



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. APPLICATION NO. 294 OF 2009

JOSEPH WANGAI MACHARIAPLAINTIFF/DECREE HOLDER

VERSUS

MACHARIA NDIGIRIGI1st DEFENDANT

KARIUKI WANYEKI alias

JOHN NDUMIA WANYEKI2nd DEFENDANT

RULING

Joseph Wangai Macharia, the plaintiff decree holder herein, took out the motion dated 4th February 2011 in which he sought for the following orders.

- a. *That the application herein be certified urgent and be heard expert in the first instance.*
- b. *That the honourable court be pleased to issue orders prohibiting and restraining the defendant/judgment – debtor from transferring or charging the property L.R no. Tetu/Kabage/65 by sale or otherwise and that all persons be prohibited from receiving the same by purchase gift or otherwise, until further orders from this court.*
- c. *That the honourable court be pleased to issue the cost of this application to the applicant.*

The Plaintiff decree holder swore an affidavit he filed in support of the motion. Kariuki Wanyeki alias John Ndumia Wanyeki, the 2nd Defendant herein, filed a replying affidavit he swore to oppose the motion.

The plaintiff stated that the parcel of land known as L.R. no. Tetu/Kabage/65 is the only remaining asset after L.R. no. Tetu/Kabage/8-6 was sold. It is alleged that four months had passed by the time of filing the motion after entry of judgment yet there was no evidence that the defendant intends to settle the debt. The 2nd Defendant denied that he was personally liable to settle the liabilities of the 1st Defendant. He urged this court to apportion him ½ of the costs of the suit. He argued that they have filed an appeal against the tribunal's decision vide Nyeri H.C.C.A no. 73 of 2008. He also pointed out that there is a pending application for stay of execution pending appeal. The 2nd Defendant proposed to settle the costs by monthly installments. Macharia Ndigirigi, the 1st Defendant herein also filed a replying affidavit to oppose the motion. He made near similar averments like those of the 2nd Defendant.

The background of this dispute is short and straightforward. The applicant filed a complaint before the Nyeri Land Disputes Tribunal against the Respondents. The complaint was heard and decided in favour of the applicants. The Respondents appealed to the Provincial Land Disputes Appeals committee but they lost the appeal. The land Provincial Disputes Appeals committee ordered interalia the respondents to pay costs. The bill was taxed. What is remaining is for the respondents to satisfy the order

on costs. The applicant has now sought to recover his costs by attaching the parcel of land known as L.R. no. Tetu/kabage/65 belonging to John Ndumia Wanyeki alias Kariuki Wanyeki. He has urged this court to issue a prohibitory order which is a pre-requisite for the attachment of immovable property. The Respondents have pleaded that they are ready and willing to liquidate the amount by installments. They have also stated that they have filed an appeal. The reasons given by the Respondents appear to be good grounds to indulge them. However, they have not taken advantage of the relevant provisions of the law to apply for those remedies. In short, they have not applied to liquidate the outstanding sum by monthly installments nor have they applied for an order of stay of execution pending appeal. Having failed to apply for the available remedies, the respondents have themselves to blame. I am convinced the notice of motion dated 4th February 2011 is well founded. It is allowed as prayed.

Dated and delivered this 29th day of July 2011.

J.K. SERGON
JUDGE

In open court in the absence of parties with notice.

J.K. SERGON
JUDGE