



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND COURT**

**ELC NO. 74 OF 2015**

**CHRISTOPHER O. OPONDO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ODUKU M. ODUKU.....DEFENDANT/APPLICANT**

**RULING**

1. The application for determination is a motion on notice dated 7/12/2018 and filed on the same date. It is stated to be brought under Order 42 Rule 6 of the Civil Procedure Rules. The Defendant – **ODUKU MUGANDA ODUKU** – filed it against the Plaintiff – **CHRISTOPHER ODHIAMBO OPONDO**. The two were disputing over ownership of a portion of land in land parcel No. LR. MARACHI/ELUKONGO/1609, which the Plaintiff claimed to have bought and fully paid for, but which the Defendant claimed was only partially paid for. The court delivered judgment on the matter on 25/9/2018 and allowed the Defendant to retain his land. The Defendant was also ordered to refund the Plaintiff the money already paid plus interest and also pay for the value of developments undertaken by the Plaintiff on the land.

2. It appears clear that the Plaintiff has now moved to execute in order to realise his entitlement from the Defendant. The Defendant is opposing the execution and that is why the application herein is filed. The application came with four (4) prayers but the prayers for consideration are now three, the others having been for consideration at an earlier stage. The prayers for consideration are as follows:

Prayer 2: Pending hearing of an appeal No. 147/2018,

Court of Appeal, Kisumu, execution of the decree/judgment/orders made herein on 25/9/2018 be stayed.

Prayer 3: Costs hereof be paid by the Respondent.

Prayer 4: Any other order be made as the court deems fit and just.

3. The application is premised on the grounds that the Plaintiff intends to execute the judgment without regard to the conditions set out in the judgment; that the judgment has not directed the kind of execution to be carried out; that the Plaintiff has fabricated his development on the land in order to swindle the Defendant of money; and that the Plaintiff is slippery person and it will not be easy to recover money from him if the appeal succeeds.

4. I have not seen the Plaintiff's response to the application but both sides filed submissions. The Defendants submissions were filed on 28/1/2019. He highlighted the facts surrounding the application and submitted that he is appealing. He also submitted that the Plaintiff can only execute if he is not paid his money as ordered.

5. The Plaintiff's submissions were filed on 12/2/2019. According to the Plaintiff, the Defendant is using all means to defeat justice. The Defendant was said to have failed to meet his end of the bargain as ordered by the court. His application was said to lack merit and the court was asked to dismiss it with costs.

6. I have considered the application and the rival submissions filed. There is a serious weakness regarding the application as filed. The Defendant talks of having filed an appeal and even refers to the appeal as being No. 147/2018 at Kisumu. No notice of appeal was availed. No memorandum of appeal is on record. Ordinarily, the court is interested in seeing the notice of appeal and the memorandum of appeal. When these are not availed, it becomes impossible to establish whether there is an appeal filed. The Defendant herein only talks of having filed an appeal but has not availed records to prove what he is saying.

7. Where some records of appeal are availed, the court is usually able to assess whether the appeal is arguable. It is not now possible to make

this assessment as no records are with us. The application herein fails not because the Plaintiff has made a good response to it but because of the omission to avail records of appeal. As things stand, the court is not even able to establish whether the alleged appeal exists.

8. It is for this reason that the application herein is found to be devoid of merits. The same is hereby dismissed with costs to the Plaintiff.

**Dated, signed and delivered at Busia this 30<sup>th</sup> day of July, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff/Respondent: Present

Defendants/Applicant: Present

Counsel for the Plaintiff/Respondent: N/A

Counsel for the Defendant/Applicant: N/A

Court Assistant: Nelson Odame