



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 109 OF 2009

MBEU KITHAKWA.....PLAINTIFF/RESPONDENT

VERSUS

PHILIP MUCHIRI.....DEFENDANT/APPLICANT

RULING

In the Motion dated 9th July 2011, Philip Muchiri, the Defendant herein, has asked to be given the following orders:

1. *That this application be certified as urgent.*
2. *That service be dispensed with in the first instance and prayer 3 be granted as a matter of urgency.*
3. *That the Honourable Court be pleased to stay the execution flowing from the Certificate of Costs dated 6th October 2009 pending the determination of this application.*
4. *That the Honourable Court be pleased to set aside the Certificate of Costs dated 6th October 2009 and the taxed costs thereunder and the Respondent's bill of Costs be taxed de novo.*
5. *That this Honourable Court do interrogate the conduct of Julius K. Mundia Court process Server and make the relevant disciplinary Orders if any impropriety is found.*
6. *That in the alternative to prayer 4 above, that this Honourable Court be pleased to stay the execution flowing from the Certificate of Costs pending the taxing Master's response to the Notice of Objection to Taxation dated on 7th October 2009 and filed on even date.*
7. *That costs of this application be to the Applicant in any event.*

The Defendant swore an affidavit in support of the Motion. Mbeu Githakwa, the plaintiff herein, opposed the Motion by filing the replying affidavit of Cyrus Ndirangu Kirunyu, a licensed process server.

The main ground the Defendant has raised in support of the Motion is that he was not served with the Notice of Taxation and the Bill of costs. He claimed he was serving a jail term in G. K. Prison Nyeri Main Prison when it was alleged he was served. The Defendant further challenged the admissibility of the affidavit of Cyrus Ndirangu Kirunyu. The Plaintiff on his part is of the view that the Defendant was duly served with the Notice of taxation and a bill of costs. It is also argued that the Defendant was brought to Court on a production order issued by Court.

Let me begin by giving the brief background of this dispute. The Plaintiff filed the Plaint dated 19th November 2007 in which he prayed for *inter alia* a permanent injunction to restrain the Defendant from burying the remains of Mugo Kithakwa, deceased, on the parcel of land known as **L.R. NOS. INOI/KERUGOYA/768 and 769**. On 4th June 2008, the suit was struck out for being

resjudicata. Taxation proceedings were thereafter filed. The Applicant avers that he was not served. A preliminary issue regarding the admissibility of the replying affidavit of Cyrus Ndirangu Kirunyu. It is argued that since he is not a party to these proceedings, he should not have deponed the replying affidavit. With respect, I do not agree with that submission. The Motion is hinged on service of process. The only person who can answer to such allegations is the process server who did the service. I refuse to strike out the replying affidavit. Having dealt with the preliminary issue, let me now consider the merits of the Motion. I have already stated that the Applicant alleges that he was not served with process because he was in prison. The Applicant service by Julius Mundia. I have carefully looked at the affidavit of service of Julius Mundia and it is clear that he served a hearing notice plus a production order. The process server who served the Bill of costs is Cyrus Ndirangu Kinyunyu, the deponent of the replying affidavit. There is evidence that the Applicant was brought to court on 25th September 2009 when he alleged he had not been served with the bill of Costs. If indeed, the Applicant was not served, then how was he produced in Court by the prison authorities. I am convinced that the Applicant was properly served by both Cyrus Ndirangu Kirunyu and Julius Mundia. In the end I find no merit in the Motion. It is dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 21st day of October 2011.

J. K. SERGON
JUDGE