



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**

**Miscellaneous Application 96 of 2008**

**IN THE MATTER OF AN APPLICATION BY WAWERU THIRIKWA**

**AND**

**IN THE MATTER OF CIVIL PROCEDURE RULES ORDERS XXXII**

**RULE 1, 2 & 8**

**BETWEEN**

**WAWERU THIRIKWA ..... PLAINTIFF**

**AND**

**M'NKANATA M. KIOGA ..... 1<sup>ST</sup> DEFENDANT**

**M.M. KIOGA ADVOCATES ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

It would appear from the annexures in this matter that the present applicant, Waweru Thirikwa and another person, Joseph Macharia had a dispute with the respondents regarding costs which had been taxed at Kshs. 79,469.60. By a notice of motion dated 15<sup>th</sup> June 2004 the applicant applied and this court (Sitati, J) granted an order of stay of execution on certain terms.

Subsequently the respondents also filed a motion seeking the vacation of those stay orders and the Decree Holder to be allowed to complete the execution. That application was allowed by myself, holding that there was no evidence that the conditions upon which the stay was granted were complied with. In both applications the applicant had counsel.

In the present claim the applicant suing as a pauper states that following the orders vacating the stay, the respondents have sold his land and he is aggrieved. That the sale was irregular and further that execution ought to have been levied against his colleague – Joseph Macharia.

The applicant has filed chamber summons dated 13<sup>th</sup> January 2009 to which this ruling relates. He seeks in that application restraining orders against the respondents to stop them from transferring parcel of land No. KIIRUA/NAARI-MAITEI/339.

The application is premised on the grounds that the respondents did not render any legal service to the applicant as the latter never instructed them. That the respondents did not disclose to the court that indeed the conditions for stay were fulfilled by the applicant depositing the funds as ordered. He has also deposed that he was surprised to see his property advertised for sale yet he had no notice that the orders of stay had been lifted. That eventually the land was sold to one Muita Thirikwa.

The respondents despite service did not reply or attend court on the hearing date. The orders sought in this application being in the nature of an injunction will only issue if it is demonstrated that there is a *prima facie* case with a probability of success and further if it is shown that if the orders sought are not granted the applicant may suffer an injury which is not capable of being compensated by an award of damages. Finally, should there be doubt the application ought to be decided on a balance of convenience. See **Giella V. Cassman Brown** E.A. L.R. 1973 Page 358.

The applicant has led evidence by way of averment and annexures that the suit property was sold on 30<sup>th</sup> November 2007 to one Muita Thirikwa through a public auction. If that be so, then the suit property is no longer with the respondents hence they cannot be restrained. The said Muita Thirikwa is not a party to this application. Furthermore an injunction will serve no purpose and will indeed be in vain considering that the property has been disposed of to a third party and there is no evidence that it has not been registered in his name or even transferred further. The certificate of official search relates to 2002 when there was both an order of prohibition and a caution.

For these reasons, this application must fail and is dismissed. I make no orders as to costs.

Dated and delivered at Meru this 29<sup>th</sup> day of May 2009.

**W. OUKO**

**JUDGE**