

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

MISCELLANEOUS CIVIL APPLICATION NO. 13 OF 2008

1. **CELINE MUGENI BWIRE**

2. **OSCAR NOEL BWIRE** (suing on their behalf and as a legal representative of Lucia Akumu Bwire & Sebastian Paul Bwire Kanoti).....**APPLICANTS**

VERSUS

EMMANUEL DENNIS BWIRE.....RESPONDENT

RULING

1. The respondent/applicant raised a preliminary objection dated 26th April 2016 and which was subsequently amended on 30th November 2018 based on the following grounds:

a) That the application is bad in law, sham and incompetent and fatally defective as the prayers sought cannot be made in a miscellaneous application.

b) That the entire suit is defective in law and in substance since it is res judicata as the subject matter herein had been heard and determined in Busia SRMC P&A No.126 of 1989.

c) That the entire suit and the application dated 26th April 2016 is incompetent and ought to be struck out with costs.

2. The preliminary objection was opposed on grounds that the issue of res judicata cannot be adequately canvassed at this juncture.

3. Both parties admitted that there is a Probate and Administration Cause No. 126 of 1989 in the Busia Chief Magistrate's court. Any application in respect of that succession cause ought to be made in the Lower Court. That is the court that is seized of the matter in dispute.

4. I therefore make a finding that the entire Miscellaneous application is misconceived. The P.O is allowed with costs. The applicants ought to file their application in Busia SRMC P&A No.126 of 1989.

DELIVERED and SIGNED at BUSIA this 26th day of February, 2019

KIARIE WAWERU KIARIE

JUDGE.