



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA**

Miscellaneous Civil Application 55 of 2010

JOHNSON WABWIRE OGOLA.....APPLICANT

VERSUS

EGESA ODEBA ADUNDO.....RESPONDENT

RULING

The application before the court is a Notice of Motion dated 24.5.2010. It seeks-

a) **THAT** for the purpose of ease of hearing and expeditious determine of the matter between the parties, **Busia PMCC No. 384 of 2009** and **Busia PMCC NO.32 OF 1986** be transferred to the High Court at Busia and be consolidate.

b) **THAT** costs be provided.

The grounds upon which the application is based are that-

- i. The two matters are related and the suit land is basically the same, namely, **L.R NO. Bukhayo/Matayo/315**.
- ii. It was originally registered in the names of **Oduori Gideon Were**.
- iii. **It was subdivided into L.R. NO. Bukhayo/Matayo/1356 and 1357** and that the former was later subdivided to 1403 and 1404 and 14004 was also eventually subdivided into 2141 and 2142.
- iv. The applicant is the administrator with authority to continue with the matter.

The application is purportedly brought under Section 3, Section 3A and Section 63 (e) of the Civil Procedure Act.

The affidavit in support of the application inter alia, states that the applicant and one **Wilfred Oduori** and **Gideon Were** were brothers and the died in 1991. That he owned **L.R. NO. Bukhayo/ Matayo/315**. That even after his death in 1991, Busia PMCC No. of 32 of 1986 in which he was a party, proceeded in terms of execution of an existing decree to recover costs after part of it was transferred without a grant of letters of administration being granted and without a personal representative being appointed to administer his Estate.

The applicant/ deponent then further avers that he field an objection in PMCC NO. 32 of 1986 aforesated and he field PMCC No. 384 of 2009. For those reasons, he seeks consolidation of the two suits for expennditious hearing.

The application is strenuously opposed.

The Respondent in his replying affidativ depones that the information in support of the application is full of misinformation. That the suit PMCC NO. 32 of 1986 is determined suit since 1989. That the court in the case ordered for subdivision of title No. **Bukhayo/Matayo/1403** and transfer of 4 acres thereof to the Responent. That the land was indeed subdivided into **Bukhayo/Matayo/2141** and **2142** and that incase the judgement debtor failed to transfer one subdivision, the Court's executive officer would do it.

The Respondent also deponed that the Judgement debtor failed to transfer and the Executive Officer of court did so. That thereafter, the proper law was followed. That the Respondent has in addition in PMCC NO. 384 of 2009 described himself as

son thereof and in this application as a brother.

The Respondent also deposes that the reliefs sought in the various suits herein mentioned are different and that 32 of 1986 is already determined and cannot be consolidated with 384 of 2009 which is a fresh case. Nor has substitution of the judgement debtor been regularly effected in Civil Case No. 32 of 1986 so that the applicant has no recognizable status in this suit and has no locus standi. That the limited grant in this kind of situation is not enough to give him locus or a position equal to that of a personal representative.

I have carefully considered this application after properly perusing the material placed before me together with both submissions. I am satisfied first and foremost that the correct provision for withdrawal and transfer of a suit to itself by the High Court in section 18 of the civil procedure Act, not those quoted. Clearly, the application is brought under totally inapplicable provisions. It is my view and finding that where there is a specific provision for doing a specific act, the same has to be used to do the stated Act. No other provision, unless authorized, can be used to attempt to do such act. In this application clearly, a wrong provision of law has been quoted to seek exercise of discretion not provided under it. Put differently, sections 3, 3A and 63 of the Act do not apply to transfer cases from one court to another. In that case, this court has no relevant power or jurisdiction to transfer and consolidate the cases as prayed. That reason alone should be adequate to dismiss this application.

Besides the above reasons however, PMCC NO. 32 of 1986 is a determined suit. Acts done under it accounting to law remain in place and no successful application has made to reverse the situation. This court accordingly cannot have good reason to transfer and consolidate a settled suit with PMCC NO. 384 of 2009 which is a fresh suit.

Thirdly, the applicant has not shown that he has capacity to pursue a sit in respect of which he has no substantive grant of letters of administration. I indeed observe that the applicant is not swearing the whole truth when at one stage he calls himself a brother to deceased, then a son and then he states he is the owner of the land that he clearly depones belonged to the deceased. In other words, he is not approaching this court with clean hands required of those who seek equitable reliefs as he does herein.

Finally, the relief sought, if granted is likely to overturn many people settled rights which will likely hurt innocent third parties. The delay in bringing this application is inordinate. Nor did the applicant provide this court with legal authorities to guide it in arriving at a fair decision, but simply hurled raw material at the court's face and hoped for the best.

The result is that this application has no merit. It is dismissed with costs to the respondent.

Orders accordingly.

DATED and **DELIVERED** at Busia this 6th day of October 2010

D.A. ONYANCHA

JUDGE