



**Atingo v Mbalanya (Environment and Land Appeal E004 of 2022)
[2023] KEELC 19973 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19973 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

E ASATI, J

SEPTEMBER 21, 2023

BETWEEN

READON ELISHA ATINGO APPLICANT

AND

OLIVER SHADRACK MBALANYA RESPONDENT

*(Being an appeal from the judgement of the Honourable RM Ndombi
SRM in Vibiga CMCC E66 of 2018 delivered on the 3rd March, 2022)*

RULING

1. This ruling is in respect of the Notice of Motion application dated March 14, 2023 brought pursuant to the provisions of Section 3 and 3A of the *Civil Procedure Act*. It seeks for orders that the Deputy Registrar of this court do execute all forms necessary to effect transfer of 50 feet by 100 feet of land parcel No. West Bunyore/ebusikhale/2028.

Secondly, that the County Surveyor and Land Registrar do visit land parcel No. West Bunyore/ebusikhale/2028 to mark out and establish boundaries for a portion measuring 50 feet by 100 feet from the aforesaid parcel of land and thirdly, the OCS Luanda police station to provide security and that costs be in the cause.

2. The grounds upon which the application was brought were that there is a decree in favour of the Applicant. That the Respondent is not willing to execute the necessary documents for transfer of the portion of land. That the Respondent has turned hostile and that it is in the interest of justice that the orders sought be granted. The application was supported by the Supporting Affidavit sworn by the Applicant on March 14, 2023.
3. The application was opposed vide Replying Affidavit sworn by the Respondent on May 8, 2023. The Respondent deposed that being dissatisfied with the appeal, he filed an appeal vide ELC Appeal NO. E003 of 2023. That the application is not made in good faith as it is meant to deny justice to him since



he has filed an appeal. He prayed that the application be dismissed and he be given a chance to be heard on the appeal.

4. The application was heard orally on July 11, 2023. It was submitted on behalf of the Respondent that the decree was unimplementable as the portion of land claimed by the Applicant measures only 0.004 Hectares.
5. The two grounds advanced in opposition to the application are that there is an appeal pending and secondly that the decree is incapable of being implemented as the land is smaller than the award. Regarding the existence of the appeal under Order 42 Rule 1, no appeal or second appeal shall operate as a stay of execution or of proceedings. The fact that the Respondent has filed a Notice of Appeal does not stop the execution process.

Regarding the contention that the suit land is smaller than the award made, the Respondent never raised this issue in the pleadings and evidence in the lower court and even in the hearing in the appeal.

6. I find that the application has merit and allow it as follows: -
 - i. the Deputy Registrar of this court do execute all forms necessary to effect transfer of 50 feet by 100 feet of land parcel No West Bunyore/ebusikhale/2028 in favour of the appellant.
 - ii. The County Surveyor and Land Registrar do visit land parcel No West Bunyore/ebusikhale/2028 to mark out and establish boundaries for a portion measuring 50 feet by 100 feet from L R No West Bunyore/ Ebusikhale/2028.
 - iii. The Officer Commanding Station Luanda police station to provide security during the exercise.
 - iv. Each party to bear own costs of the application.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 21ST DAY OF SEPTEMBER 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE

In the presence of:

Maureen- Court Assistant.

Munyendo for the Applicant.

Manyoni for the Respondent.

