



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.281 of 2013

WILSON WAMWAYI ANDATI.....PLAINTIFF

VERSUS

SAMUEL SAMWENJA OMUYUKO.....DEFENDANT

RULING

1. **Samuel Samwenja Omuyuko**, alias Samuel Muroka, the Defendant, vide a notice of motion dated 3rd July 2015 seeks to have Kisumu ELC No.20 of 2015 consolidated with this case for hearing and determination. The notice of motion is based on two grounds that “the question in both suits is similar” and that “the issues concern the same parties and parcel of land.” The application is supported by the affidavits of the Defendant sworn on 3rd July 2015 and 17th February 2017.
2. The notice of motion is opposed by Wilson Wamwayi Andai, the Plaintiff, through the grounds of opposition dated 13th August 2015.
3. The notice of motion came up for hearing on the 9th May 2017 when Mr. Kowinoh Advocate for the Defendant and the Plaintiff in person made their oral submissions.
4. The issues for determination are as follows;
 - a) Whether the consolidation of Kisumu ELC No.20 of 2015 is desirable for the issues between the parties to be decided with finality.
 - b) Who pays the costs.
5. The court has carefully considered the grounds on the notice of motion, grounds of opposition, affidavit evidence, pleadings filed and come to the following findings;
 - a) That the Plaintiff commenced this suit through the plaint dated 11th October 2013 against the Defendant seeking for eviction order, general damages and costs in respect of land parcel **South Ugenya/Ruwe/316**. That the Defendant entered appearance through memo dated 24th October 2013 and filed his statement of defence dated 11th November 2013 in which he among others at paragraph 5, averred that “the Plaintiff’s claim is statutory time barred by virtue of the of (sic) provisions of Limitation of Actions Act and doctrine of adverse possession, the Defendant having occupied, used and constructed on the suit property without interruption since 1977 to date.” That the Plaintiff filed a reply to the defence dated 13th January 2013 and among others avers that the Defendant is put to strict proof of the allegations of paragraph 5 of the defence and that the

Defendant's occupation of the suit land has not been peaceful at all

b) That the Defendant then sued the Plaintiff through the originating summons in Kisumu ELC NO.20 of 2015 (O.S) seeking to be declared the owner of land parcel South **Ugenya/Rule/316** through adverse possession. The originating summons is dated 26th November 2014 and filed on 27th May 2015. The Plaintiff herein who is the respondent in the originating summons opposed the application through the replying affidavit sworn on the 20th July 2015.

c) That from the findings in (a) and (b) above, it is obvious that both suits are between the same parties and over the same land.

d) That whereas this suit was filed on 11th October 2013, the ELC No.20 of 2015 was filed about 1 ½ years later. That this obviously contravenes **Section 6** of the Civil Procedure Rules and the originating summons does not disclose that there was another matter between the same parties and over the same subject matter that was pending in this court.

e) That there was nothing stopping the Defendant herein from including a counterclaim in his statement of defence.

6. That having come to the foregoing conclusions, the court finds no merit in the notice of motion dated 3rd July 2015 and the same is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 27TH DAY OF SEPTEMBER 2017

In presence of;

Plaintiff Present

Defendant Present

Counsel None

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/9/2017

27/9/2017

S.M. Kibunja Judge

Oygi/Joane court assistant

Parties present

Defendant: My advocate has not come.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/9/2017

Order: The ruling dated and delivered in open court in presence of both parties in person.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/9/2017