



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

LAND CASE NO 46 OF 2016

GORDON OLUOCH OLIMA.....PLAINTIFF

VERSUS

JOSEPH MBOYA OKORE.....DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 21st April 2017 brought under order 10 Rules 10,11, and 51 of the Civil Procedure Rules, Sections 6 and 63 (e) of the Civil Procedure Act where the Applicant seeks

a) Spent

b) Spent

c. That the proceedings herein be stayed pending the hearing and determination of ENVIRONMENT AND LAND CASE NO 126 OF 2014 which is pending before this Honourable court in which the matter in issue is also directly in issue in the instant case.

d. That the prayer in No 3 above to apply also to ENVIRONMENT AND LAND CASE NO 158 OF 2015, which is also pending for determination before this Honourable court

e. That the costs of this application be provide for

2. The said application is premised on the grounds adduced on the application and supported by an affidavit sworn by Joseph Mboya Okore the Defendant/Applicant herein, on the 4th November 2016.

3. The Application was urged by Mr. Ogonda Counsel for the Defendant/Applicant who relied on the grounds on the face of the application and the supporting affidavit seeking that the proceedings in Environment and Land Case No 126 of 2014 as well as Environment and Land Case No 158 of 2015 be stayed pending the hearing and determination of the present suit being Environment and Land Case No 46 of 2016 matters which are pending in this court and which raise the same issues and have the same parties. Counsel submitted that the subject matter in all the suits touches on ownership of Kisumu /Manyatta B/91 which was registered in the name of Monica Atieno Moro as at the time of filing suit No. 146 of 2014.

4. Environment and Land Case No 126 of 2014 was filed by the present defendant when he sought for adverse possession against the said Monica Atieno Moro who then filed suit a parallel suit against the defendant in Environment and Land Case No 158 of 2015 instead of filing a defence. While the two suits

were pending the Plaintiff in the present suit, Mr. Gordon Oluoch Olima, filed yet another suit seeking for eviction orders against the defendant/Applicant herein.

5. That pending the hearing and determination of the two suits there was transfer of title to Mr. Gordon Oluoch Olima the plaintiff/Respondent in the present suit which formed the basis of the present application.

6. That this suit cannot therefore be allowed to proceed on the same subject matter with the same parties pending the hearing and determination of the 1st and 2nd suits and that all suits be stayed and the first suit be determined in order of priority. He then prayed for the orders sought to be granted.

7. The application was opposed by Mr. Anyul Counsel for the Plaintiff/Defendant stating that when the matter was lastly in court on the 10th November 2016, prayers 1 and 2 of the application were granted wherein the remaining prayers were left in abeyance so that the applicant could correct/amend his application after filing their defence but the defendant/ Applicant chose instead to proceed with the application despite the said order.

8. The best way to deal with these matters, submitted counsel, was to apply for consolidation of the suits that may be pending. Counsel submitted that the documents filed in the present case indicated that the plaintiff was the registered owner of the suit land and that he was a stranger to Environment and Land Case No 126 of 2014 and Environment and Land Case No 158 of 2015. The court could therefore not halt cases to await the finalization of other cases.

9. There was a rejoinder to this application in that Counsel for the Applicant/Defendant submitted that the last two cases were filed subsequent to Environment and Land Case No 126 of 2014 by the same law firm and to say that the Plaintiff in the present case was a stranger to the other two cases could not be sustained, the plaintiff in Environment and Land Case No 126 of 2014 was claiming for adverse possession and the fact that the plaintiff in the present case now holds title to the suit property is not reason to run against the adverse possessor who was in open and active possession of the suit property. The proceedings of 10th November 2016 are on record.

10. This court has been asked to stay the proceedings in the present case pending *the hearing and determination of* Environment and Land Case No 126 of 2014 *and* further that upon issuing the said orders that the same do apply to Environment and Land Case No 158 of 2014 reason being that *the subject matter in the instance case was directly and substantially in issue in the present case being* Environment and Land Case No 46 of 2016.

11. I have gained sight of the proceedings of 10th November 2016 and I note that prayers 1 of the present application dated the 4th November 2016 was granted wherein the judgment entered on the 25th April 2016 was set aside.

12. Defendants were directed to file and serve their statements of defence while prayers 3, 4 and 5 were left in abeyance. Parties were then asked to comply with order 11 of the civil Procedure Rules within 30 days. I do not see any orders addressed to the Defendant/Applicant to amend his application.

13. I have also looked at the grounds on the face of the application as well as the annexed affidavit and the same are to the effect that the Defendant /Applicant in the present suit and who is in possession of the subject suit land filed suit No 126 of 2014 against the defendant one Monica Atieno Moro claiming adverse possession, that the Defendant in that suit then filed another suit being No. 158 of 2014 and then disposed of the suit land to the Present plaintiff who then files suit No. 46 of 2016 to have the Defendant/Applicant evicted from the suit land.

14. The issue for determination then by this court is whether to issue orders for stay of proceedings in Environment and Land Case No 46 of 2016 and Environment and Land Case No 158 of 2014.

15. There is no dispute that Environment and Land Case No 126 of 2014 was filed by the Defendant/Applicant against one Monica Atieno Moro who the filed another case being Environment and Land Case No 158 of 2014 herein and the same relates to the same subject matter being Kisumu /Manyatta B/91 which also is the subject matter in the present suit. The issues that stand to be determined in both suits are indeed common.

16. Under **sections 1A and 1B** of the Civil Procedure Act Cap 21 Laws of Kenya the court is enjoined to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil proceedings in a just, expeditious, proportionate and affordable cost to the parties. Article 159 (2) (a) (b) (c) and (d) of the Constitution further underscore the role of the court in the administration of Justice. Article 159 (2) (b) provides that Justice shall not be delayed while Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.

17. These Constitution provisions mirrored against sections 1A and 1B of the Civil Procedure Act clearly enjoin the courts to endeavor to do substantive justice to the parties without necessarily being shackled by procedural technicalities.

18. While in the present matter it is true that Environment and Land Case No 126 of 2014 was filed earlier than Environment and Land the present suit and involves the same subject matter I do not consider that given the circumstances of this matter any justice would be achieved by ordering the instant suit to be stayed to await the hearing and determination of the earlier suit.

19. I have considered the issues that arise in both matters and I am satisfied that the order that commends itself in the circumstances is that all the suits should be ordered consolidated to be heard together.

20. In the result therefore I decline to make an order staying Environment and Land Case No 46 of 2016 and do in the interest of justice order that the two suits be consolidated and that the plaint filed by the plaintiff in the instant case be treated as a Defence and counter claim to the plaint filed by the Defendant in Environment and Land Case No 126 of 2014. The Defendant be and is hereby granted leave of 14 days from the date of this ruling to file his reply and defence to the counter claim.

21. That following the order of consolidation that I have given the suits will henceforth be continued with under this case file namely Environment and Land Case No 126 of 2014.

22. The court orders that the consolidated suits be mentioned before the resident Judge for further directions on the further conduct of the suit on the 9th November 2017.

23. That I direct that the costs of this application shall be in the cause.

Dated and delivered at Kisumu this 25th day of October 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE