



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

Civil Case 1600 of 1999

THE EAST AFRICAN PORTLAND CEMENT CO. LTD. PLAINTIFF

VERSUS

CECILIA JOHNSON NTARADEFENDANT

R U L I N G

The Motion on Notice dated 28.3.2006 was brought by the plaintiff under Order XLIV Rule 1 (1), Order L Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law for one order apart from costs that the Orders dated 2.10.2002 be reviewed and set aside. The grounds for the application are as follows:-

- (a) That there is a discovery of new and important matter which was not within the applicant's and its Counsel's knowledge.**
- (b) That in particular the Grant of Letters of Administration jointly issued to the defendant and the objector were revoked and/or annulled by a Court Order on 18.9.2002.**
- (c) That the Objector's Counsel, A.G. Opiyo represented the applicant in respect of the Summons for revocation of Grant of Letters of Administration and actually appeared in Court when the consent giving forth to the Order dated 18.9.2002 was recorded.**
- (d) That as of 19.9.2002, the Objector did not have the Legal capacity to pursue the application dated 3.7.2002 hence**

any Orders flowing therefrom are null and void.

The application is supported by an affidavit sworn by one Rosemary Gituma, the plaintiff's Finance Manager. The affidavit is an elaboration of the above grounds. Neither Grounds of Opposition nor replying affidavit were filed. The application was therefore heard ex parte on 2.11.2006. Central to the plaintiff's application is the ground that there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by the applicant at the time when the order complained of was made.

The new discovery is the order recorded by consent in Nairobi High Court Succession Cause No.1726 of 1993 by which the Letters of Administration intestate granted on 10.2.1994, to the defendant and the Objector, Catherine Nkatha Mworira to the estate of Johnson Mwitari Ntara were revoked. The plaintiff contends that the Grant of Representation having been revoked on 18.9.2002, the Objector ceased to have Legal capacity to prosecute her objection application which came up for hearing on 19.9.2002. On that date with the knowledge that she had no Legal capacity to represent the estate of Johnson Mwitari Ntara, she urged Mwera, J. to allow her objection application. Mwera, J. agreed with the Objector and on 2.10.2002 held that the attachment of the property in question was unlawful and unwarranted. The Learned Judge further held that the seized motor vehicles still in the name of Johnson Ntara were part of his estate and the plaintiff could not seize them on indebtedness of the defendant alone. In those premises the plaintiff prays that the Orders made by Mwera, J. on 2.10.2002 should be reviewed and set aside.

The record shows that the Objection was lodged by Notice dated 20.6.2002. When the plaintiff/deed holder was served with the notice of Objection, by its notice lodged on 24.6.2002, it intimated that it would proceed with the attachment wholly. The objector then filed the application by way of Chamber Summons dated 2.7.2002 to establish the claim of the estate over the attached property. There is no dispute that the objector had legal capacity to bring the application. Indeed upto the 18.9.2006 she was clothed with Legal authority to represent the estate of Johnson Mwitari Ntara.

After hearing the application Mwera, J. specifically found that the seized motor vehicles were still in the name of Johnson Ntara and were part of his estate and the plaintiff could not seize them on the indebtedness of the defendant alone. Those findings were findings of fact on the affidavit evidence adduced before the Learned Judge. Those findings in my view did not depend on whether or not the Objector had Legal capacity to prosecute the Chamber Summons. The Objector may have lost her right to represent the estate of Johnson Ntara on the filing of the order revoking the Grant of Representation to his estate. That in itself cannot invalidate the specific findings of fact made by the Learned Judge with respect to the seized motor vehicles.

Besides, the Order sought to be reviewed was made one 2.10.2002 slightly over 4 years ago. The record shows that the plaintiff lodged a similar application on 1.3.2005. On 21.3.2006 the plaintiff withdrew the application on the ground that there was an error on the face of the application. The present application was then filed on 14.6.2006. The delay in filing of the application is attributed to belated desire on the part of the Advocates for the Objector to lodge their bill of costs for taxation. That desire provoked the enquiry regarding the status of the Grant of Representation to the estate of the said Johnson Ntara leading to the filing of this application. It is not easy to appreciate the nexus between the Objector's costs and the status of the Grant of Representation. In any event, Mwera, J. did not mention costs in his ruling of 2.10.2002.

In the premises it is my view that the application for review was not brought without unreasonable delay.

In the result, this application cannot succeed. It is dismissed and as the Objector did not file any response to the application, I make no order as to costs.

DATED and DELIVERED at NAIROBI this 30th day of November 2006.

F. AZANGALALA

JUDGE

DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER 2006 in the absence of the Applicant and the Respondent.

F. AZANGALALA

JUDGE

30/11/06