



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

JUDICIAL REVIEW NO. 7 OF 2009

**IN THE MATTER OF LAND TITLE NO. KAKAMEGA/CHEKALINI/964, 965, 966 FORMERLY
KAKAMEGA/LUGARI/13/2008**

A N D

**IN THE MATTER OF THE CHIEF MAGISTRATE’S COURT AT KAKAMEGA MISC.
AWARD NO. 179 OF 2008 AND 1/2009**

B E T W E E N

REPUBLIC.....APPLICANT

A N D

**THE CHAIRMAN LUGARI LAND DISPUTES TRIBUNAL.....1ST
RESPONDENT**

A N D

BOAZ INDASIA MUGASIAINTERESTED PARTY

PERUS OTIENO.....1ST EX-PARTE APPLICANT

GIDEON OGINGA.....2ND EX-PARTE APPLICANT

JAIRUS OUNZA OTIENO3RD EX-PARTE APPLICANT

R U L I N G

1. On 29.4.2010, I made a Ruling with regard to the Judicial Review Proceedings instituted by way of a Notice of Motion dated 23.3.2010. In conclusion, I stated as follows;

“18. I will quickly end by stating that the Motion before me is clothed with merit and is wholly allowed as prayed.

19. Costs in the cause.”

2. I see no extracted order on record but on 19.5.2010, M/S Kiveu & Co. Advocates filed a Bill of Costs

and Certificate of Costs was issued by the Deputy Registrar of this court on 29.7.2010. Execution proceedings thereafter commenced and by a Notice of Motion dated 29.9.2010 the present Applicant prayed for orders that;

1. ***“The Honourable Court grants leave to the firm of A.B.L. Musiega & Company Advocates to act for the applicant for the purposes of this application.***
2. ***One John M. Kitiabi T/A Nyuki Auctioneers be enjoined to this proceedings for the purposes of this application.***
3. ***The Honourable Court do find as a matter of fact that it never awarded costs to the respondents in its ruling dated 29th April, 2010 and do declare so.***
4. ***The Honourable Court do find as a matter of fact that if any of the respondents were eager to have costs awarded to them against the applicant they ought to have moved the court for an express order to that effect and do declare so.***
5. ***The Honourable Court do find as a matter of fact that the 1st, 2nd and 3rd Respondents or their counsel misled the Deputy Registrar to tax their bill with the aim of executing it against the applicant un-procedurally and in total abuse of the process of the Honourable Court and declare so.***
6. ***The Honourable Court do find as a matter of fact that the application for and the execution itself was irregular, unlawful and un-procedural having been undertaken without regard to the available legal framework.***
7. ***This Honourable Court finds as a matter of fact that the 5th Respondent acted in contravention of the Law in attaching and carrying away the applicant’s property without proclamation which is mandatory and do declare so.***
8. ***This Honourable Court finds as a matter of fact that the KShs.35,000.00 extorted from the applicant by the 5th respondent and the KShs.17,000.00, extorted by the 1st, 2nd and 3rd respondents from the applicant was demanded and recurred in contravention of the law and or due process and declare so.***
9. ***This Honourable court do find as a matter of fact that arising from the foregoing the applicant is entitled to a remedy and recovery of the sums paid against the 1st, 2nd, and 3rd Respondents and do declare so.”***

3. The grounds in support are that;

1. ***“No costs were awarded to any of the respondents as against the applicant in the ruling of the court delivered on the 29th April, 2010.***

2. ***In filing and taxing the bill before the Deputy Registrar of the Honourable Court the 1st, 2nd and 3rd respondents deliberately misled the court and abused its process.***
3. ***In view of the law, determination of issues regarding costs is in the discretion of the court.***
4. ***In executing for costs which clarification was never sought first from the Honourable Court the 1st, 2nd and 3rd respondents clothed themselves with the authority of the Honourable Court, usurped illegally the court's powers and acted with selfishness and malice against the applicant.***
5. ***The applicant was entitled to notice before execution his previous counsel having gone on court record as being no longer keen on representing him.***
6. ***The 5th defendant/respondent illegally attached before proclaiming hence the necessity of enjoining him to the application.***
7. ***The Deputy Registrar cannot legally award costs and issue execution for them in the absence of this court's award of the same.***
8. ***Proceedings in the matter had been concluded with the previous counsels on record save for the execution and the foregoing application.***
9. ***The 5th respondent acted without legal authority in failing to file his bill in court for assessment and in extorting money from the applicant purporting the same to be his fees.***
10. ***The money demanded from the applicant by the 1st, 2nd and 3rd respondents was without any legal basis."***

4. The elaborate grounds are repeated in the Supporting Affidavit sworn on 29.9.2010 by the Applicant.

5. I have seen a Replying Affidavit sworn on 30.11.2010 by the 4th Respondent, the Auctioneer. All he states is that he served notice of intention to execute and once no payment for costs was made, he proceeded to execution.

6. In his Replying Affidavit, Gideon Odinga stated that when I granted the prayers in the Motion "wholly" it included prayer (c) thereof which was for costs of the Application for leave to institute judicial review proceedings as well as the Notice of Motion aforesaid. That the resultant attachment was therefore proper and lawful.

7. My mind is clear that the Respondent acted unlawfully and by closing his eyes to the clear order on costs; that "costs shall be in the cause," he read the Ruling of 29.4.2010 selectively and to grant himself costs which I never granted him or intended to. It beats logic that whereas I specifically made an order as to costs, he will fall onto the wording of his Motion and claim costs. If there was any ambiguity in the orders made, the advocate for the Respondent should have sought clarification or rectification or

amendment of the order before blindly filing a Bill of Costs which was predicated on no extracted decree or order of this court.

8. What I am saying is that the purported certificate of costs is a nullity and so is the attachment pursuant to it. That means that prayers **3, 4, 5, 6, 7, 8** and **9** of the Motion before me, are granted as prayed. No costs are sought and none are awarded and for avoidance of doubt, each party will bear its costs as regards the Application dated 29.9.2010.

9. Orders accordingly.

Delivered, dated and signed at Kakamega this 14th day of April, 2011.

ISAAC LENAOLA

J U D G E