



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 29 OF 2021

AFRICANUS ORONE IMULA.....PLAINTIFF/RESPONDENT

- VERSUS -

MICHAEL OUMA OMUSUGU.....1ST DEFENDANT/APPLICANT

JOSEPH O BARASA ETYANG.....2ND DEFENDANT

DAVID EKAGALA ABANYA.....3RD DEFENDANT

RULING

1. The Applicant brought the present Application under sections 3 and 3A of the Civil Procedure Act and Order 2 Rule 15 of the Civil Procedure Rules on the 23rd of June, 2021 for orders THAT:

a. This Suit be struck out;

b. The costs of this application be provided for.

2. The Application was supported by the affidavit of MICHAEL OJUMA OMUSUGU dated 19th July, 2021 and on the following grounds;

a. That it is scandalous, frivolous and/or vexatious;

b. That it may prejudice, embarrass or delay fair trial or the action;

c. That it is a blatant abuse of the process of the Court;

d. That there exists Busia ELC No. 4 of 2021 over the same subject matter which case is pending before the subordinate court;

e. That it may cause confusion if two different decisions were rendered.

3. The Respondent opposed the Application on the following grounds:

a. That the Applicant has not explained how the Plaintiff did not comply with the law while filing this case;

b. That the Plaintiff in this case is not a party to Busia CMC ELC NO. E004/2021 as alleged;

c. That further the 2nd and 3rd Defendants herein are not parties to Busia CMC ELC NO. E004/2021 as alleged;

d. That it is only the High Court that can entertain a claim for adverse possession and/or originating summons and as such the same cannot be canvassed before Busia CMC ELC NO. E004/2021;

e. That the subject matter of the two causes may be the same (LR No. SOUTH TESO/CHAKOL/173) but the causes of action are different and there can be therefore no conflicting decisions;

f. That the 1st Defendant has the option of applying to consolidate the two cases if he believes that they are similar instead of filing the present application; and

g. That Busia CMC ELC NO. E004/2021 has since been dismissed.

4. The Applicant filed a supplementary affidavit on the 8th of October, 2021 in which he swore further that:

a. The 2nd and 3rd Defendants may not have been parties to Busia CMC ELC NO. E004/2021 but the cause of action against them are the same;

b. It is true that this Honourable Court is seized with jurisdiction to entertain a claim for adverse possession and/or originating summons and as such if the Respondents had any legal interest and/or cause of action against it, they were at liberty to file a counter-claim in the Busia CMCC No. E004 of 2021 other than filing the instant suit;

c. The subject matter in these cases is the same being L.R No. SOUTH/CHAKOL/173 which is the cause of action at the Busia CMCC ELC No. E004 of 2021;

d. There exists no remedy for consolidation of the two suits by the Respondents in the circumstances hence the same is defective;

e. Busia CMCC No. E044 of 2021 has since been active and alive and slated for hearing on the 18th of October, 2021;

f. The suit filed touches on the same subject and the cause of action are the same and therefore can result in a conflicting decision.

5. Parties agreed to canvass the application by way of written submissions and the Applicant filed their submissions on the 8th of October, 2021. He submitted that the Respondent had the option of filing a counter-claim in BSA CMCC ELC 004 of 2021 instead of filing this suit which amounts to abuse of the court process. The Applicant submitted further that he has demonstrated how vexatious and incompetent the suit is. He went further to define a counter-claim by quoting the provisions of Order 7(3) of the Civil Procedure Rules. The Applicant contends that asking the court to consolidate the two cases is equivalent to asking the Court to validate the abuse. He urged the Court to dismiss the suit with costs to the Applicant.

6. The Respondent filed his submissions on the 8th of November, 2021. He submitted that in the present case he is seeking adverse possession of part of L.R SOUTH TESO/CHAKOL/173 whereas in Busia CMC ELC No. 04/2021 where the two plaintiffs are seeking for omnibus reliefs among them general damages for trespass, vacant possession, mesne profits and removal of caution. That due to the different causes of action, there can be no conflicting judgements. He submitted further that the issue of adverse possession could not be raised as a counterclaim because section 38(1) of the Limitations of Action Act provides that a claim for adverse possession should be filed at the High Court. He urged the Court to dismiss the application with costs.

7. The substantive law on sub judice is found in Section 6 of the Civil Procedure Act, Cap 21 which provides that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

8. The Applicant has asked this Court to strike out this suit with costs as the same is an abuse of the court process due to the existence of BSA CMCC 004 of 2021. The test in determining whether a matter is sub judice another suit is to consider whether the parties are the same or they could have brought their claim under any of the parties in the existing suit. It is not in dispute that the subject matter of this suit is similar to the subject matter in Busia CMCC ELC 004 of 2021. From the copies annexed in the earlier suit, the only party appearing in both suits is Michael Ojuma Omusugu. The remaining parties are different and the plaintiff was not a party in the suit before the CMC's court.

9. The Applicant argues that this claim could have been introduced in the earlier suit by way of a counter-claim. It is impossible for the Respondent to have applied to join the existing suit then introduce a new claim of adverse possession. The Applicant has not explained the relationship of this Respondent to the parties in BSA CMCC ELC 004 of 2021 which would then demonstrate that he could have litigated this claim through the parties in case 004 of 2021. Thus the Respondent had to bring his claim in a separate suit before the parties could decide whether the two suits can be consolidated or not.

10. The sameness in title notwithstanding, the matters in issue in the two suits are different and so are the parties. The Respondent is not a party to the suit in the lower court and the Defendants in the Chief magistrate court case are not parties to this case. In the case of **C.K. Bett Traders Limited & 2 others v Kennedy Mwangi & another [2021] eKLR**, the Court held that:

‘Although the parties before the High court were the same as those before the trial court and this appeal, the issues were not the same. The issue before the High court was whether the appellants’ goods could be attached, the issue before the trial court was whether the appellants suffered loss and whether they were entitled to compensation. In the circumstances, the suit did not fit the criteria for holding the suit *res judicata*. The answer to the second issue is that the suit was not *res judicata*.’

11. The upshot of the foregoing is that the current suit does not meet the criteria of abuse of the Court process and as such the application

stands dismissed with costs to the Plaintiff/Respondent.

DATED, SIGNED & DELIVERED AT BUSIA THIS 20TH DAY OF JANUARY, 2022

A. OMOLLO

JUDGE