



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUSIA**  
**PROBATE AND ADMINISTRATION NO. 21 OF 2007**  
**IN THE MATTER OF THE ESTATE OF ODONGO**  
**ODWAKO KHADUDU.....DECEASED**  
**AND**  
**REMJUS ODHIAMBO ODONGO.....PETITIONER/APPLICANT**  
**VERSUS**  
**MOURICE SYSLVESTER OUMA.....OBJECTOR/RESPONDENT**  
**AND**  
**BERNARD AODUOR OMONDI.....INTERESTED PARTY**

**RULING**

**(Chamber Summons application dated 6<sup>th</sup> October, 2015)**

1. On 1<sup>st</sup> October, 2014 my brother Tuiyott, J recorded orders in this matter as follows:

**“After perusing the file in Busia H. C. C. C. No. 36 of 2001 it is hereby agreed by the counsel as follows: -**

**(1) There be stay of these proceedings pending the hearing and determination of the Appeal arising from Busia H. C. C. C. No. 36 of 2001.**

**(2) Either party to be at liberty to move the Court for review of the Orders.”**

2. On 6<sup>th</sup> May, 2015 Remjus Odhiambo Odongo the Administrator of the estate of the deceased Odongo Odwako Khadudu (“the deceased”) made an oral application to review the order of stay and he was asked to make a formal application.

3. Through the Chamber Summons application dated 6<sup>th</sup> October, 2015 the Administrator/Applicant prays for orders as follows: -

**“i. That the orders of 1.10.14 (staying proceedings) herein be and are hereby reviewed and**

**set aside.**

**ii. That all cautions, restriction, inhibition, injunction, registered on title No. Marachi/Bumala/331 be and are hereby lifted/removed.**

**iii. That the orders of 16.6.11 – the certificate of confirmation of a grant be effected/registered accordingly.**

**iv. That this court do make such just orders.**

**v. That the costs be provided for.”**

4. Mourice Sylvester Ouma the Objector is named as the Respondent and Bernard Oduor Omondi is named as an Interested Party.

5. The Applicant's application is supported by his affidavit sworn on 6<sup>th</sup> October, 2015. The Applicant's case is that the deceased died intestate on 3<sup>rd</sup> November, 2005. He subsequently commenced these proceedings seeking the authority of the Court to administer the estate of the deceased. A grant of letters of administration intestate was made to him on 4<sup>th</sup> June, 2007 and confirmed on 16<sup>th</sup> June, 2011.

6. The Respondent filed an objection dated 2<sup>nd</sup> February, 2012. He also together with the Interested Party caused restriction, caution and inhibition to be registered over the parcel of L.R. Marachi/Bumala/331 an asset of the estate of the deceased.

7. Before the Respondent's objection was heard and determined, Busia H. C. C. No. 36 of 2011 in which the Respondent was claiming the land in question was dismissed. It is the Applicant's case that as a result of the dismissal of the Respondent's claim by the Environment and Land Court, the objection herein was rendered baseless.

8. According to the Applicant, the Respondent does not intend to pursue his appeal at the Court of Appeal and the stay order issued in this matter is detrimental to the beneficiaries of the estate of the deceased. He therefore urges the Court to grant the orders sought.

9. The Respondent opposed the application through a replying affidavit sworn on 25<sup>th</sup> May, 2016. His case is that he filed Civil Application No. 70 of 2014 before the Court of Appeal at Kisumu seeking extension of time to file a notice of appeal out of time and the application was allowed on 2<sup>nd</sup> December, 2015. Further, that he filed a record of appeal in Kisumu Civil Appeal No. 16 of 2016 and the same was served upon the Applicant's counsel on 3<sup>rd</sup> February, 2016.

10. It is therefore the Respondent's case that the Applicant is untruthful in saying that he has not filed an appeal and that he has no interest in pursuing an appeal.

11. The Respondent averred that no cogent reasons have been advanced for reviewing the stay order and a review of the same will render his appeal nugatory. He urged the Court to dismiss the application.

12. The Interested Party opposed the application through a replying affidavit sworn on 18<sup>th</sup> October, 2016. It is his position that the Objector's objection herein is still pending hearing and determination and it would be wrong to set aside the stay order. Further, that removing the caution he has placed on the land may result in the land being alienated.

13. The Interested Party also pointed out that the appeal lodged by his brother (the Respondent) before the Court of Appeal is yet to be determined and the Applicant has not demonstrated why the stay order should be reviewed.

14. A perusal of the file shows that the Respondent's objection in this matter is spent as the foundation of

his claim was dismissed in a judgement delivered by the Environment and Land Court in Busia HC. C. C. No. 36 of 2001. His fate now lies with the Court of Appeal where he has lodged an appeal against that judgement. This fact was well known to the Court and the parties when they recorded consent on 1<sup>st</sup> October, 2014 staying these proceedings pending the hearing and determination of the appeal arising from the decision in Busia H. C. C. C. No. 36 of 2001.

15. The evidence placed before the Court shows that Respondent sought and obtained leave to file a notice of appeal out of time. He has also filed the record of appeal.

16. The Applicant has not established any change of circumstances in order for this Court to lift the order staying these proceedings. His attempt to argue that the Respondent had misled the Court about an appeal having been filed holds no water. Rule 2 of the Court of Appeal Rules, 2010 defines an appeal to include an intended appeal. The Respondent did not in any way mislead the Court.

17. As the Respondent and the Interested Party have pointed out, there has not been any change in the circumstances that prevailed at the time the order was issued to warrant a review of the same.

18. The application has no merit and the same is therefore dismissed. The costs of the application to abide the conclusion of these succession proceedings.

**Dated, signed and delivered at Busia this 30<sup>th</sup> day of March, 2017.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**