



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 62 OF 2017**

**ESTHER WANGOI.....PLAINTIFF**

**= VERSUS =**

**MOLYN CREDIT LIMITED.....DEFENDANT**

**R U L I N G**

1. The application before me for consideration and determination is a Notice of Motion dated 3/7/2017 and filed on 12/7/2017. The application was filed by the defendant – **MOLYN CREDIT LIMITED** - against the Plaintiff - **ESTHER WANGOI MWANGI**. It was brought under Order 2 Rule 15, (i) (d), of Civil Procedure Rules and Section 6 of Civil Procedure Act (Cap 21 Laws of Kenya). The Defendant, as applicant, wants the suit herein struck out (prayer 1) or be stayed (prayer 2) pending hearing and determination of Busia ELC No.54 of 2017 – **MOLYN CRDIT LTD Vs ESTHER WANGOI MWANGI**. Esther is the respondent in this application.

2. The parties herein are tussling over ownership of Land parcel **BUKHAYO/MUNDIKA/285** (Suit Land), with each feeling aggrieved by the other. Each party has filed a suit against the other. Esther has filed this suit. Moyn Credit Limited had filed its own suit earlier. Its suit is **BUSIA ELC No.54 of 2017**. And because the suit was filed earlier, Molyn Credit Limited wants its hearing and determination given priority. Molyn Credit Limited, as defendant in this matter, faults the Plaintiff, Esther, for filing another suit – this suit – while its own, which is dealing with the same subject matter is unheard and undetermined. It therefore wants this suit struck out or stayed.

3. Esther, however, has a different view. She didn't know, she averred, that the earlier suit by the defendant existed when she filed this suit. She wants the court to give directions on how the two suits should be handled.

4. The application was canvassed by way of written submissions. The defendants/applicants submissions were filed on 14/12/2017. It was submitted that this is a matter that deserves to be struck out, it being subjudice the earlier suit. The cases of **THIBA M.N. Hydro Co. Ltd vs JOSPHAT KARU NDWIGA [2013] eKLR** and **NJENGA KARUME & 2 OTHERS Vs KUNGU GATABAKI & ANOTHER [2015] eKLR** were cited to drive home the point.

5. The Plaintiff/respondents submissions were filed on 5/12/2017. It was submitted that the parties in this suit are the same parties in ELC No.54/2017. The subject matter, Land parcel No.**BUKHAYO/MUNDIKA/2851**, or suit land, if you like, is the same. The plaintiff/respondent suggested consolidation of the two suits as the best way forward.

6. I have had a look at the two suits as filed. I have also considered the application, the response made, and the rival submissions. In my considered view, striking out this suit is not in the best interest of justice. Doing so might send the wrong message that the plaintiff's case is hopeless or very weak and therefore deserving of summary disposal. Yet that is not the picture that emerges when one considers the case on the face of it. It seems to me that the case is as much deserving of judicial scrutiny and consideration as the earlier case filed by the defendant/applicant herein. It is for this reason that I find the idea to consolidate the two suggested by the plaintiff/respondent plausible. I wouldn't have taken this position if there was anything to show that the plaintiff/respondent knew of the earlier case when she filed this case. What appears instead is that the plaintiff/respondent was unaware of the earlier case when she filed this case.

7. I therefore order and direct that the two matters be consolidated so that they can be handled together. The earlier matter – **ELC No.54/2017** – will be taken as the lead suit while this suit itself will be treated as a counter-claim. The application is therefore dismissed but costs will be in the cause.

**Dated, signed and delivered at Busia this 30<sup>th</sup> day of October, 2018.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: Absent

Defendant: Absent

Defendant: Absent

Counsel of Plaintiff: Present

Counsel of Defendant: Absent