



**REPUBLIC OF KENYA**

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

**IN THE MATTER OF THE ESTATE OF LATE INDAKWA ODERA – DECEASED**

**SUCCESSION CAUSE NO.539 OF 2006**

**EMMANUEL ODERA OMUMASABA .....RESPONDENT**

**VERSUS**

**SILAS ODERA INDAKWA .....PETITIONER/APPLICANT**

**RULING**

**Application**

1. By the Notice of Motion dated 12<sup>th</sup> August 2015 the Applicant seeks for Orders of stay of execution of the Orders made on 29<sup>th</sup> May 2015 pending the hearing and determination of the Appeal. The application is based on the grounds that the Applicant was dissatisfied by the ruling delivered on the 29<sup>th</sup> May 2015 and has filed an appeal to challenge the said ruling. He contends that unless the Order sought is granted, the Respondent may go ahead and execute before the hearing and determination of the appeal.
2. The application is supported by the Applicant's affidavit where amongst other things he states that the intended appeal is meritorious and that unless the Orders sought are granted the appeal will become of academic importance only. He also says that his appeal has high chances of success.

**Response**

3. The application is opposed by Emmanuel Odera Omumasaba the Respondent who filed a replying affidavit on the 5<sup>th</sup> of November 2015. He depones therein that the application is incompetent, frivolous and vexatious and amounts to an abuse of the Court process. He adds that the application has been filed after undue delay and that the Applicant has not filed any appeal capable of being heard and if one has been filed the same is a non-starter for having been filed without leave of the Court. He holds the view that the Applicant's failure to invoke the provisions of the law allowing him to file the instant application has prejudiced him as he is unable to respond accordingly. Lastly that this Court's jurisdiction has not been invoked by the Applicant.

**Determination**

4. This Court notes that the Applicant has failed to invoke the provisions of the law under which he has moved this Court. Does failure to cite the provisions of the law under which an application is brought render the application incompetent?
5. The answer to the above question is in the affirmative. Failure to invoke the Court's jurisdiction is fatal to the application and it means that the Court has not been moved at all. See **KARIUKI –**

**VS- COUNTY COUNCIL OF KIAMBU 1985-1998 1 E.A 90** where the Court held that Statutory provisions invoke the jurisdiction of the Court. The application therefore lacks merit and the same is dismissed with costs to the Respondent.

6. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 30<sup>th</sup> day of June 2016.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Mr. Munyendo for Ombito (present) Applicant

Present in Person - Respondent

Mr. Okoiti - Court Assistant