



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

**Civil Suit 585 of 2004**

**TAVULI CLEARING & FORWARDING LIMITED.....PLAINTIFF**

**VERSUS**

**CHARLES KALUJEE LWANGA .....DEFENDANT**

**R U L I N G**

The suit was filed on 27<sup>th</sup> October 2004 against a defendant who by that time had passed away some six months prior.

The plaintiff applied on 16<sup>th</sup> November 2004 and obtained judgment against the defendant in default of an appearance. A decree and certificate of costs was issued by the court. The present application, the subject of this ruling was filed just as an application for that decree to be transferred to Ugandan High Court was due to be argued.

As stated before, and it is not contested by the counsels who appeared before me, the defendant was dead before the present suit was filed. The application is moved by one of the executrix of the Estate of the late Charles Kalujjee Lwanga, the named defendant herein. The applicants contention is that the exparte judgment obtained herein, is irregular since service was incapable of being effected on a dead defendant. Curiously the affidavit of service, if it ever existed, has been '*spirited*' away from this file. One would have expected that counsel for the plaintiff would have unravelled this mystery.

What ought to be the fate of that judgment then. Undoubtedly it ought to be set aside and all incidentals attached to it, ex debito justitiae.

The matter would however not end there; the applicant annexed an affidavit sworn by one **SHEM OLUOCH OPIYO**, who described himself as a director and a shareholder of the plaintiff company. He deponed his company has never either through him or his co-director instructed the firm of M/s Odera Obar & Company Advocates to file the present action nor was he the author of the verifying affidavit annexed to the plaint. By any stretch of imagination that revelation discloses monumental abuse of the court process.

What does the firm of M/s Odera Obar & Company have to say in response? That the present application shows a '*thread*' of attempts to crucify Mr Odera Advocate personally. That there is no evidence before court to prove that he personally knew that the defendant was dead. That the affidavit of plaintiff's director/shareholder is not backed up by a company's resolution and should therefore be ignored. That the court should deal with the alleged process server who served the summons and not the counsel. Mr Odera Advocate then referred to succession cause NO. 3127 of 2005 where he said he was seeking to nullify the

grant of letters of administration to the applicant. The court in respect of that succession cause states that it is of no significance to the application at hand and the court does not intend to deal with it any further than that.

The courts response to the arguments of the firm of M/s Odera Obar & Company advocates is as follows; that whether or not the applicant seeks to crucify Mr Odera is of no importance to this matter because it does not controvert the evidence placed before court. That where as the said firm might not have known that the defendant was dead when this suit was filed they ought to have known when attempts were made to serve summons and plaint. The said firm ought to have brought before the court their office copy of the affidavit of service in order to absolve, to some extent, itself from blame. No such affidavit was presented to court. The obvious inference is that the firm cannot extricate itself from the illegality seen in this matter.

The court does find that there has been a very deliberate abuse of its process and the court can in that case invoke its inherent powers to undo whatever action has been perpetrated in abuse of its process.

The prayers in the applicant's chamber summons application dated 23<sup>rd</sup> November 2005, which are for consideration in this ruling are: -

Ø That the exparte judgement entered against the defendant on the 18<sup>th</sup> of November, 2004, the decree issued on 19<sup>th</sup> November 2004, the certificate of costs dated 19<sup>th</sup> November and all orders consequential thereto be set aside Ex debito justitiae.

Ø That this suit be struck out with costs and that such costs be borne by the firm of Kennedy Odera Obar Advocates and or the plaintiff.

In the court's view the judgment entered hereof and the whole suit should be struck out for having being filed against a deceased person and obviously filed without authority of the plaintiff. Spry J.A in the case MAGON – VS – OTTOMAN [1968] E.A. 156 stated:

**“In my opinion where a court passes judgment when it has no jurisdiction to do so, the person against whom the judgment is passed is entitled as of right to have it set aside and no conditions can properly be imposed.”**

In the case CAMOS AND PARTNERS – VS – S.F. HASSAN [1964] E.A. 644 it was held that:

“(ii) a deceased defendant's estate is entitled to move the court for an order for costs of the suit after the suit has abated.

(iii) the deceased's legal representative could not be made a party to the suit as it had abated by operation of the law but it was equitable that the applicant should have an order for the costs of the suit and the application under the inherent powers of the court.”

The above findings in those two cases find favour with me and are applicable in this case.

Under section 27 of the Civil Procedure Act the court has wide discretion to make orders in respect of costs. In the case of BUIKE ESTATE COFFEE LTD AND TWO OTHERS – V – LUTABI [1962] E.A.328 the court state:

**“If it shall.....appear that the plaintiff's advocate has not duly authorised by the lawful directors (whoever they may be) to institute proceedings on behalf of the company, the advocate can be ordered to pay the costs of the suit personally.”**

Similarly in the case BUGERERE COFFEE GROWERS LTD – V – SEBADUKA AND ANOTHER [1970] 147, the court found that an advocate is liable to pay costs personally for filing a suit he is not authorised to so file. In the case of an incorporated company the court held that such authority can only be

by a resolution or resolutions passed either at a company or board of director's meeting, recorded in the minutes. In this present suit no such resolution was presented by counsel as authority to file the present suit.

The finding of this court is that counsel Kennedy Odera Obar will pay the applicants costs of the present application.

The orders of this court are: -

- (1) That the ex parte judgment entered herein on 18<sup>th</sup> of November 2004, the Decree issued on 19<sup>th</sup> November 2004, the certificate of cost dated 19<sup>th</sup> November 2004 and all or any other consequential orders thereto are hereby set aside.**
- (2) That this suit is hereby struck out.**
- (3) That the costs of the chamber summon dated 23<sup>rd</sup> November 2005 will be paid by Kennedy Odera Obar Advocate to the Estate of Charles Kalujjee Lwanga.**

MARY KASANGO

**JUDGE**

Dated and delivered this 9<sup>th</sup> day of March 2006.

MARY KASANGO

**JUDGE**