



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 365 of 2000

NTIRAMPEBA LAURENT.....PLAINTIFF

VERSUS

CHUNILAL R. PARMAR t/a QUARZO.....DEFENDANT

R U L I N G

The application is a Notice of Motion dated 12th March, 2007 brought under Section 3A of the Civil Procedure Rules and Order XXIII, rule 8 of the Civil Procedure Rules. It seeks that the sum of KShs.750,000/= together with all the accrued interest deposited in the joint account of M/s Khan & Katiku Advocate and Ms. T. K. Kamba Mbaabu in Stanbic Bank Account Number 0195000952002 be released to the firm of Khan & Katiku Advocate on behalf of the estate of the Plaintiff.

The grounds cited on the face of the application are:-

- a) **The suit has abated**
- b) **The said sum of KShs.750,000/= rightly belongs to the estate of the Plaintiff.**

There are other grounds raised in the affidavit sworn in support of the application by JOHN KATIKU Advocate.

The application is opposed. There is a replying affidavit sworn by TIMOTHY KARIBA MBABU Advocate which raises various important issues affecting the issuance of the orders sought in the application.

The suit herein was filed by the Plaintiff, now deceased on the 1st March, 2000.

The plaint contained four prayers:-

- a) **An injunction restraining the defendant from evicting the plaintiff from the suit premises.**
- b) **In the alternative an order that the Plaintiff's goods distrained by the Defendant be released to him.**
- c) **General damages.**
- d) **Costs of the suit.**

In very brief terms, the Plaintiff was claiming that any rent he should have paid to the Defendant for premises rented from him was set off by the agreement of the parties against a debt the Defendant owed the Plaintiff.

The Defendant filed its defence and denied any involvement with the Plaintiff in a business transaction culminating in owing any monies to the Defendant. The Defendant also averred that the Plaintiff was truly in rent arrears and that it was for that reason that the Defendants levied distress by distraining the Plaintiff's goods.

Eventually both parties to the suit filed a consent letter dated 18th September, 2000. The order was adopted by the court on 22nd December, 2000. The order directed that the sum of KShs.750,000/= deposited in court by the Plaintiff be deposited in an interest earning account in the joint names of the Advocates of both parties. That is the subject matter of this application.

There is no dispute that the Plaintiff in this suit died on 5th January 2003 and has since not been substituted. The suit has therefore abated under Order XXIII, rule 8 of the Civil Procedure Rules.

The Respondent's Advocate has raised a very important issue. Who instructed the Advocate who brought this application now before court? Mr. Wangila Advocate submitted that there was no need of annexing any documents to prove that Khan and Katiku had received instructions to hung the instant application. It was Mr. Wangila's view that since Khan and Katiku were on record for the Plaintiff before he died they are properly authorized to bring the application.

With due respect to Mr. Wangila the legal position is that until the representatives of the deceased Plaintiff's Estate or the Administrator of that Estate get involved in this matter, the Advocates on record have no mandate or locus to move the court in any manner notwithstanding the Plaintiff had instructed them to act for him before he died. The Law of Succession Act Section 45 (1) is very clear that no person has a right to intermeddle with any property of a deceased person unless as authorized under the Act or other written law or by a grant of representation. The section provides as follows:-

"45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person."

The Advocates who have brought this application are not showing under which law they have come nor have they alleged that they have a grant of representation under the Law of Succession Act permitting them to make the application nor that they have been instructed by anyone with such grant or authority.

I find that it is against the law to grant the application as sought as it will be allowing strangers to commit an offence under Section 45 (2) of the Law of Succession Act. The application is clearly incompetent, bad in law and misconceived. I agree with the Respondent's Advocate that it ought to be struck out.

In the circumstances I strike out the application dated 12th March, 2007. Due to the obvious mischief intended in the bringing of this application, I condemn the Advocates on record Khan & Katiku Advocates, to pay the costs of this application personally, to the Defendants/Respondents.

Dated at Nairobi this 25th day of May, 2007.

LESIT, J.

JUDGE

Read, signed and delivered in presence of:-

.....holding brief for Mbaabu for Respondent.

Masinde holding brief for Wangila for Applicant.

LESIT, J.

JUDGE