



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**SUCCESSION CAUSE NO. E2 OF 2021**

**IN THE MATTER OF THE ESTATE OF**

**THE LATE SAMSON OWANGE OMBWAYO (DECEASED)**

**MAURICE ONAM ODORO.....APPLICANT/APELLANT**

**VERSUS**

**ERICK OMONDI OBILO.....1<sup>ST</sup> RESPONDENT**

**ISAIAH OMEDO OBILO.....2<sup>ND</sup> RESPONDENT**

**FREDRICK ONYANGO OBILO.....3<sup>RD</sup> RESPONDENT**

**RULING**

The Appellant, **MAURICE ONAM ODORO**, has asked the Court to order that the execution of the Order dated 5<sup>th</sup> February 2021 be stayed.

1. The learned trial magistrate revoked the grant which had been issued to the Petitioner (who is the Appellant herein).
2. Secondly, the trial Court ordered that the title deed that had been issued to the Appellant be cancelled. In order to give effect to the order for the cancellation of the title deed, the trial Court directed the Appellant to surrender the original title deed to the Registrar of Lands, for cancellation.
3. Being dissatisfied with the decision, the Appellant has lodged an appeal to the High Court.
4. Shortly after filing the appeal, the Appellant filed the application dated 17<sup>th</sup> March 2021, seeking stay of execution until the appeal was heard and determined.
5. The Appellant believes that his appeal has overwhelming chances of success.
6. Meanwhile, the Respondents hold the view that the Appellant had failed to demonstrate that he had an arguable appeal, with high chances of success.
7. It is common ground that when the Appellant lodged his application for the grant of letters of administration, he supported the said application with a letter from the Assistant Chief of South Ratta Sub-location dated 16th September 2018. In the said letter the Appellant was described as being;

***“... the only son” of the Samson Owange Ombwayo, (Deceased).***

8. Meanwhile, in the Gazette Notice dated 30<sup>th</sup> November 2018 the Appellant was described as being a brother of the deceased.
9. When the Appellant was testifying on 15<sup>th</sup> October 2020, he said that his father was Alex Odoro Ongonga, who is an older brother of

Samson Ombwayo (Deceased).

10. On his part, the Appellant believes that the mis-description of the relationship between him and the deceased was a minor mistake, which could be rectified.
11. I note that in his submissions before me, the Appellant stated that he is a grandson of the deceased.
12. On their part, the Respondents submitted that the Appellant had intentionally and fraudulently misrepresented the facts, when he applied for the grant of letters of administration.
13. When the appeal comes up for hearing, the appellate court will make a determination whether the erroneous information was a small mistake or a serious misrepresentation which was made **intentionally and fraudulently**.
14. However, it cannot be disputed that when the “*facts*” were presented by the Appellant, the Court issued the grant on the basis of the said “*facts*.”
15. Therefore, whether or not the “*facts*” were a mistake or were an intentional and fraudulent misrepresentation, it would follow that the court relied on the same, when issuing the grant.
16. It will be interesting to hear the Appellant’s explanation concerning how his alleged mistake could have been either excused or overlooked by the learned trial magistrate when she revoked the grant.
17. For now, I would not share the Appellant’s view concerning the probable outcome of his appeal; in other words, I find that the Appellant has not demonstrated that the appeal has **overwhelming chances of success**.
18. Nonetheless, the appeal is deemed to be arguable.
19. The Respondents submitted that if the Court did not stay execution, the Appellant would not be prejudiced.
20. They have also submitted that the Appellant ought to deposit security in court, for the loss and damages which the Appellant was causing to the estate of the deceased.
21. In this case, the matter in issue is not of a monetary nature. If the issues were of a quantifiable monetary nature, it may have been possible to determine the nature of the security which the Appellant ought to deposit as security.
22. The Respondents sought and got orders for the revocation of the grant. The learned trial magistrate ordered the Appellant to **surrender the title deed to the Registrar of Lands, so that the same can be cancelled**.
23. The Respondents have submitted that;  
  

**“..... it also goes without saying that  
once the fraudulent grant and title  
deeds were revoked, it was incumbent  
upon the applicant to vacate the estate  
land and stop his illegal activities of  
wasting the estate, but he refused,  
hence the need for police intervention  
to make sure he complies with the  
court order.”**
24. I have carefully perused the order issued by the learned trial magistrate.
25. The said order does not require the Appellant vacate the land which constitutes the estate of the deceased.

26. For now, the Appellant is only required to surrender his title deed to the Registrar of Lands, so that it can be cancelled. If he declines to surrender the said title deed to the Registrar of Lands, the Respondents may move the trial court for appropriate orders, to compel compliance.

27. In my considered view, the surrender of the title deed to the Registrar of Lands cannot prejudice the Appellant.

28. It is in the interests of justice that the land which is the subject matter of the proceedings herein, be conserved.

29. If the Appellant continues to hold onto the title deed which is in his name, there might be a real risk that the estate might be jeopardized.

30. Accordingly, I reject the application. The Appellant will pay to the Respondents the costs of the application.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF OCTOBER 2021**

**FRED A. OCHIENG**

**JUDGE**