

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. CIVIL CASE NO. 294 OF 2009

JOSEPH WANGAI

MACHARIA.....APPLICANT/RESPONDENT

VERSUS

**MACHARIA NDIGIRIGI.....1ST
RESPONDENT/APPLICANT**

**KARIUKI WANYEKI.....2ND
RESPONDENT/APPLICANT**

RULING

Pursuant to the provisions of *Sections 50 and 51* of the Advocates Act, Macharia Ndigirigi, the 1st Respondent/Applicant herein, applied for the certificate of costs issued on 20th August 2010 to be set aside vide the Motion dated 28th September 2010. The Motion is supported by the affidavit of the Applicant sworn on 28th September 2010. When served with the aforesaid Motion, Joseph Wangai Macharia, the Applicant/Respondent herein filed a replying affidavit to oppose the same.

The thrust of the Respondent/Applicant's Motion is that he was not served with the Notice of taxation hence the taxation proceeded *ex parte* and only came to learn of it when auctioneers attached his property. The Respondent/Applicant further argued that since **L.R. NO. TETU/KABAGE/69**, the subject matter of the suit was government land no action would lie against him.

The Applicant/Respondent on the other hand is of the view that the Motion lacks merit since **L.R. NO. TETU/KABAGE/69** was registered in the name of Wanjiru w/o Macharia and not the government. The Applicant/Respondent further alluded that the notice of taxation was duly served upon the Respondent/Applicant.

I have considered the rival submissions and the material placed before me. I have already stated that the application is premised on two main reasons: First that the notice of taxation was not served. Secondly, that there is an allegation that the suit property is government land hence no suit can flow from it. Let me start with the second ground which is to the effect that the suit land i.e. **L.R. TETU/KABAGE/69** is government land. I have perused the copy of the official search attached to both affidavits. The one annexed to the affidavit of Macharia Ndigirigi shows that the suit land is registered in the name of Wanjiru w/o Macharia and that there is intention to have the same exchanged with **L.R. NO. MWEIGA/KAKANGA/15** and **MWEIGA/KAKANGA/192**, whereas the one attached to the replying affidavit of Joseph Wangai Macharia shows that the land is still in the name of Wanjiru w/o Macharia. But the truth is that the government expressed its intention to acquire **L.R. NO. TETU/KABAGE/69** in exchange with other parcels on 30th September 1987. After a careful consideration of the matter, I am convinced that the property was still registered in the name of Wanjiru w/o Macharia until 30th September 1987 when the same was transferred to the government. In a nutshell it is now government property. The history leading to the filing the bill of costs which was taxed giving rise to the certificate of costs made on 20th August 2010 started when Joseph Wangai Macharia filed a

complaint before the Nyeri Land Disputes Tribunal against James Macharia Ndigirigi & Another. The Land Disputes Tribunal ruled the case in favour of Joseph Wangai Macharia. The losers appealed to the Provincial Land Disputes Appeals Committee and lost again. They i.e. Macharia Ndigirigi and Kariuki Wanyeki were ordered to vacate **L.R. NO. TETU/KABAGE/69** and to pay costs. The decision of the Provincial Land Disputes Appeals Committee was adopted by the Chief Magistrate's Court on 12th November 2008. Upon obtaining the adoptive order, the Respondent/Applicant proceeded to tax his bill of costs. There is no evidence that the Appellants appealed against the decision of the Provincial Land Disputes Appeals Committee. The Respondent/Applicant is now before this Court claiming that the Applicant/Respondent is not entitled to costs because the land in dispute is Government land. To be fair to the Applicant/Respondent, I do not think that submission can stand because there is an order of costs awarded by the Provincial Appeals Committee and adopted by the Chief Magistrate's Court as its order.

The first issue is whether or not the notice of taxation was served. This issue is not difficult to decide because there is ample evidence in the affidavit of service of Antony Kinuthia sworn on 29th July 2010 which shows that the notice of taxation and the bill of costs was served upon Kariuki Wanyeki and Macharia Ndigirigi on 28th July 2010 in the presence of Joseph Wangai Macharia. It is therefore obvious that Macharia Ndigirigi and his colleague intentionally refused to attend court for the taxation of the bill of costs. They have themselves to blame. I find the Motion to be without merit. It is dismissed with costs to the respondent/Applicant i.e. Joseph Wangai Macharia.

Dated and delivered at Nyeri this 19th day of November 2010.

J. K. SERGON

JUDGE

In open court in the presence of Macharia holding brief Nygei for Applicant and Respondent in person.