



**REPUBLIC OF KENYA**

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

**Succession Cause 44 of 1994**

**MEME M'IMENTI ..... PETITIONER**

**VERSUS**

**ELIJAH M'NGITI ..... OBJECTOR**

**RULING**

By her ruling delivered on 20<sup>th</sup> December 2006, Sitati, J declared that the respondent in the instant application was the rightful heir of the deceased in this cause and directed that the grant of representation be issued to him and that the temporary grant issued earlier to the applicant in the present application be revoked. Costs were awarded to the respondent.

The grant was subsequently issued to the respondent. Pursuant to the order of costs learned counsel for the respondent filed a notice of taxation. The bill of costs was finally taxed and a certificate issued at Kshs. 64,395/=. That is what has prompted the instant application by way of Notice of Motion dated 21<sup>st</sup> November 2007. It seeks in an omnibus manner orders to stay of execution, setting aside of the certificate of costs, a declaration that the execution was illegal, null and void for want of procedural compliance and compensation for illegal attachment.

The applicant's counsel has averred that he was granted leave to withdraw from acting for the applicant on 25<sup>th</sup> May 2007. That the notice of taxation was never served upon him. He has listed under paragraph seven (7) of his affidavit several steps that were not taken before attachment and sale. I may note here that the first application by the applicant dated 26<sup>th</sup> September 2007 was dismissed on 11<sup>th</sup> October, 2007 for non-attendance. Before it was dismissed learned counsel for the respondent had replied to it. The applicant then filed the instant application and the respondent once again filed a replying affidavit and grounds of opposition.

In that reply, learned counsel for the respondent maintained that he personally effected service of the Notice of Taxation and the hearing notice upon counsel for the applicant, who acknowledge service under protest. That the same Notice of Taxation and the hearing notice were also served by a process server, Geoffrey Mburugu M'Mukiri, on the applicant personally. That the firm of the respondent's advocates continued to serve the firm representing the application with subsequent applications despite protests from the latter.

The application is expressed to be brought under the provisions of section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules, invoking the inherent jurisdiction of the court. There is no express provision for the reliefs sought under the Law of Succession Act and Rule 63 (1) of the Probate and Administration Rules does not cover them. That being so the application is right in bringing the application under the inherent jurisdiction of the court.

The two broad issues in this application are whether the Notice of Taxation was duly served and whether the process of attachment and sale was regular. It was the applicant's case that after counsel previously acting for him was granted leave to cease acting for him, no hearing notice was served on him in person and taxation proceeded *ex parte*.

There is no dispute that counsel for the applicant filed an application on 2<sup>nd</sup> May 2005 seeking leave to

cease acting for the applicant. The same was not opposed and was allowed on 25<sup>th</sup> May 2005. That effectively removed counsel for the applicant from the record. It is therefore curious that this notwithstanding and counsel for the respondent having been present when leave to cease acting was granted, the latter continued to serve the firm of Ondari and Co. Advocates.

The service on the firm on 16<sup>th</sup> April 2007, 7<sup>th</sup> June 2007 and on 14<sup>th</sup> June 2007 was of no effect. From 25<sup>th</sup> May 2007 when learned counsel for the applicant withdrew to 27<sup>th</sup> September 2007 when he was once again appointed, all applications ought to have been served personally on the applicant. An affidavit of service sworn on 14<sup>th</sup> June 2007 by Geoffrey Mburugu M'Mukiri, a process server maintains that on 14<sup>th</sup> June 2007 the applicant was personally served with the hearing date.

That averment has not been controverted. The applicant has not filed an affidavit to deny this. The taxing master was satisfied that the hearing notice was duly served.

I come to the conclusion on this point that the applicant had notice of the hearing of Notice of Taxation. The second issue is whether attachment and sale were conducted in a regular manner. It is the contention of counsel for the applicant that there was no proclamation and no advertisement or notification of sale. These accusations are level led against the auctioneer, Ndiungi Agencies Auctioneers. In situations such as this the auctioneer ought to have been joined to explain how execution was conducted. Apart from two letters to the Deputy Registrar by the auctioneers confirming that proclamation was on 17<sup>th</sup> August 2007 and the proclaimed livestock seized on 15<sup>th</sup> September 2007, there is no other evidence to the contrary. In other words, the applicant was duty bound to satisfy the court on a balance of probabilities that the process of execution was flawed. That he has failed to do.

In the result, I find no merit in this application which is hereby dismissed with costs to the respondent. The respondent is at liberty to list his application dated 10<sup>th</sup> August 2007 for hearing.

Dated and delivered at Meru this 29<sup>th</sup> day of October 2008.

**W. OUKO**

**JUDGE**