



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CIVIL APPEAL NO. 38A OF 2006**

**JOSEPH ONYANGO WANYAMA.....APPELLANT**

**=VERSUS=**

**CHARLES JUMA OLOO..... RESPONDENT**

**AND**

**CHRISPINUS OKUMU JUMA.....INTERESTED PARTY**

**R U L I N G**

**CHARLES JUMA OLOO** and **CHRISPINUS OKUMU JUMA** filed the notice of motion dated 14<sup>th</sup> August, 2014 through their advocate M/S. Gabriel Fwaya for the following orders;-

- ‘‘1. That the name of the Interested Party – Chrispinus Okumu Juma be struck out of this proceedings/appeal.
2. That this appeal be dismissed for want of prosecution and non- compliance with directions/orders of the court and for being incompetent.
3. That in the alternative and without prejudice to prayer 1 and 2above, the orders of 5<sup>th</sup> July, 2011 be vacated.
4. That costs be provided for.’’

The application is based on seven grounds marked (i) to (vii) and the affidavit of Charles Juma Oloo sworn on 14<sup>th</sup> August, 2014.

The application is opposed by Joseph Onyango Wanyama, the Appellant through his replying affidavit sworn on 24<sup>th</sup> October, 2014.

During the hearing of the application on 29<sup>th</sup> October, 2014, Mr. Fwaya advocate represented the Respondent and Interested Party, while the Appellant was in person. Mr. Okutta Advocate, through whom the memorandum of appeal dated 14<sup>th</sup> December, 2006 had been filed, informed the court that his office never came on record for the Appellant but only prepared the document.

The court has carefully considered the grounds on the application, supporting and replying affidavits and submissions by Mr. Fwaya and the Appellant and find as follows;-

1. That this appeal was commenced through the memorandum of appeal dated 14<sup>th</sup> December, 2006 filed through M/S “Ouma – Okutta Associates Advocate for the Appellant.” The document has only two parties as follows:

“ Joseph Onyango Wanyama – Appellant

-versus-

Charles Juma Oloo - Respondent.”

2. That on 5<sup>th</sup> October, 2009, the court directed that a complete record of appeal be filed and served. On the 22<sup>nd</sup> February, 2010, the court allowed the Appellant to reconstruct the record of appeal and serve it in 30 days. Then during the subsequent mention on 22<sup>nd</sup> March, 2010, the Appellant indicated his desire to engage an advocate and another mention was fixed on 19<sup>th</sup> April, 2010.
3. That the Appellant filed the application for stay of execution of Busia PMCC. NO. 310 of 2010 pending the hearing and determination of this appeal. The application had introduced Chrispinus Okumu Juma as the Interested Party, and on being satisfied that the application had been served and no opposing papers had been filed, the court allowed the application on 5<sup>th</sup> July, 2011.
4. That M/S. Ouma-Okutta Associates Advocates came on record for the Interested Party through the notice of appointment of advocates dated 3<sup>rd</sup> November, 2011. On the same day, counsel moved the court verbally to strike out the name of the Interested Party from these proceedings but was directed to file a formal application.
5. The Interested party filed the application dated 20<sup>th</sup> February, 2012 to strike out his name from this appeal but the application is yet to be prosecuted to date. That by notice of change of advocate dated 15<sup>th</sup> April, 2013, the firm of M/S. Waiganjo & co. Advocates came on record for the Interested Party in place of M/S. Ouma – Okutta Associate Advocates. That the Interested Party then filed the application dated 15<sup>th</sup> April, 2013 with five prayers. The 4<sup>th</sup> prayer is for striking out the name of the Interested Party and hence similar to the prayer in the application dated 20<sup>th</sup> February, 2012. The 2<sup>nd</sup> and 3<sup>rd</sup> prayers are for Respondent and Appellant to be enjoined from interfering with the Interested Party’s use of land parcel Samia/Luchululo/Bukhulungu/1085. The application is also yet to be prosecuted.
6. That by notice of appointment of advocate dated 26<sup>th</sup> May, 2014, M/S. Fwaya Advocate came on record for the Respondent and Interested Party and thereafter filed the application dated 14<sup>th</sup> August, 2014 which is subject of this ruling.
7. That as clearly set out above, this appeal relates to the Lower Court orders of 16<sup>th</sup> November, 2006 of Hon. E.H. Keago . This is discernable from the memorandum of appeal dated 14<sup>th</sup> December, 2006 and record of appeal dated 23<sup>rd</sup> March, 2010 and filed in court on 18<sup>th</sup> January, 2011 through receipt number 3657359.
8. That in view of the finding in (7) above, it is erroneous for the Respondent and Interested Party to contend that it is not clear in respect of which Lower court proceedings this appeal relates to.
9. That the order of 5<sup>th</sup> July, 2011 in respect of the application dated 16<sup>th</sup> June , 2011 for stay of execution of proceedings in PMCC. NO.330 of 2010 did not have the effect of making Chrispinus Okumu Juma a party in this appeal. The appeal relates to the parties to Busia PMCC. No. 460 of 1996 only, and Chrispinus Okumu Juma was not one of them. It is instructive to note that in the application dated 16<sup>th</sup> June, 2011, Chrispinus Okumu Juma was named as an Interested Party and this must have been due to the interest he had reportedly acquired over land parcel Samia/Luchululo/Bukhulungu/1085 , which was the suit land in Busia PMCC. No. 460 of 1996. Order 1 Rule 10 (2) of the Civil Procedure Rules defines an Interested Party as one whose involvement is necessary for the court to **‘effectually and completely adjudicate upon and settle all questions involved in the suit.’** The Supreme Court in the case of *Trusted Society of Human Rights Alliance –vs- Mumo Matemo & 5 others* [2014] eKLR

defined an Interested Party as follows;

*“An Interested Party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause.”*

It is the considered view of this court that, though Chrispinus Okumu Juma is not a party in the appeal, his participation in these proceedings cannot be gainsaid considering he has since the orders of 16<sup>th</sup> November, 2006 acquired interest on the suit land. The extent to which the Interested Party will participate in the proceedings will of course be limited to his Interests.

10. That the way the Interested Party was enjoined in these proceedings through the application dated 16<sup>th</sup> June, 2011 may not have been proper as the application for stay of execution could have been made in a separate file. This is because the orders being stayed were not issued 2010. The court is obligated by Article 159 (2) (d) of the constitution to administer justice without undue regard to procedural technicalities. The court is of the view that none of the parties to this appeal are prejudiced by the inclusion of the Interested Party.

11. That having found that the Appellant filed the record of appeal dated 23<sup>rd</sup> March, 2010 on 18<sup>th</sup> January, 2011, it is only fair that he be accorded his day in court and the appeal decided on merit even though he may not have served within the time given. The multiple applications, confusion on which party is represented by M/S. Ouma – Okutta Associate Advocates and the criminal trial against Appellant, may have gone towards contributing to the delay in disposing of this appeal.

12. That while rejecting the application dated 14<sup>th</sup> August, 2014 with an order that each party bears his own costs, the court issues further orders as follows;

- a. That the application dated 14<sup>th</sup> August, 2014 is dismissed with each party bearing his own costs.
- b. That in view of Order (a) above, the pending applications by the Interested Party dated 20<sup>th</sup> February, 2012 and 15<sup>th</sup> April, 2013 are marked spent. This will pave way for the expeditious disposal of the appeal.
- c. That the Appellant is granted 60 days to engage an advocate, if he still so desires, and within the same period ensure the record of appeal is served and an affidavit of service filed.
- d. That the appeal be mentioned in March, 2015 to fix a hearing date.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON 28<sup>TH</sup> DAY OF JANUARY, .2015.**

**IN THE PRESENCE OF;.....PRESENT IN PERSON APPELLANT PRESENT IN PERSON RESPONDENT.**

**PRESENT IN PERSON INTERESTED PARTY. MR. FWAYA FOR RESPONDENT AND INTERESTED PARTY.**

**JUDGE.**