



**REPUBLIC OF KENYA**

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

**LAND & ENVIRONMENTAL DIVISION**

**ELC NO. 123 OF 2015**

**FREDRICK OMONDI OKEYO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MARY WERE.....1<sup>ST</sup> DEFENDANT /APPLICANT**

**DOUGLAS OTIENO WERE.....2<sup>ND</sup> DEFENDANT /APPLICANT**

**RULING**

1. The application before me is a Notice of Motion dated 4/4/2017 and filed on the same date. It is brought under Sections 3 and 3A of Civil Procedure Act (Cap 21) and seeks the following orders:

- a. That this honourable Court be pleased to issue an order to the Applicants staying the hearing of this suit scheduled for 27/4/2017 pending hearing and determination of the 2<sup>nd</sup> Applicants application dated 10/4/2017 in Busia High Court Succession Cause No. 195 of 2013.
- b. That costs be provided for.

These two prayers are set out as prayers (2) and (3) on the face of the application. The Applicants - **MARY WERE** and **DOUGLAS OTIENO WERE** - are Defendants in the suit herein filed on 27/10/2015. The Respondent - **FREDRICK OMONDI OKEYO** is the Plaintiff.

2. The tussle between the Applicants and the Respondent revolves around ownership of land parcel No. **SOUTH TESO/ANGOROMO/4276**. The grounds in support of the application are clear: The Applicant has filed an application in Busia High Court Succession No. 195 of 2013 seeking to cancel registration of the Respondent as proprietor of land parcel SOUTH TESO/ANGOROMO/4276 by transmission pursuant to the Certificate of Confirmation of grant issued to the Respondent dated 29/6/2015. That application, if allowed, is said to have the effect of resolving this suit. It was averred that the Respondent stands to suffer no prejudice if the order sought is granted.

3. The 2<sup>nd</sup> Applicant – **DOUGLAS OTIENO WERE** – said that the land is his own, having been purchased by his late father from the Respondent’s father sometimes in the past. The Respondent however filed Succession Cause No. 195 of 2013 where he misrepresented that the land was part of his late father’s estate. The High Court then treated the land as such and the grant issued by that Court was used to register the Respondent as owner at the land’s office. The Applicants are challenging the grant vide application dated 10/4/2017 filed in court on 13/4/2017. In the meantime, they want the hearing of this suit stayed to await the outcome of that application.

4. The Respondent responded in two ways viz:
  - a. Grounds of opposition filed on 26/4/2017
  - b. Replying affidavit filed on 24/5/2017

In sum, the application is said to be frivolous, vexatious and an abuse of the Court process given that the Court had even given LAST ADJOURNMENT to the matter. The application was alleged to be aimed at prolonging the Applicant's stay on the Respondent's land. The Applicants were faulted for not paying costs as ordered by Court and the Respondent further said that the Applicants were not parties to the Succession Cause at the High Court.

5. The Respondent said further that the Applicants filed BUSIA ELC No. 79 of 2017 (OS) against him claiming ownership by adverse possession. That claim means they acknowledge his ownership as the registered owner and they therefore cannot be heard to challenge this title. According to the Respondent the issues raised in the application are the same issues raised by the Applicants herein in their counter-claim.

6. The matter was canvassed by way of written submissions. The Applicants submissions were filed on 16/5/2017. It was submitted that what is required of them is to show they have an arguable case with high chances of success; that they have filed their application expeditiously; and that it is in the interest of justice that the application be allowed. These are conditions spelt out in the case of **KENYA POWER AND LIGHTING CO. LIMITED vs ESTHER WANJIRU WOKABI [2014] eKLR**.

7. To the Applicants, the application and the annexures availed establish an arguable case; they also filed the application expeditiously since this suit has never taken off since it was filed; and it is in the interest of justice that stay be granted.

8. The Respondent's submissions were filed on 24/5/2017. It was reiterated that the application is part of the applicants design to delay the case. Further, what is being sought at the High Court is essentially being sought here by way of counter-claim. It was further pointed out that the purported registration of the 2<sup>nd</sup> Applicant as owner lacks endorsement of the Land Registrar. With this in mind, the Applicants were said to be on a fishing expedition. They want to be awarded land in Succession Cause, they want this Court to cancel the Respondents title on grounds of fraud, and they claim the same land in another suit by adverse possession.

9. Like the Applicants the Respondent sought to rely on Kenya Power & Lighting case (Supra). To the Respondent however, the conditions stipulated in it have not been met.

10. I have considered the application, the responses made, and the rival submissions. I have had a look too at the court record generally. The 2<sup>nd</sup> Applicant is in court in three ways. He has the Originating Summons case No. 79 of 2017 which is still pending. He has a counter-claim in this suit. And he has his application in Succession Cause No. 195 of 2013 at the High Court. A look at his counter-claim and the application at the High Court shows that the two are essentially similar and seek to achieve the same thing. Yet the counter-claim came first and he did not deem it necessary to withdraw or abandon it before shifting to High Court to essentially make the same claim.

11. And while the 2<sup>nd</sup> Applicant is intent on staying the Plaintiffs case to await the outcome of the application, he has not stayed his other case (the O.S.) in this Court to await the same outcome. What this means is that while still pursuing his case at the High Court, he can still pursue his other case here while the Respondents case would have stalled if stay is granted. The Respondent obviously will be disadvantaged. The Applicants generally will have the ability to determining the pace of their case; the Respondent will not. The court has to be wary of that.

12. The two sides sought to rely on the same decided case. The Applicants brought the application at the High Court over one and a half years since the filing of this case. The decided case requires that there be

no delay in filing such application. The Applicants submitted they have not delayed as this case has never taken off. They conveniently forgot to reckon that a major obstacle to the case taking off has been they themselves. The Court record readily shows that they have caused adjournment after adjournment until the Court had to give the matter last adjournment on 26/1/2017 and even after that, they still came up with other excuses later to block take-off. Yet even though that is the position, the Applicants wants to use it to their own advantage. The Court cannot allow that. The fact of the matter is that there has been delay on the part of the Applicants and that delay cannot be excused. The Succession Case in the High Court where the grant was issued is not a new matter.

13. It is also generally the position that it is this Court, not the High Court, that has the mandate to decide on land ownership. I will not say much on this as the High Court will have the final say on the application before it but it is curious that the Applicants have two claim of ownership in this Court and another at the High court. And all these claims relate to the same piece of land.

14. When all is considered therefore, I am not persuaded that this is an application that has merits. I am tempted to belief, as the Respondent has alleged, and having regard to what the Court record shows, that the Applicants are possibly intent on delaying this case. I hereby therefore dismiss the application herein with costs.

**Dated, signed and delivered at Busia this 26<sup>th</sup> day of July, 2017.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff/Respondent: .....

1<sup>st</sup> Applicant/Defendant.....

2<sup>nd</sup> Applicant/Defendant.....