



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**MISC. CIVL APPL. NO. 209 OF 2012**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE MINISTER FOR LANDS.....1<sup>ST</sup> RESPONDENT**

**NGOSI NTHUKU.....2<sup>ND</sup> RESPONDENT**

**AND**

**MARY KOKI MUTHOKA.....1<sup>ST</sup> EX-PARTE APPLICANT**

**MUNYIVA MUTHOKA.....2<sup>ND</sup> EX-PARTE APPLICANT**

**RULING**

1. This Ruling is in respect to the Ex-parte Applicants' Application dated 23<sup>rd</sup> November, 2015 in which the Applicant is seeking for the following reliefs:

***a. Kande Auctioneers or any other auctioneers acting upon the instructions of the 2<sup>nd</sup> Respondent be restrained from attaching and selling the movable property of the Ex-parte Applicant.***

***b. Anastacia Wayua Mikenga be restrained from executing the decree of this court dated 2<sup>nd</sup> April, 2015.***

***c. The costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the Applicant who has deponed that after filing the Judicial Review Application, he became aware that the 2<sup>nd</sup> Respondent had passed on; that the court pleadings were then served on Anastacia Wayua, the 2<sup>nd</sup> Respondent's daughter and that the said Anastacia Wayua never took out the letters of administration in respect of her deceased mother.

3. It is the Applicant's case that the said Anastacia Wayua has proceeded to instruct Kande Auctioneers to issue a proclamation notice with instructions to execute a decree in respect of her deceased mother.

4. In response, Anastacia Wayua deponed that she is the daughter to the 2<sup>nd</sup> Respondent (deceased); that the Applicant proceeded with the suit against her deceased father; that her father had died way before the Application for leave to file Judicial Review was made on 9<sup>th</sup> October, 2014 and that the filing of the

Notice of Motion was an abuse of the court process.

5. According to the deponent, her appearance in the matter was never challenged by the Applicants; that when the matter was withdrawn with costs, she is the one who should be paid and that there is no pending suit before the court.

6. The deponent deponed that the taxation was duly carried out and that the Applicant never opposed the same.

7. In his submissions, the Ex-parte Applicants' advocate submitted that Annastacia Wayua Mikenga has no *locus standi* in the matter for want of letters of administration in respect to her deceased father; that she is not a proper party in the suit and that an award of costs cannot be made to her.

8. Counsel relied on several authorities which I have considered.

9. The advocate for Annastacia Wayua Mikenga submitted that Order 53 Rule 3 empowers the High Court to hear any person who desires to be heard in opposition to the Motion; that the said Annastacia instructed advocates who filed a Preliminary Objection and that her appearance was never challenged by the Applicants.

10. Counsel submitted that upon withdrawal of the suit, his client was entitled to costs because she is the one who incurred those costs and that his client has the *locus standi* to pursue those costs.

11. The record shows that on 14<sup>th</sup> September, 2012, the Ex-parte Applicants filed a Chamber Summons Application seeking for leave to take out an Application for Judicial Review for an order of prohibition.

12. After hearing the Application, the court granted to the Applicant leave to file a substantive Notice of Motion within twenty one (21) days.

13. The substantive Notice of Motion was filed and served, not on the Respondent (*who was already dead*), but his daughter, Annastacia Wayua.

14. The said Annastacia appointed an advocate who came on record on 28<sup>th</sup> November, 2014. On the same day, a Notice of Preliminary Objection was filed by Annastacia Wayua's advocate in which he stated that the 2<sup>nd</sup> Respondent died way back on 6<sup>th</sup> February, 2014.

15. When the matter came up for hearing, the Applicant's advocate withdrew the suit whereupon the court stated as follows:

***“The Notice of Motion dated 23<sup>rd</sup> October, 2014 is marked withdrawn with costs to the 2<sup>nd</sup> Respondent.”***

16. On the basis of the said order, Annastacia Wayua filed a Bill of Costs which was taxed.

17. Annastacia Wayua did not make a formal Application to substitute the 2<sup>nd</sup> Respondent before she filed her Notice of Preliminary Objection to the Notice of Motion.

18. Indeed, considering that the 2<sup>nd</sup> Respondent was dead before the commencement of the suit, Annastacia Wayua did not have the *locus standi* to join in the suit on behalf of her late father before seeking the leave of the court to do so.

19. In any event, the court was very clear while awarding costs. The costs were to be awarded to the 2<sup>nd</sup> Respondent, meaning that it is only the legal representative of the Respondent that could pursue those costs on behalf of the 2<sup>nd</sup> Respondent.

20. Although Annastacia claims that she is entitled to costs on the basis of Order 53 Rule 6 of the Civil Procedure Rules, Annastacia Wayua does not fall within the category of “*any person who desires to be heard*” contemplated under the said provision.

21. I say so because Annastacia was not enjoined in the proceedings as a person independent of the 2<sup>nd</sup> Respondent, but rather as the daughter of the 2<sup>nd</sup> Respondent.

22. In any event, and as I have already pointed out, the court did not make any order awarding costs to the said Annastacia Wayua. She cannot therefore rely on the provisions of Order 53 Rule 6 of the Civil Procedure Rules to claim for costs in her personal capacity.

23. For those reasons, I allow the Applicant’s Application dated 23<sup>rd</sup> November, 2015 as follows:

*a. Annastacia Wayua Mikenga be and is hereby restrained from executing the decree of this court dated 2<sup>nd</sup> April, 2015 in her personal capacity.*

*b. Annastacia Wayua Mikenga to pay the costs of this Application.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30<sup>TH</sup> DAY OF JUNE, 2017.**

**O.A. ANGOTE**

**JUDGE**