



**NJENGA MUCHIRI.....PLAINTIFF/RESPONDENT**

**Versus**

**MUHURI MUCHIRI .....1<sup>ST</sup> DEFENDANT/APPLICANT**

**GEORGE MAINA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

This is an application by Notice of Motion dated 11<sup>th</sup> April 2000 filed by the Defendants in this suit under Order XXI Rule 22, Order XLIV Rules 1, 2, 3(2) and Order L all of the Civil Procedure Rules. The Notice of Motion is also stated brought under Section 3 A of the Civil Procedure Act and all other enabling provisions of the law.

According to the Applicants Counsel Mr. Kiania Njau, at the moment prayers number 1 and number 2 are overtaken by events. What remain are prayers number 2 A and number 3. Prayer number 3 is for costs of the Notice of Motion. Prayer number 2 A states as follows:

**“THAT the Honourable Court do review its judgment delivered on the 7<sup>th</sup> day of April, 2000”**

Prayer number 2 is asking for stay of execution of that judgment until this Notice of Motion is heard and determined. I am told no interim order was obtained on the basis of that prayer 2.

Prayer number 1 was for dispensing with service in the first instance.

Grounds on the basis of which the Notice of Motion is brought are set out on the face of the Notice of Motion. Two grounds are set out the most important being ground number 1 stating that

**“The applicants have discovered new and important evidence which if it had been adduced at the hearing of the suit would have influenced the court in making its judgment in their favour.”**

Ground two is simply that the Applicants (stated as “respondents”) risk being evicted.

Although Mr. Kiania Njau stated that there is no replying affidavit filed, I am seeing one dated 14<sup>th</sup> April 2000 deponed by Njora Waweru, Advocate, who said had the conduct of this suit on behalf of the Plaintiff. It was filed on 14<sup>th</sup> April 2000.

However, during the hearing of this Notice of Motion, there was no appearance for the Plaintiff/Respondent. Mr. Kiania Njau told the court that the Plaintiff had died and hearing notice was served upon Plaintiff’s personal representative (legal representative) already substituted as Plaintiff, in this suit, namely Hannah Nyamunya Njenga, but she declined to sign same and failed to attend hearing which therefore proceeded in her absence. Service was on 26<sup>th</sup> September 2009.

An old Notice of Motion filed on 11<sup>th</sup> April 2000 only four days after the judgment sought to be

reviewed was delivered on 7<sup>th</sup> April 2000. It was filed on that date 11<sup>th</sup> April 2000 by M/s Nyangoro & Co. Advocates who also on the same date filed Notice of Change of Advocates replacing M/s Kamau & Co., Advocates, who had hitherto been representing the Defendants.

To support the Notice of Motion is a long affidavit covering 17 paragraphs deposed by Muhuri Muchiri the 1<sup>st</sup> Defendant/Applicant.

By then the Plaintiff Njenga Muchiri was a live and lived until the year 2004 when he passed away. Mr. Kiania Njau the present Counsel for the Defendants came into the suit on 28<sup>th</sup> June 2007. He explains that no execution of this court's judgment in this suit dated 7<sup>th</sup> April 2000 has taken place to-date. Why then did the Plaintiff take Defendants to court in this suit?

Mr. Kiania Njau explains also the delay in prosecuting this Notice of Motion, though from the Bar, stating that the Plaintiff had caused the Defendants to be remanded in prison custody on an allegation of murder and that when the defendants came out of prison after a long stay the problem of getting a personal representative of the Plaintiff substituted in this suit came there to be resolved.

Having carefully considered the matter as a whole, I do not find merits in this Notice of Motion dated 11<sup>th</sup> April 2000 and the same is hereby dismissed with costs to the Plaintiff/Respondent for the following reasons:

Firstly, the long affidavit supporting the Notice of Motion betrays the applicants as it contains information from which it can be seen that clearly this is not a situation where the Applicants had no knowledge and were not in possession of the evidence they claim they now intend to bring in the trial in the suit. It is apparent that if any such evidence was not brought, it was a deliberate decision of the then Advocates for the Applicants M/s Kamau & Co. Advocates. Replacement of M/S Kamau & Co. Advocates by M/s Nyangoro & Co. Advocates in order to file this Notice of Motion within four days of the judgment dated 7<sup>th</sup> April 2000 is a very good indicator of what I am saying. Otherwise what prevented Kamau & Co. Advocates from filing the Notice of Motion yet they were the ones who were more familiar with issues in this suit than Nyangoro & Co. Advocates were at that time? They simply wanted re-hearing.

Secondly, contents of the supporting affidavit reveal that this Notice of Motion is an appeal disguised as an application for review and this is more so when reference is made to Defendant's evidence claimed to have been adduced in the trial without contravention by the Plaintiff which apparently the Applicants are saying was not considered by the court. Otherwise why are they referring to such evidence in a review?

Thirdly, the personal representative (Legal representative), now Plaintiff, who may not even have been personally involved in the suit transactions is likely to be prejudiced if the present judgment is set aside for a fresh trial to take place. Thus the end of justice is unlikely to be served better in the new trial than it was served in the previous trial which gave rise to the questioned judgment delivered on 7<sup>th</sup> April 2000 in the presence of Njenga Muchiri. Why is this Notice of Motion prosecuted with the name of a deceased party being shown as Plaintiff/Respondent?

Dated this 30<sup>th</sup> day of October 2009.

J.M. KHAMONI

JUDGE

**Present :**

M/s Kiania Njau & Co. Advocates for the Defendants/Applicants

Court Clerk: Kabiru

**Court Further Order**

Leave for appeal, if required, is hereby granted.

J.M. KHAMONI

JUDGE

30/10/09