissal of one at the expense of the other. If the Defendant in this suit has even the most rudimentary knowledge of what a Preliminary Objection entails, he would readily appreciate that it is inappropriate to raise it given the circumstances of this case. And this is so because a preliminary objection is normally raised when the facts surrounding a given matter are not in contention. It is normally argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained. (See **MURIRURI Vs KIMEMIA [2002] 2 KLR 677** and **SIRMA Vs KPRONO [2005] IKLR 197**).

7. It is not correct, as the Defendant alleges, that the issues raised in this case are the same as those raised in his suit No. ELC 156/2017. The issues are different in the two cases and each party is seriously contesting the issues raised by the other. The Preliminary Objection raised is therefore without merit. I hereby dismiss it.

8. I had earlier on mentioned consolidation. Consolidation of suits is usually within the discretion of the court. The discretion is unlimited and can be ordered even against the wishes of a party. But the discretion should be exercised judiciously. The parties herein are tussling over the same piece of land, with each making a claim against the other in separate suits. I perceive that consolidation is proper as common questions of fact and/or law may arise. The parties are involved in what one may view as cross-actions against each other and consolidation

will save time and expense. No one will be prejudiced.

9. The court itself is duty-bound to ensure efficient disposal of its business and deal with cases at reasonable speed. Consolidation of these matters will ensure their timely disposal and reduce cost for the parties.

10. I therefore direct and/or order that the two matters be consolidated so that they are heard together. The earlier suit – ELC No. 156 of 2017 – can be treated as the lead or main suit while this suit itself can be treated as a counter-claim. These are the orders of this court. There will be no order as to costs.

**Dated, signed and delivered at Busia this 12<sup>th</sup> day of September, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: Absent

Defendant: Absent

Counsel for the Plaintiff: Absent

Counsel for the Defendant: Present

Court Assistant: Nelson Odame