



**REPUBLIC OF KENYA**

**High Court at Meru**

**Miscellaneous Civil Case 42 of 1993**

**WAWERU THIRIKWA ..... APPLICANT**  
**JOSEPH MACHARIA ..... APPLICANT**  
**VERSUS**  
**M.M. KIOGA ADVOCATE.....RESPONDENT**

**RULING.**

The Applicant vide three separate Applications filed sometimes in court in the year 2010,2011 and 2012,respectively has sought a number of orders.

The 1<sup>st</sup> Application is a Chamber Summons purportedly brought under Order 53 Rule 1 of the Civil Procedure Rules and Order XXXVI Rule 1 of the Civil Procedure Rules. The said Application is dated 12<sup>th</sup> July 2010 and seeks the following orders:

**a). That this Honorable court be pleased to exercise its discretionally powers judicially and allow this application for stay of execution pending its orders dated 2<sup>nd</sup> July 2010 pending determination of an Application to set aside earlier order for sale by auction of land Title No. Kiirua /Maitei/339 of the Application herein dated 3<sup>rd</sup> March 2006 vacated on 8<sup>th</sup> June 2007.**

**b). The Applicant be granted leave to question legality of Advocates' Remuneration Act of the following:**

**i.Whether the learned advocate is at liberty to tax a non client an advocate/client bill of taxation in the matter of Advocates Act.**

**ii.Whether the learned advocate adduced any evidence of having acted for the Applicant vide H.C.C NO.12 of 1987.**

**iii.Whether the learned advocate produced any documentary proof of evidence of assessment of the Advocate/Client Bill of Taxation against the Applicant.**

**iv.Whether the learned advocate cheated the honorable court to vacate an order dated 3<sup>rd</sup> March 2006 to aid defrauding of land title number Kiirua/Naari Matei/339 belonging to the Applicant herein.**

The said Application is premised on the grounds inter alia that the Applicant was not a party in H.C.C.C.

**NO 12 of 1987 of Joseph Macharia and Michael Kiriinya versus Attorney General and others.** He contends that there is an error apparent on record showing Kshs.580, 000 instead of Kshs. 80,000, and that there is confusion in this honorable court of including the Applicant in the aforesaid cause and that the Applicant at no time or at all has ever been a party to **criminal case No. 2 of 1987.**

The Applicant in his supporting affidavit avers that the Respondent has committed a criminal offence of uttering false Advocate/Client Bill of Costs against him and that he was not a party. It is not clear but the Applicant contends that there was no *locus standi* in **Civil Case No.12 Of 1987** and also in **Criminal Case Number 2 Of 1987** in the Chief Magistrates Court at Meru and that further at no time was he served with court documents and refused to sign and that further his land title number Kiirua/Maitei /339 was sold by public auction fraudulently on the face of uttering false Advocate/Client Bill of taxation.

The second Application is also a chamber summons Application dated 19<sup>th</sup> January 2011. In that Application, the Applicant has sought the following orders:

- 1). **That this Honorable court be pleased to consolidate the instant file with High Court civil case No. 12 of 1987 here with for perusal to aid justice, avoid injustice and disaster to the Applicant.**
- 2). **The 1<sup>st</sup> Applicant be granted leave to question advocate enumeration act of the following:**
  - a). **Whether or not the Respondent is entitled to demand any bill of costs from the 1<sup>st</sup> Applicant whom he was not acting for or/and non client one Waweru Thirikwa.**
  - b). **Whether or not the Respondent was paid advocate /bill of costs by interested party of Kshs 40,000 from total of accessed bill of costs of Kshs 130,000 in civil suit No. 12 of 1987 filed by in this honorable court by the 2<sup>nd</sup> Applicant through the Respondent.**
  - c). **Whether or not land title No. Kiirua/Naari/Maitei/339 stood as surety of civil case No.12 of 1987 given to the Respondent for his costs.**
  - d). **Whether or not Respondent substantiated record of formal proof of advocate/client bill of cost against the 1<sup>st</sup> Applicant in the accessed bill of cost of total of 79,469.60**
  - e). **Whether Respondent was acting for the 1<sup>st</sup> Applicant or the 2<sup>nd</sup> Applicant herein and if he was not acting for 1<sup>st</sup> Applicant, can bill of assessment of costs be taxed against 1<sup>st</sup> Applicant.**
  - f). **Whether or not the accessed bill of costs vide civil case number 12 of 1987 of Kshs 130,800 Respondent was paid Shs 40,000 and 2<sup>nd</sup> Applicant was paid Kshs 90,000 by the interested party herein.**
  - g). **Whether the Respondent was withdrawn from acting for the 2<sup>nd</sup> Applicant herein and if so is Respondent entitled to tax any advocate/client bill against the 1<sup>st</sup> Applicant who was not locus standi.**
  - h). **Whether Respondent uttered false Advocate/Client Bill of Costs against the 1<sup>st</sup> Applicant herein with intent to defraud his Land Title Number Kiirua/Naari/Matei/339.**
  - m). **Whether the Respondent obtained orders to sell 1<sup>st</sup> Applicant's land title number Kiirua/Naari/Maitei/339 by fraud, collusion or perjury in the matter of law.**
  - k). **Whether 1<sup>st</sup> Applicant land was sold by fraud despite having deposited a sum of Kshs. 80,000 in joint account of the Respondent and the 1<sup>st</sup> Applicant advocate Charles Kariuki in Consolidated Bank Meru.**

**j). Unless Respondent is entitled to bill of taxation against 1<sup>st</sup> Applicant an order of Justice Ouko dated 21<sup>st</sup> February 2006, be set aside and all consequential orders against 1<sup>st</sup> Applicant herein and sale by auction of land parcel number Kiirua/Naari/Maitai/339 be revoked and the same revert to original owner Waweru Thirikwa the Applicant herein plus a deposit of Kshs 80,000 the same.**

The Applicant has sworn an affidavit in support of the application. He has deposed, inter alia that the Respondent had obtained an order to sell his land title number Kiirua/Naari/Maitai/339 by fraud, collusion perjury in the matter of law and that further the said parcel of land was sold despite him having deposited Kshs 80,000 in Consolidated Bank Meru branch. The Applicant further deposes that the Respondent has uttered a false Advocate Client Bill of Costs and that at all times the Respondent had been acting for the 2<sup>nd</sup> Applicant in **Civil Suit Number 12 1987** and not the Applicant. The Applicant further deposes that despite several complaints to the Advocates' Complaints Commission and the Law Society of Kenya, no necessary action has ever been taken against the Respondent for recovery of his land.

The third and final application is a Chamber Summons application under a certificate of urgency dated 31<sup>st</sup> January 2012. The rules upon which the application is premised has not been stated. In that application, the Applicant seeks the following orders:

**1. This honorable court be pleased to issue an order for Respondent to show cause why sale by auction of Land Title number Kiirua/Naari/Maitai/339 should not be revoked and instead revert to the original owner for want of fraud by executed plan (sic).**

**2. This honorable court further to issue an order to the Respondent to show cause why Kshs.80,000 deposited in the joint account of the Respondent and Charles Kariuki advocate for the Applicant on 5<sup>th</sup> March 2006 in Consolidated Bank Meru should not be refunded to the Applicant herein with interest at court rates.**

**The said application is said to be premised on the following grounds:**

**a). 21 days given to the Respondent to file his replying affidavit on 30<sup>th</sup> November 2011, by this honorable has lapsed and he has failed to file the same.**

**b). At no time or at all has the Respondent ever produced formal proof of having rendered any service to the 1<sup>st</sup> Applicant vide Criminal Case number 2 of 1987 and civil case number 12 of 1987 of the same.**

**c). The honorable was cheated by the Respondent to issue an order for sale by auction land title number Kiirua/Naari/Maitai/339 despite Kshs 80,000 having been deposited in the joint account of both the Respondents and Charles Kariuki for the Applicant in Consolidated Bank Meru.**

The Applicant has sworn an affidavit in support of the instant application where he deposes that vide **Criminal Case number 2 of 1987** and **HCCC Civil Case number 12 of 1987**, the Respondent had represented Joseph Macharia and Michael Kiriinya. The Applicant further states that he was not locus standi in the said cases, though in my view I think he means that he was not a party in those suits. The Applicant further contends that the Respondent has uttered false Advocate Client Bill of Costs vide the 2 cases, with an intention of defrauding him his land and Kshs 80,000 by abuse of court process and calculated plan.

The applications are opposed. The Respondent has filed Grounds of Opposition and a Replying Affidavit. The Respondent contends that the Applicant has attempted to set aside the contested Advocate Bill of Costs which was taxed way back in 1993, but he has not been successful. The Respondent further contends that by an application dated 18<sup>th</sup> October 2002, the Applicant made an application to set aside taxation of costs which application was struck out by the Deputy Registrar on 14<sup>th</sup> May 2004. The Respondent further contends that thereafter, an advertisement of sale was made in the newspaper but the

sale did not proceed until much later, due to numerous applications whereupon the Applicant engaged another firm of advocates namely Charles Kariuki and company advocates, who filed an application dated 15<sup>th</sup> June 2004.

The Respondent contends that later on the matter went before Hon. Sitati, J. who made orders that Kshs 79,469 be deposited in an interest earning account. The Respondent further contends that the Applicant purported to have deposited the money with his advocates but that they stayed for a long time without being paid their money where, they filed an application to vacate Sitati J's orders which orders were vacated by Ouko J who allowed them to proceed with execution vide a ruling dated 8<sup>th</sup> June 2007.

The Respondent further contends that the Applicant again came to court through an application praying for the same and similar orders which application was subsequently dismissed by the court on 2nd July 2010.

The Respondent has further filed Grounds of Opposition opposing the Applicant's applications on the grounds, inter alia, the application is misconceived and based on no law, that when execution is completed it cannot be reversed, and that the application is vexatious as several similar applications have been made, considered by the court and subsequently dismissed. For the above reasons the Respondent urges that the Applicant is a vexatious litigant and that his applications should be dismissed.

I have carefully considered these applications and examined the pleadings relied upon by the parties. What is striking about the applications is the fact the applications were drawn by a layman, and apart from poor language used in drafting the same, have various omissions including failure to invoke the provisions of law upon which the applications are premised; while in others, the Applicant has cited wrong provisions of the law. The applications are also repetitive in some respects. I considered striking out the applications. However the Oxygen Principle under section 1A (1) of the Civil Procedure Act stops me from doing so for reason it will only lead to further delay in this very old matter. That section provides:

**“1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act”**

In addition the provision of Article 159(2) (d) of the Constitution 2010 cures the defect. That Article stipulates as follows:

**“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**

**(d) justice shall be administered without undue regard to procedural technicalities; and...”**

It is for these reasons that I chose to determine the applications even though two of them do not invoke the jurisdiction of the court.

I noted that even though there are two Applicants on face of the application, only the one name first pursued the application

The applications were urged and considered together.

The principle subject of the Applicant's applications was a taxation of Advocate/Client Bill of Costs between him and the Respondent which he contends ought not to have been done as he was never a client of the Respondent. The other matter raised is the sale of the Applicant's piece of land Kiirua/Naari-Maitei/339 in execution of the Bill of Costs.

Having perused the record it is evident that following the said taxation on 23<sup>rd</sup> May 1994, the Respondent applied for execution to recover the taxed amount, which execution was to be by way of attachment and

sale of the Applicant's land Kiirua/Naari-Maitei/339. Thereafter the Applicant, on 15<sup>th</sup> June, 2004 filed an application by way of Notice of Motion seeking a stay of the sale of his property and the setting aside of the taxation of the advocates costs and of all subsequent orders. The said application was heard by Sitati J. The Learned Judge delivered her ruling on 21<sup>st</sup> February 2006 where she granted a stay of the sale of the property subject to the Applicant depositing Kshs 79,469/90, in an interest earning account in the joint names of the party's advocates, within 14 days from the date of the ruling

On or about 3<sup>rd</sup> March 2006, the Respondent herein filed a Notice of Motion application seeking to set aside the orders made by Sitati J on 21<sup>st</sup> February 2006, which application was allowed by Hon. Ouko J. who vacated the orders of Sitati J and directed execution to proceed since the Applicant in the instant applications had deliberately failed to comply with the conditions upon which the stay orders had been issued.

It was against that background that the Applicant on 25<sup>th</sup> January 2010 filed what he purportedly called ***"notice of objection of 1<sup>st</sup> Applicant against sale by auction of land title number Kiirua/Naari-Maitei/339 and uttering of false documents"***. The said objection was heard by Kasango J. The Applicant had sought the following orders:

**a).The Respondent's case all consequential orders be set aside and be substituted to be dismissed and call it proceedings into this Honorable court.**

**b).Sale by auction of the Applicant's land title number Kiirua/Naari/Maitei/339 be revoked.**

The grounds upon which the application was premised was, inter alia that the Respondent had obtained an order of sale of his land by fraud, collusion or perjury and that the same was sold despite the Applicant having deposited Kshs.80,000 in joint account of the parties advocates as per the orders of the court of 21<sup>st</sup> February 2006. On 2<sup>nd</sup> July 2010, Kasango J. once again dismissed the Applicant's application stating, inter alia that the said application was misconceived because unless and until the orders of Hon. Ouko, J were either set aside or appealed against, the court would have no jurisdiction to entertain the reopening of the issue relating to execution by MM Kioga and Company Advocates. In the ruling of Hon. Kasango, J. Judge observed:

**"the execution was allowed to proceed before entry of judgment on the taxed costs."**

The Applicant in his affidavits has stated that his land was sold through fraud, despite having deposited Kshs 80,000 with his then advocates namely Charles Kariuki and Company Advocates, and the Respondent herein. The Applicant has annexed a deposit receipt voucher from Consolidated Bank showing that indeed the money was deposited in the name of the Applicant's then advocates and the Respondent herein. The said deposit receipt is dated 5<sup>th</sup> March 2006. The Respondent, in the replying affidavit, and in particular paragraph 13, has deposed as follows:

**"the Applicant purported to have deposited this money with his advocates but has never been paid to us".**

The Applicant's has in his affidavit dated 19<sup>th</sup> February 2011 annexed a deposit receipt dated 5<sup>th</sup> March 2006 which indicates that this money was actually deposited in the joint account in the names of the advocates of both parties. In another affidavit dated 28<sup>th</sup> Nov 2011, the Applicant has annexed a letter from his former advocate addressed to the LSK. In page three of the said letter and in particular paragraph 3, the Advocate wrote as follows:

**"you may advise the complainant to:**

**(i) .....**

**(ii) Instruct advocate or himself to come and take over our part in the joint account for Kshs 80,000 in the bank”.**

That letter is an acknowledgement that the money the subject matter of Hon Sitati, J and Hon Ouko, J ruling had indeed been deposited in a joint account in the joint names of the advocates to both parties. The deposit receipts are proof of the deposit.

As Hon Kasango J observed, the execution in this case was carried out even before the Respondent applied for judgment on the Taxed Costs. The position is that after obtaining judgment on taxed costs, the respondent was expected to file suit against his client to recover his fees. He ought not to have executed in the Miscellaneous Application file in which his Advocate/Client Bill of Costs had been taxed. As stipulated under section 48(1) of the Advocates Act, the Respondent should have filed a suit for the recovery of costs due to him or his firm one month after a bill for such costs has been delivered to the client. The suit would then be heard in the normal way after serving the Client with the plaint. All these processes were not undertaken and the entire execution was in all the circumstances of the case flawed.

**My findings in this matter are:**

**1. Taking all these factors into consideration I find that the learned Hon. Ouko J.’s finding that no money was deposited was in error as the 14 days within which the deposit should have been made as per the order of Hon Sitati, J. should have lapsed on 5<sup>th</sup> March 2006. The application by the Respondent before Hon. Ouko, J. was dated 3<sup>rd</sup> March 2006. It is crystal clear that the application was made and or brought prematurely. More importantly the finding by the Judge that there was no deposit in compliance of the Hon. Sitati’s order was in error. It is clear the Respondent misled the court. He proceeded to execute before important steps were made whereby the judgment debtor would have had an opportunity to present the entry of judgment and forestall execution. There should have been a suit before execution. The Respondent was in such a hurry to execute that the legal processes which should have been observed before execution were flouted. Fraud cannot therefore be ruled out.**

**2. The position is that after obtaining judgment on taxed costs, the Respondent was expected to file suit against his client to recover his fees as stipulated under section 48(1) of the Advocates Act. The suit would then be heard in the normal way after serving the Client with the plaint. All these processes were not undertaken and the entire execution was in all the circumstances of the case flawed, irregularly and illegal.**

**3. Since the execution was carried out, before his application to question the Respondent was heard, and before suit was filed in which the Applicant could have been given an opportunity to be heard in challenge of the propriety or otherwise of the Bill of Costs; including an opportunity to interrogate the Respondent whether or not he acted for the Applicant in any matter; and whether or not he was justified to file the Bill of Costs, the Applicant was denied due process in this case and has suffered great prejudice.**

**4. The Applicant was denied an opportunity to challenge the execution and the entire process.**

**What the Applicant has lost in material terms:**

**1. The Applicant lost Ksh. 80000/-.**

**2. The Applicant has lost his land Title No. Kiirua / Naari-Maitei/339.**

**Conclusion:**

**1. The application for stay of execution on the one hand and for stay of sale of the land Title No. Kiirua / Naari-Maitei/339 on the other cannot succeed since a court can only stay that which has not been done.**

**2.The court cannot re-open, in an application of this nature, an examination of the Respondent, not only due to what has transpired, but also because the ruling of Hon. Ouko J. still stands.**

**3.The Applicant's only option is to file a civil suit to recover his properties.**

**4.In view of the orders I have made herein, I order that each party bears their own costs of these applications.**

**SIGNED AND DELIVERED THIS 18<sup>TH</sup> DAY OF APRIL 2013**

**LESIIT, J.  
JUDGE**