



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO. 2511 OF 2011**

**IN THE MATTER OF THE ESTATE OF PETER ODUSI alias PETER ODUSI TABU –  
DECEASED**

**RULING**

1. The application that I am called upon to determine is dated 8<sup>th</sup> August 2012. It seeks orders to stay execution of the order made herein for 14<sup>th</sup> June 2012 pending hearing and determination of an intended appeal.
2. On 19<sup>th</sup> January 2012, Christine Achieng Ogesa and Serah Siegisa Ogesa moved this probate court by a Motion dated 19<sup>th</sup> January 2012 against the British American Asset Managers Ltd, whom they named respondent for an order that the said respondent do surrender, a sum of Kshs.6,526,061.44 held by them on behalf of the deceased, to the applicants' lawyers to be invested by the said lawyers pending the determination of this cause. They brought the said application in their personal capacities as sisters and eligible dependants of the deceased. They founded their claim on the fact that they were named as the contact persons for the purpose of the transaction between respondent and the deceased.
3. The application was determined on 14<sup>th</sup> June 2012. GBM Kariuki J. ordered that the sum of Kshs.6,526,061.44 held by the respondent be invested by the respondent in the highest possible interest bearing amount for the benefit of the estate. The Motion dated 19<sup>th</sup> January 2002 was dismissed.
4. It is the order for the investment of the unit funds that is sought to be stayed in the present application.
5. I have perused the papers in this matter. I have noted that the grant of letters of administration intestate has not been made. There are no administrators in place. I note too that the claim in the application dated 19<sup>th</sup> January 2012 was really civil in nature and it is matter that perhaps should have gone to the civil court.
6. The place of appeals from the High Court to the Court of Appeal for orders made by the High Court sitting as a probate court is fairly controversial; for the Law of Succession Act does not have any specific provisions for a right of appeal from High Court to Court of Appeal, except for decisions on estates the subject of Islamic Law. My inclination is to find that I have no jurisdiction to order stay pending appeal.
7. However, going by my remarks in paragraph 5 above, I am persuaded that the dispute before court tended towards being a civil matter rather than one turning on succession law. That being the case, the provisions of the Civil Procedure Rules governing stay of execution can be called in aid in this case.
8. Under those provisions a grant of stay pending appeal is available so long as the following factors are taken into account –

- (a) that the application for stay has been file without unreasonable delay;
- (b) that the applicant would suffer substantial loss should the order be denied; and
- (c) that the applicant furnishes security for due performance.

9. The order being challenged was made on 14<sup>th</sup> June 2012. The respondents through counsel applied on 6<sup>th</sup> July 2012 for a copy of the ruling. They then moved to court on 9<sup>th</sup> August 2012. The request for a copy of the ruling was sought after three (3) weeks and the application filed after one and half months. There was clearly delay on the part of respondent in asking for a copy of the ruling as well as in filing the application for grant of stay. The delay however cannot be said to have been unreasonable.

10. The respondent argues that unit funds are governed by certain regulations set out in the Capital Markets Act and the Capital Markets (Collective Investments Scheme) Regulations, 2001. They are apprehensive that if they act in a manner which does not conform to these regulations they would expose themselves to liability to the persons who would ultimately be entitled to the said funds and to the regulating authorities. Significantly because the orders made on 14<sup>th</sup> June 2012 were not founded on the said regulations. The liability exposure in the circumstances is likely to lead substantial loss.

11. There is also the issue that grant of representation has not yet been made herein to any one, and quite obviously it has not been confirmed. This could provide a basis for challenging the decisions ultimately made by the respondent on the basis of the order of 14<sup>th</sup> June 2012.

12. Orders for furnishing security are at the discretion of the court. The applicant has not offered any securities for due performance.

13. I am convinced that this is a proper case for grant of the orders sought and I hereby make the following orders:-

- (a) That there shall be stay of the order of this court given on 14<sup>th</sup> June 2012 pending the hearing and determination of the appeal intended to be filed by applicant at the Court of Appeal;
- (b) That the applicant shall deposit a sum of Kshs.250,000.00 in court as security for due performance; and
- (c) That costs shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 16<sup>th</sup> DAY OF May 2014.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Mrs. Chege advocate for the petitioner.**

**No advocate for the respondent.**