

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL SUIT NO.20 OF 2012

BONVENTURE ODEYO OBUYU (Suing as the Administrator of the Estate of

ELIAS MALOMBA OBUYU alias MALOMBA OTIERO –DECEASED)

.....PLAINTIFF

VERSUS

BERNARD MULEMBO NAMWAMBA.....DEFENDANT

RULING

By a notice of motion dated 27th April 2012 purportedly made under **Order 2 Rule 15, Order 40 Rules 4(2)(3)** and 7, and **Order 51** of the **Civil Procedure Rules**, the Defendant sought orders of this court to have the suit filed by the Plaintiff either dismissed or struck out on the grounds that it was sham, frivolous, vexatious and an abuse of the process of this court. The Defendant further sought an order of this court to have the order issued on 29th March 2012 set aside. The grounds in support of the application are stated on the face of the application. The Defendant contends that the matter in dispute was *res judicata* because the same had been conclusively determined in Nakuru HC Succession Cause No.600B of 2006. The Defendant further argued that the order which was obtained on 29th March 2012 had elapsed after effluxion of the time established by statute. The Defendant contends that there is another suit pending before the Busia Chief Magistrate's Court that had earlier been filed that deals with the same matter in dispute. The application is supported by the annexed affidavit of Bernard Namwamba, the Defendant.

The application is opposed. The Plaintiff has filed a replying affidavit in opposition to the application. In the said affidavit, the Plaintiff states that he was not a party to the Nakuru HC Succession No. 600B of 2006. He also denies being a party to the civil suit that is pending before subordinate court. He depones that his suit against the Defendant is based on the assertion or claim that the Defendant had fraudulently transferred the parcel of land known as Plot No.20 Port Victoria to his name from the Plaintiff's deceased father without legal authority. He swore that the Defendant's application had no legal basis but is meant to frustrate him from prosecuting his case. He urged the court to dismiss the application.

At the hearing of the application, this court heard oral rival submission made by Mr. Miano for the Defendant and by Mr. Makokha for the Plaintiff. This court has carefully considered the said submission. It has also read the pleadings filed by the parties herein in support of the respective opposing positions. The dispute between the Plaintiff and the Defendant is over a parcel of land registered as Plot No.20 Port Victoria. The dispute has been a protracted one. The Defendant claims that he inherited the suit parcel of land that previously belonged to his deceased father Namwamba Obuyu Willy - Deceased who died on 5th March 2005. He averred that he inherited the suit parcel of land through succession proceedings in Nakuru (i.e. Nakuru HC Succession Cause No.600B of 2006). It is the Defendant's case that the Plaintiff did not therefore have a cause of action against him. In his understanding, once the court at Nakuru had transmitted the land to him, any subsequent claim in respect of the suit parcel of land would be *res judicata*. On his part, It is the Plaintiff's case that the suit parcel of land did not in actual fact belong to the father of the Defendant but to his late father Elias Malomba Obuyu alias Malomba Oyiero - Deceased who died on 4th March 1983. From the evidence, it appears that the father of the Plaintiff and the father of the Defendant were brothers. The Plaintiff contends that the defendant used fraud to have the suit parcel of land transferred from his late father's name to his name without following the legal process. To support his contention, the Plaintiff annexed to an affidavit in support of an earlier application a copy of transfer

of plot certificate issued by Port Victoria Town Council on 13th November 2008.

This court's evaluation of the rival claims made by the Plaintiff and the Defendant clearly points to the fact that there exists a genuine dispute as to the ownership of the suit parcel of land. That dispute can only be resolved after the court has heard the rival cases of the Plaintiff and the Defendant. This court does not agree with the thrust of the Defendant's application which is to the effect that the High Court at Nakuru had determined the dispute when it issued the certificate of confirmation of grant in the succession cause. As correctly observed by the Plaintiff, he was not a party to the succession cause. He could not be a party to that succession cause because he was not a beneficiary of the estate of that particular deceased. Again, if as claimed by the Defendant that he inherited the suit parcel of land pursuant to the said succession proceedings, why did he obtain transfer of the same parcel of land from another person other than his deceased father? That is a question which can only be answered in a full trial and not in an interlocutory application such as this one. While it is true as stated by the Defendant that there is another pending case over the same subject matter in the subordinate court, the Plaintiff in this case is not party to that suit. The suit was apparently filed by his brother. However, so that the real dispute in controversy may be expeditious determined by the Land and Environment Court, this court in exercise of its inherent jurisdiction, and with a view to expeditiously disposing of the matter in dispute, consolidates the case pending before the subordinate court, being Busia CMC. Civil Suit No.74 of 2012 Bernard Namwamba – Vs- Patrick Obuyu, with the present case.

The upshot of the above reasons is that the application filed by the Defendant and which is dated 27th April 2012 is hereby dismissed with costs. The parties in the two cases are ordered to fix the case for mention before the Land and Environment Court for further directions.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 24TH DAY OF MARCH 2013.

F. TUIYOT

JUDGE