



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**CIVIL CASE NO. 30 OF 2017**

**JOSEPH WANYAMA OJIAMBO ..... PLAINTIFF**

**VERSUS**

**JUSTUS OUMA WEBUYE (Being sued as personal representatives of**

**LINUS WEBUYE (Deceased) ..... DEFENDANT**

**R U L I N G**

1. The defendants raised a Preliminary Objection to the hearing of this matter on the following grounds;

**1) The defendant lacks capacity to be sued on behalf of Linus Webuye – deceased.**

**2) That plaintiff has no cause of action against the defendant.**

2. In his submission, the defendant stated that Linus Webuye – deceased is the registered owner of L.R No. Bukhayo/Matayos/2080. The defendant states that he has not taken out letters of administration of his deceased father’s estate. The defendant is sued as the personal representative of Linus Webuye-deceased.

3. In contesting the Preliminary Objection, the plaintiff stated that the defendant was granted letters of administration in Succession Cause No. 11 of 2001 on 30/11/2016 which grant was initially issued to the plaintiff before the same was revoked.

4. In his defence at paragraph 9, the defendant pleaded thus;

*“The defendant avers that there has been a dispute between the plaintiff and the defendant in Busia High Court P & A No. 11 of 2001, which matter was determined in favour of the defendant hence this suit is res judicata.”*

5. In the case of ***Mukisa Biscuits Distributors Limited Vs West End Limited (1969) eKLR*** the Court held that a preliminary point of law qualifies as such if it can be determined without requiring the adduction of evidence/facts to prove its existence. The defendant admits the existence of BSA H.C. P & A No. 11 of 2001 which he says was determined in his favour. There is need for evidence to be placed before this Court to show the nature of the determination that was made in favour of the defendant as the determination was not annexed to the pleadings on record.

6. The plaintiff has submitted that the grant was initially issued to him but was later revoked and issued to the defendant on 30<sup>th</sup> November 2016. The question on which set of facts this Court should believe can only happen after hearing both parties based on documents they present. This makes the Preliminary Objection raised to fall below the threshold set in the ***Mukisa Biscuit Case supra***.

7. The second limb of the objection also requires evidence to be adduced. I need not say more on it. In summary, I find the Preliminary Objection raised is unmerited and I proceed to dismiss it with costs.

**Dated, signed and delivered at BUSIA this 15<sup>th</sup> day of April, 2020.**

**A. OMOLLO**

**JUDGE**