



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CIVIL APPEAL NO.36 OF 2005**

**MICHAEL MUSAU KITIVO.....APPELLANT**

**VERSUS**

**MAURICE NDAMBUKI KITIVO.....RESPONDENT**

**RULING**

(1) This is an application by way of Notice of Motion under Order L rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act brought by Michael Musau Kitivo (“**the Appellant/Applicant**”). In prayer 3 thereof, he seeks the following order –

**“3. That there be stay of execution of the certificate of taxation and all the consequential orders thereof until succession cause No.345 of 2003 which is pending in the High Court of Kenya at Machakos is heard and determined.”**

(2) Having read the application, the Appellant’s supporting affidavits respectively sworn on the 19<sup>th</sup> February, 2009 and the 17<sup>th</sup> April, 2009 in conjunction with the Respondent’s replying affidavit made on the 3<sup>rd</sup> March, 2009 as well as the Appellant’s and the Respondent’s written submissions respectively dated the 16<sup>th</sup> December, 2009 and the 29<sup>th</sup> January, 2011, I have come to the conclusion that the application must fail.

(3) The Court of Appeal concluded its judgment dated the 25<sup>th</sup> July, 2008 in the following terms:-

**“In summary, we say this. Sitati, J. erred in purporting to deal with the issue of ownership of the subject land when the dispute over the same land was pending before another court. She also erred in declining to consider the evidence on the applicable customary law which was adduced before the trial court as a dispute regarding burial of a person subject to customary law and practices may only be resolved following that law and practice.**

**What is the effect of the conclusions we have come to? Although as we stated earlier the learned Judge erred on those two aspects, she affirmed the judgment of the trial court which, with respect, was correct in its result. That being the conclusion we come to, we are left with no alternative but to set aside the reasons for the judgment but dismiss the Appellant’s appeal.** We make no orders as to costs. [emphasis added].

(4) The result of this judgment is that it dismissed the appeal but set aside only the reasons for the judgment of Sitati, J. It must follow, therefore, that in all other respects, that judgment and decree of Sitati, J dated the 13<sup>th</sup> July, 2007 is valid and still subsisting as it was not set aside by the Court of Appeal. And as it included costs which have been duly taxed, the Respondent is entitled to his costs.

(5) For these reasons, the application dated the 19<sup>th</sup> February, 2009 is dismissed with costs to the Respondent is entitled to his costs.

So ordered.

Dated and delivered at Machakos this 30<sup>th</sup> day of **May**, 2011.

**P. Kihara Kariuki**  
**Judge**