



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND COURT**

**ELC NO. 69 OF 2017**

**ISAAC OUMA NYABERA.....APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF BUSIA..... RESPONDENT**

**RULING**

1. The application before me is a Notice of Motion dated 1/8/2018 filed in court on 2/8/2018. The Applicant – **COUNTY GOVERNMENT OF BUSIA** – is the Defendant in this suit while the Respondent – **ISAAC OUMA NYABERA** – is the Plaintiff. The application is brought under Sections 1A, 1B, 3A, 34, and 63(e) of the Civil Procedure Act (cap 21), Order 22 Rules 22 and 25 and Order 51 rule 1 of the Civil Procedure Rules. It expressed also to be brought under the Judicature Act, the inherent powers of the court, and all enabling provisions of the law.

2. The application has four (4) prayers but prayers (a) and (b) are now moot, having been for consideration at the exparte stage. The prayers for consideration now are (c) and (d), which are as follows:

Prayer (c): That there be a stay of execution of the judgment issued herein pending the hearing and determination of the application dated 3/5/2018 for reconstruction of the file already fixed for mention on 19/9/2018 and the intended application for the setting aside of the exparte objection proceedings scheduled to be filed and prosecuted vide Busia High Court Succession Cause No. 205 of 2009 once reconstructed.

Prayer (d): That costs of this application be provided for.

3. From the grounds advanced in support of the application it appears that there was a grant made in probate and administration proceedings (**BUSIA HIGH COURT SUCC. CAUSE NO. 205 of 2009**) where the Applicant had been given a portion measuring 0.7Ha in what is presently Land Parcel No. MARACHI/BUJUMBA/2414. The Respondent filed objection to the grant and there was revocation of the grant. According to the Applicant the objection proceedings were conducted exparte. The Applicant desires to challenge the proceedings but the relevant court file is untraceable. An application has already been made to reconstruct another file. The apparent delay in mounting the challenge to the objection proceedings is attributed to the misplacement or loss of the aforesaid file.

4. The Respondent responded to the application vide a replying affidavit filed on 14/9/2018 and dated the same. According to the Respondent, this application is brought in bad faith as the court has already issued judgement in this matter. The order sought is viewed as an attempt to circumvent compliance with the decree or order arising from judgement. It was pointed out that the judgement is not appealed against and there is also no application to review or set it aside. The Applicant is said to have arrogantly refused to comply with the order arising from the judgement.

5. The application was said to be lacking in merit. The court was asked to dismiss it with costs.

6. The Applicant filed a supplementary affidavit on 3/10/2018. It was pointed out that the application is bonafide and that an order for reconstruction of the lost file has already been granted. An application to challenge the objection proceedings is also said to have been filed.

7. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 3/10/2018. The Applicant emphasized the need to be granted the order of stay. It pointed out that the intended challenge has good chances of success and that if execution is allowed to go on, its livestock market activities that take place at the site will be disrupted leading to inevitable loss of revenue. The ability of the Respondent to compensate the Applicant if the title is eventually cancelled was also doubted. This court was said to have the powers to grant the orders sought.

8. I have considered the application, the response made, and the rival submissions. The suit herein was filed way back on 28/3/2017. The

Defendant filed a short defence thereafter consisting of mere denials. When the time for hearing came, the Defendant availed no evidence. The Plaintiff had premised the suit on registered ownership of the land in dispute. The Applicant had a perfect opportunity to challenge that ownership. It failed to do so. With the judgement now issued, and with execution now an inescapable reality, the Applicant now belatedly comes to court asking to be allowed to challenge the Respondent's title or ownership. I am unable to read due diligence on the Respondent's part.

9. There is nothing really new that would warrant this court to feel justified in granting the orders being sought. The proceedings meant to be challenged took place long ago. When this suit was filed, the Applicant could still have mounted the intended objection. It did not. The suit had come with a copy of search and the Respondent's title deed as some of the documents accompanying it. That should have provided the Applicant with a wake-up call to act fast. But the Applicant did not act.

10. I am generally in agreement with the Respondent concerning the averments made in his replying affidavit. I find the application herein unmeritorious and I dismiss it with costs.

**Dated, signed and delivered at Busia this 27<sup>th</sup> day of November, 2018.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicant: Absent

Respondent: Absent

Counsel for Applicant: Present

Counsel for Respondent: Present

Court Assistant: Nelson Odame