



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURT**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 376 OF 2012**

**ISAIAH WAWERU NGUMI .....PETITIONER**

**VERSUS**

**THE HON ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT**

**THE OFFICER COMMANDING STATION- KIKUYU POLICE STATION .....2<sup>ND</sup>  
RESPONDENT**

**THE DISTRICT CRIMINAL INVESTIGATION OFFICER- KIKUYU DISTRICT..3<sup>RD</sup>  
RESPONDENT**

**LUCAS GATONYE KIMANI .....1<sup>ST</sup> INTERESTED PARTY**

**MARTHA MUGURE GATONY.....2<sup>ND</sup> INTERESTED PARTY**

**GEORGE KIMANI.....3<sup>RD</sup> INTERESTED PARTY**

**EDWARD KINUTHIA KIMA.....4<sup>TH</sup> INTERESTED PARTY**

**MWAURA KIMANI .....5<sup>TH</sup> INTERESTED PARTY**

**RULING**

1. The petitioner filed this petition alleging violation of various of his constitutional rights. Upon hearing the parties, the court found no merit in the petition, and it was dismissed with costs. The interested parties' costs were taxed in the presence of counsel for the petitioner at Kshs 242, 567 by Hon. A. N. Ongeru in her ruling dated 16<sup>th</sup> July 2014.
2. The petitioner has now filed the present application dated 16<sup>th</sup> September 2014 in which he seeks the following substantive orders:

1. ...

2. ***That this honourable Court be pleased to grant a temporary stay of seizure, attachment, seizure, distraining removal and sale by private or public auction of any of the Petitioner Applicant's property of any nature by the interested parties, their servants, agents or any other person acting or them in execution of the warrant dated 9<sup>th</sup> of September 2014 pending the hearing and determination of this application.***
3. ***That this Honourable Court be pleased to lift the proclamation dated 11<sup>th</sup> September 2014 and warrants of attachment and sale of the movable goods issued on 9<sup>th</sup> September 2014 to Warleen Traders (K) Ltd.***
4. ***That this Honourable court be pleased to grant the petitioner time to liquidate the costs of Kshs245,017/- as per the taxation ruling dated 16<sup>th</sup> august (sic) 2014 in instalments of Ksh10,000/- (Kenya Shillings Ten thousand Only) every calendar month until the Sum is paid in full)***
5. ***That all necessary directions be given.***
6. ***That the costs of this application be provided for in the cause.***
3. The grounds on which the application is based are as follows:
  - i. ***That the petitioner is willing to pay the decretal amount in 25 equal instalments of Kenya shillings Ten thousand per month***
  - ii. ***That the interested parties are aware that the petitioner/applicant is willing to pay the decretal amount but are in a hurry to embarrass him by auctioning his property.***
  - iii. ***That no prejudice will be occasioned to the interested parties if this application is allowed.***
  - iv. ***That it is just and equitable in the circumstances for this Honourable court to grant the orders sought***
4. In his affidavit in support of the application, the petitioner avers that he filed a notice of appeal against the judgment of the court in this matter; that on 29<sup>th</sup> day of April 2014, his Advocates on record received a Notice of Taxation of costs in the matter; that on 10<sup>th</sup> September 2014, his Advocates wrote to the Advocates for the interested parties, Muchoki, Kangata, Njenga & Co. Advocates informing them that they were suspicious that the said Advocates had commenced execution proceedings without furnishing his Advocates with a certificate of costs or issuing them with the requisite 10 days' notice before execution. He avers that the said letter was delivered on 11<sup>th</sup> September 2014, the same day that he received a proclamation from Warleen Traders Limited in respect of the decree issued against him on 16<sup>th</sup> August 2014 for Kshs 245,017.
5. The petitioner avers that he had instructed his Advocates to inform the interested parties' Advocates of his intention to liquidate the decretal sum, and had offered to do so by instalments of Kshs 10,000.00. He asserts that the lawful execution procedure has not been followed.
6. In his submissions, learned Counsel, Mr. Njeru Gichovi, reiterated the petitioner's averments. He argued that the petitioner had not refused to pay the decretal sum; and that it will be prejudicial to him if his goods are sold. According to Mr. Njeru, before execution, the Taxing Master is required to issue a certificate of costs by rule 26 of the Advocates Remuneration order; that Order 22 rule 22 of the Civil Procedure Code and Order 42(6)(1) and (2) give the court power to extend time for doing the things in question; and that while the petitioner participated in the taxation, there is no indication that the petitioner is unwilling to pay the decretal sum.
7. A Mr. Adira appeared before the court on 18<sup>th</sup> September 2014 and indicated that he was appearing for the interested parties. He undertook to file an affidavit in reply before the end of the

day and appear for the hearing of the application on 19<sup>th</sup> September 2014. He neither appeared nor filed an affidavit in reply.

8. I have considered the petitioner's application, the affidavit in support, and the submissions of his counsel. I have also considered the provisions of the Civil Procedure Code with regard to execution. It is indeed true that Order 22 Rule 22 grants the court to which a decree has been sent for execution the discretion to stay execution of the said decree upon sufficient cause being shown, and upon such conditions as it may deem fit.
9. In the present case, aside from his contention that he is willing to pay the amount due, that he was not given certificate of costs or a ten day notice, I am unable to find any basis for the application. The petitioner participated through his counsel in the taxation. The 10 day notice under Order 22 Rule 10 does not apply in the present case as it relates to situations where the execution is of a judgment entered in default of appearance or defence.
10. As I see it, the petitioner is basically seeking to be allowed to pay the costs by instalments. He seeks to do so by instalments of Kshs 10,000 per month. For a decretal sum of Kshs 245, 017, this would imply that the interested parties have to wait for a period of two years before they can realise the costs to which they are entitled. In my view, this is unfair.
11. The petitioner prayed for the staying of the execution against him, and expressed his willingness to abide by whatever terms the court deemed fair. In the present circumstances, and in the absence of any submissions by the interested parties, I am of the view that instalments of Kshs 50,000 per month are fair to both the interested party and the petitioner.
12. Consequently, I order that the proclamation against the petitioner's goods shall be lifted on condition:
  - i. That he pays Kshs 50,000 to the interested party together with the auctioneer's costs within 14 days hereof;
  - ii. That he liquidates the balance of the decretal sum by monthly instalments of Kshs 50,000 until payment in full;
  - iii. In default, execution to proceed.

**Dated and Signed at Nairobi this 25<sup>th</sup> day of September 2014**

**MUMBI NGUGI**

**JUDGE**

**Dated, Delivered and Signed at Nairobi this 29<sup>th</sup> day of September 2014**

**ISAAC LENAOLA**

**JUDGE**

**Mr Njeru instructed by the firm of Njeru Gichovi & Co. Advocates for the petitioner**

**No appearance for the interested party**