



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 99 OF 2002**

**IN THE MATTER OF THE ESTATE OF ANGWENYI MICHIEKA – DECEASED**

**RULING**

1. The application dated 31<sup>st</sup> October 2014 by **Charles Mose Kebira** is for stay of execution of the judgment and decree dated 26<sup>th</sup> August 2004 and all consequential orders and for setting aside of both the taxation and ex-parte orders dated 26<sup>th</sup> August 2004 together with all consequential orders. The application also seeks leave to file replying affidavit in response to the bill of costs dated 9<sup>th</sup> August 2004.

The main grounds in support of the application are contained in the body of the Chamber Summons dated 31<sup>st</sup> October 2014, as supported by the applicant's supporting affidavit of the same date. These include the fact that the applicant was never served with any pleadings in this succession cause and that he only became aware of the matter when a notice to show cause was served upon him. He contends that he was not a party to the succession cause neither was he a beneficiary of the mentioned estate. A similar application dated 12<sup>th</sup> November 2014, was also filed by the applicant.

2. The respondent **Chrisantus Makori Matara**, is opposed to the application on the basis of the grounds contained in his replying affidavit deponed on the 23<sup>rd</sup> February 2015, in which he contends that the applicant was aware of the matter as he was duly served with the necessary documents and when he was summoned by the Land Registrar to show cause why a caution should not be removed he failed to honour the summons. It was then that the matter proceeded to the court culminating in an order for the removal of the caution and for the award of costs against the applicant in favour of the respondent.

The respondent thereafter filed a bill of costs dated 9<sup>th</sup> August 2004, against the applicant who was the person responsible for the registration of the subject caution on land parcel **No. Kitutu/Mwakibagendi/297**.

3. The record of the court does show that the bill of costs was listed for taxation on several occasions but it was only on the 29<sup>th</sup> September 2004, that the Deputy Registrar taxed the bill at Kshs.16,925/=. Thereafter the respondent went into a deep slumber and then resurfaced in the month of September 2006 with an application for execution against the applicant by way of civil jail. In that regard, a notice to show cause was issued and fixed for hearing on 10<sup>th</sup> January 2007, when the applicant failed to appear resulting in a warrant of arrest against him.

A second warrant of arrest was issued against the applicant on the 25<sup>th</sup> May 2009 after he failed to appear in court on the same date. Yet a third warrant of arrest was issued on 19<sup>th</sup> September 2013 and eventually on the 29<sup>th</sup> September 2014, the applicant appeared before the Deputy Registrar either on his own or after being arrested and offered to liquidate the outstanding costs by installments.

4. On the 3<sup>rd</sup> November 2014, the matter was referred to this court for the hearing of the applicant's application dated 12<sup>th</sup> November 2015 and later for the hearing of the present application dated 31<sup>st</sup> December 2014.

The application dated 12<sup>th</sup> November 2015 was filed before the prosecution and determination of the present application. It remains pending and no effort has been made to prosecute or withdraw it. This

therefore amounts to an abuse of the court process by the applicant thereby compelling this court to now strike out the application (i.e one dated 12<sup>th</sup> November 2015).

5. With regard to the present application, it is the result of an abuse of the court process by the respondent in as much as he applied for the execution of a decree against the applicant yet a certificate of costs on the taxed amount had not been issued by the Deputy Registrar. None was sighted in this file. The application was thus pre-mature. It is also very intriguing that the respondent opted in the first instance to move against the person of the applicant rather than his property. This present application must therefore be allowed for all the foregoing reasons if only for the ends of justice and to prevent further abuse of the court process by both the applicant and the respondent.

Each party shall bear their own costs of the application.

Ordered accordingly.

**J.R. Karanja**

**Judge**

**[Read and signed this 19<sup>th</sup> day of November 2015 in the presence of Mr. Soire for applicant and the respondent in person]**