



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 132 of 2006

CHARLES K. KIPNGOK.....PLAINTIFF/RESPONDENT

VERSUS

JAMES STEPHEN KIPRUTTO A. NGOK.....DEFENDANT/APPLICANT

RULING

This Ruling relates to an Application by way of a Chamber Summons dated and filed on 24<sup>th</sup> August 2009 in which the Applicant seeks an order for stay of execution of the decree herein on the grounds that the judgment-debtor is deceased, and that the debt does not survive the deceased and that hence the decree and execution thereof lapsed.

The Application is supported by the Affidavit of Richard Miencha Advocate reiterating the above grounds. It was opposed by a Replying Affidavit of Charles K. Kipngok, the Plaintiff/Respondent sworn and filed on 26<sup>th</sup> February 2010, and in effect stating under advice from his Advocate that the deceased may be dead but the action has not abated.

Mr. Mongeri counsel for the "*applicant*" and Mr. Kurgat, Counsel for the Plaintiff/Respondent reiterated their respective grounds when the application was heard before me on 2<sup>nd</sup> March 2010. The issue is whether the action herein has abated by virtue of the death of the Defendant.

*Firstly*, the application is brought under the provisions of Section 3A of the Civil Procedure Act, (Cap. 21, Laws of Kenya) and Order XXIII, rules 1, 8 and 12 of the Civil Procedure Rules, and allegedly under all enabling provisions of the law.

Mr. Mongeri was unable to cite to the court what other enabling provisions of the law the application was brought under, unless perhaps the phrase is intended to refer to the court's inherent power. In this case it cannot refer to the court's inherent power because the applicant has invoked the provisions of Section 3A of the Civil Procedure Act which reiterates in this Act, the court's inherent power under Section 60(1) of the Constitution, to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. Where however there is specific provision governing a matter in issue, the court's inherent power is limited by the application of the statute or rule of procedure.

*Secondly* the application for stay herein is brought by an Advocate who acted for the defendant while he was alive. Since it is acknowledged that the judgment debtor (the Defendant) died on 1<sup>st</sup> August 2009, the only person competent to bring any application in this matter would be the legal representative of the deceased's estate. There is no averment in Mr. Richard Miencha's affidavit that he is the legal representative of the deceased's defendant's estate. Section 66 of the Law of Succession Act (Cap. 160, Laws of Kenya) sets out persons to whom preference may be given

to take out letters of administration. An Advocate in that capacity is not one of such persons. Besides without first being appointed a legal representative an Advocate has no capacity to file any matter in court following the demise of client except to cease acting for him. He has no instructing client. The application herein is therefore incompetent on that ground alone.

*Thirdly* and advertent to the application itself Order XXIII rule 4(1) is clear. The death of a Plaintiff or Defendant shall not cause a suit to abate if the cause of action survives or continues. Order XXIII rule 4(1) lays down the procedure in the case of death of one defendant, that a legal representative may be made a party. Order XXIII rule 4(2) provides that where within one year no application is made under subrule (1) the suit shall abate as against the deceased defendant.

From Advocate Richard Miencha's own affidavit, the Defendant died on 1<sup>st</sup> August 2009. His application was filed on 24<sup>th</sup> August 2009 some 23 days after the Defendant's death. In this case the action, or execution not only survived the Defendant's death, but his erstwhile Advocate had no capacity to file the application.

*Fourth* and finally there is no basis under Section 3A or Order XXIII rules 1, 8 or 12 thereof for a court to order a stay of execution. Those provisions do not donate the court such power. Only Order XLI of the Civil Procedure Rules donates such power.

For those reasons, I find the Advocate's application dated 24<sup>th</sup> August 2009 not only incompetent but also an abuse of the process of court. The same is dismissed with costs.

**Dated, signed and delivered at Nakuru this 7<sup>th</sup> day of May 2010**

**M. J. ANYARA EMUKULE**

**JUDGE**