

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

**MISC. APPLICATION NO. 176 OF 2017
(ARISING OUT OF CIVIL SUIT NO. 208 OF 2016)**

**PRINCE BALERA GEORGE & 71 ORS (Suing through their Lawful Attorney
MUZAMIL NKWIGHE BUKUMUNE.....
APPLICANTS**

VERSUS

- 1. THE ATTORNEY GENERAL OF UGANDA**
- 2. NATIONAL FORESTRY AUTHORITY &
153 OTHERS.....RESPONDENTS**

RULING

BEFORE: HON. LADY JUSTICE EVA K. LUSWATA

Background and brief facts

The applicant presented this application by motion under Sections 33 Judicature Act, 98 CPA and Order 11 Rules 1 and 2 CPR seeking for an order that civil suits No. 0046 of 2002 (hereinafter referred to as the former suit) and Civil Suit No. 206 of 2016 (hereinafter referred to as the current suit) be consolidated. The main two grounds prompting the action are that the applicant was unaware of the former suit and secondly that, similar questions of law and fact are addressed in both suits.

M/s Baluti & Sozi Advocates together with M/s Musimani & Co., Advocates represented the applicants while some of the respondents were represented by Mbeeta, Kanya & Co., Advocates and the 1st and 2nd respondents were specifically unrepresented.

The evidence and objections

In his affidavit in support of the application, Muzamil Nkwihwe Bukumunhe stated that the applicants came to know of the existence of the former suit after filing the current suit. He further stated that the plaintiffs in the former suit did not own the suit land and thus had no *locus standi* to file it.

Mwandha Iddi the 5th respondent filed an affidavit opposing the application. He contested the allegation that the applicant was unaware of the former suit as false since the struggles against the Attorney General and the National Forestry Authority (NFA) by those he represented in Malongo and Kityerera Sub counties in Mayuge District, had been ongoing since 1989. That those struggles were notorious and had even attracted the attention and intervention of the Head of State who on 4/2/2011, made a directive to restore the suit land to the respondents. He continued that Bukumunhe in particular had knowledge of the former suit since he has taken part in the respondents' struggles and he was also aware that the Attorney General was willing to settle the respondents' long term dispute. He opined that and the current suit was only designed to interfere with, or frustrate that long struggle which was close to completion.

He further argued that the applicants are not connected to the Royal family of Bunhole Bunanumba, the latter which has disassociated themselves from the applicants' claims and that some applicants, in particular No 17, has denied knowledge of the current suit. He concluded that the applicants do not own the suit land and the two suits ought to be heard and determined independently of each other.

Counsel Mwigo Allan who represented the 3rd, 4th and 77th respondents indicated that her clients did not object to the application. An order in default was sought against the 1st-4th and 77th respondents who were allegedly served with court process but did not respond to the application. It is my intention to address that point in my ruling.

Both counsel filed written submissions. I will not repeat the contents here but confirm that they will be considered in my decision.

The objection against a default ruling

At the hearing of 12/4/18, counsel Mwigo for the 3rd, 4th and 77th respondents confirmed that his clients did not respond to the application and had no intention to oppose it. Counsel Kanyango objected stating that those particular respondents not being party to the previous suit, have nothing to consolidate.

With respect, that would be a wrong argument. It is enough that those particular respondents are party to one of the suits. They are also party to the application and would thus have the right to voice their choice not oppose it. It is thus taken that the 3rd, 4th and 78th respondents do not oppose the application.

Two affidavits of service were filed in proof of service of the application. In his affidavit filed on 6/12/17, Baligwamunsi Herbert a clerk of this Court narrated his inability to serve the respondents individually. He professed to have served counsel Nyonyintono Asuman but neglected to attach proof of service. That notwithstanding Ms Biruma Florence claiming to be an attorney of the 3rd, 4th and 78th respondents was in Court on 12/4/18 and it is taken that her principals were aware of the summons. Having been served way back in August 2017, it is taken that those three respondents relinquished their right to oppose the application. They are deemed to have consented to it.

In the same vein, Sekitto Godfrey a clerk attached to Baluti & Ssozi Advocates confirmed that he served both the 1st and 2nd respondents at their known addresses on 8/8/17 and that they acknowledged receipt. He also served another group of respondents through Mbeeta Kamyia & Co., Advocates and Wabagaza & Co.; Advocates. He attached proof of service to the application which in my view is satisfactory. It is thus taken that the 1st, 2nd and all the respondents mentioned in paragraph 11 of Sekitto's affidavit of service by failing to respond to the application within the time allowed by statute, had no objection to it.

The law

It was the decision of the High Court in **Stumberg & Anor Vs Potgieter (1970)EA 323** that:

“consolidation of suits....should be ordered where there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to

render it desirable that the whole of the matters should be disposed of at the same time; consolidation should not be ordered where there are deep differences between the claims and defenses in each action”.

Emphasis of this court

In our law, consolidation of suits is permitted under Order 11(a) CPR. An order for consolidation can be initiated by any party or the Court and may be allowed if the following are shown:-

- 1) There are two or more suits pending in the same court
- 2) The same or similar questions of law or fact are in issue in both suits

It remains the discretion of the Court to allow or decline the prayer for consolidation and it is also open to the Court to direct that further proceedings in any of the suits is stayed until any further order is given. I do agree with applicant’s counsel that the justification of consolidation is to avoid multiplicity of suits. See for example **Mohan Musisi Kiwanuka Vs Asha Chand SCCA No. 14/2002** where it was held by Mulenga J (as he then was) *inter alia* that “.....It is the cardinal principle in our judicial procedure that Courts must as much as possible avoid multiplicity of suits. Thus, it is that rules of procedure provide for, permit where appropriate, joinder of causes of action and consolidation of suits.”

My decision

Without much ceremony, I perceive that the first condition is fulfilled. The former and current suits were filed in this Court on 25/10/07 and 12/6/16 respectively. In the former suit, evidence of three witnesses has been called and on 17/2/16, the parties reported to Court that they intended to settle the matter. The matter was given a long adjournment but no consent has been filed to date. The pleadings in the current suit have been closed and the matter is ready for scheduling.

I believe the other conditions for consolidation are also fulfilled and the following are my reasons

- 1) Whether or not Bukumune was possibly aware of the former suit is not the overriding determinant. For as long as the plaintiffs in the current suit opine that they have a claim to

pursue, which claim is not frivolous or barred by any law, they can present it with no objection.

- 2) The suits have common parties to the dispute. Mwandha Iddi the plaintiff in the former suit, is the 5th defendant in the current suit
- 3) The Attorney General and NFA are common defendants in both suits
- 4) Although not succinctly described in the former suit, the subject matter appears to be common to both suits. It is mentioned in paragraphs 5, 6 and 14 of plaint in the previous suit that the plaintiff and those he represents occupy 56 villages in Mayuge district and are facing eviction and destruction of their property by agents of the Government and the NFA under the erroneous belief that those villages form part of the Kityerera Forest School/Reserve (now Busoga Forest Reserve). That the agents of the defendants are continuously arbitrarily expanding the boundaries of the reserve to subsume the land occupied by the plaintiff and those he represents.
- 5) On the other hand, the claim by the plaintiffs in the current suit is that as subjects of the Bunhole Bubanumba Chiefdom of the Busoga Kingdom they own land that is known as the South Busoga Central Forest Reserve under custom. That following a directive of HE President of Uganda, the land was parceled out to different entities including local communities, NFA and for conservation of public spaces without due regard to their customary rights and claims. They in addition sued the 3rd and 4th defendants as administrators of the estate of the late JMN Zikusooka for the deceased having unlawfully parceled off and created a title for part of the suit land. The other defendants are sued for unauthorized encroachment on the suit land.
- 6) The defences raised in both suits are not significantly different. It is started in the former suit that the land now known as the South Busoga Reserve was gazetted for protection and eventually put under the control of the NFA. That the plaintiffs in their villages encroached on the forest reserve and are in trespass. In the current suit, it is contended that the plaintiffs have no cause of action and that the Government is neither in trespass nor guilty of fraud. The defendants also raise the issue of a political question arising from Court's intervention in what appears to be an Executive directive.

It is clear that land forming part of or the entire South Busoga Central Forest Reserve (formerly known as Kityerera Forest School) is the same land under disputed ownership by

several public, customary and private entities. Indeed, in their affidavits, Bukhumune and Mwandha appear to be accusing each other for wrongfully laying claim to the suit land.

Again in both suits, a similar history of how ownership evolved has some common aspects. In both suits it is shown that the suit land was first owned by the house of the Nanhumba chiefdom and then turned into a Government forestry institute/school. That institution was in 1939 transferred to Nyabyeya in Bunyoro due to a sleeping sickness epidemic in the area. It is claimed in the former suit that with the passing of the epidemic, the institution was turned into a forest reserve which had a clear boundary separating it from villages occupied by the Plaintiffs. In the current suit, the plaintiffs claimed to have regained their land in 1959 after the epidemic passed and have since 1989 sparred with the Forestry Department and the NFA its successor, over ownership of the suit land.

In my view, allowing the previous suit to completion will not rest this matter. This is because the successful party would still have to contend with the alleged customary claims by the plaintiffs in the current suit. I note that the previous suit has progressed to the extent of possibility of a settlement. In fact Mwandha Iddi and his counsel voiced their disenchantment that the plaintiffs in the current suit only want to take advantage of their long struggle which has attracted influential political intervention.

Much as their efforts are appreciated, Courts of Law are enjoined to settle all manner of disputes to effective conclusion. Judging from the number of claims and population involved and evidence by the respondents that the ongoing dispute has attracted incidents of extreme violence, lasting peace and harmony in the area can only be attained if all claims are fully addressed. In fact, I see no danger in allowing the plaintiffs in the current suit to join the settlement efforts championed by the office of the President especially if it will avert what may be a protracted litigation.

I therefore allow this application and order that from the date of my order, HCCS NO. 208/2016 and HCCS NO.46/2002 are consolidated and shall be heard by the same Judge. I further order that the modalities of how the consolidation is to be effected will be agreed upon by the parties with the guidance of the Court during a scheduling conference that is to be fixed before the Registrar of this Court.

For that reason, further hearing of these suits as separate actions is stayed.

My orders are intended to meet the expediency and ends of justice. Therefore, each party shall meet their costs of the application.

I so order.

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EVA K. LUSWATA

JUDGE

08/01/2018