



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Joseph Emongura Otiengi (Deceased) (Succession
Cause 80 of 2003) [2025] KEHC 7092 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE 80 OF 2003**

WM MUSYOKA, J

MAY 29, 2025

IN THE MATTER OF THE ESTATE OF JOSEPH EMONGURA OTIENGI (DECEASED)

RULING

1. I am called upon to determine a Motion, dated 19th December 2024. It seeks stay of execution of orders made on 13th December 2023 and the setting aside of the orders. It also seeks leave to file a response and defend the application dated 24th November 2023. It is at the instance of Rose Amunyet, an administratrix of the estate herein. She avers that the application, dated 24th November 2023, was never served on the estate, and she only got to know of it when the police visited, with respect to the orders of 13th December 2023. She avers that the estate was condemned unheard.
2. There is a reply to the application, by Paul Otieno Aloo and David Kimani. They aver that the order of 13th December 2023 was served on the firm of Okeyo & Company Advocates. It is averred that there had been sales of property after the grant had been confirmed on 15th November 2013. It is also pointed out that there was a suit filed in Busia ELC/E001/2024, where Okeyo & Company *Advocates act* for the applicant.
3. I have seen annexures to the reply. There is an affidavit of service of 13th December 2023, showing that an order, made on 28th November 2023, which had fixed the matter for hearing on 13th December 2023, had been served upon and received by Okeyo & Company, Advocates. There is the order made on 13th December 2023, showing that it had also been served upon and received by Okeyo & Company, Advocates. There is a copy of the plaint in Busia ELC/MCELC/E001/2024.
4. The application was to be canvassed by written submissions. The parties confirmed filing them. I have had access to both sets of submissions, filed by both sides, I have read them and noted the arguments made.
5. After the summons, dated 24th November 2023, was filed, it was placed before me, on 28th November 2023, and I directed that it be served, for hearing on 13th December 2023. On 13th December 2023, only one party appeared. An affidavit of service was filed, showing that the order of 28th November 2023, on service, had been extracted and served on the firm of Okeyo & Company, Advocates, who were on



- record. The affidavit of service indicated that the said firm had received the order, and acknowledged service. It would also appear that after the order of 13th December 2023 was made, the same was served on Okeyo & Company, Advocates, who received it, and acknowledged service of the order by stamping and signing it. Being satisfied of that service, I granted the application as prayed, as it was not opposed.
6. From what I see on record, there was proper service of the application, going by the affidavit of service of 13th December 2023, which was acknowledged on the order of 28th November 2023. For some unknown reason, Okeyo & Company, the Advocates on record for the applicant, despite having proper notice of the court appearance, scheduled for 13th December 2023, chose to stay away from court, hence the application was allowed.
 7. I see that the applicant insists that there was no service. Yet, the service was properly and effectively effected on the Advocates who were on record in the matter for her. She has not denounced the firm of Okeyo & Company, Advocates. She has not asked to cross-examine the court process server, who served the papers on Okeyo & Company, Advocates, one Gakuya James Muriithi, on that service. There is evidence of service, through an affidavit of service. It is not enough to just assert that there was no service, a further step ought to be taken, to impeach the alleged service, through cross-examination of the process server. The respondent has prima facie evidence of service, the burden is on the applicant to impeach that service. That has not been done in this case.
 8. Then there is the delay in the bringing of the instant application. The impugned orders were made on 13th December 2023. The instant application came on 19th December 2024, a whole calendar year thereafter, yet the order of 13th December 2023 had been served on Okeyo & Company, Advocates, sometime in December 2023. I am not persuaded that that delay has been explained, or justified.
 9. Overall, therefore, I am not persuaded that the application before me, dated 19th December 2024, is merited, for the reasons given. I hereby disallow and dismiss it. As this is a succession cause, no orders on costs shall be made. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 29TH DAY OF MAY 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Maxwell Okeyo, instructed by Bogonko Otanga & Company, Advocates for the applicant.

Mr. James Gakenga, instructed by JO Juma & Company, Advocates for the interested parties.

Mr. Bogonko, instructed by Bogonko Otanga & Company, Advocates for the Objectors.

