



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 2906 of 1989**

**SUPERIOR ENTERPRISES LIMITED ..... PLAINTIFF**

**VERSUS**

**GULSHAN SHAMSUDEEM NIMJI [ADMINISTRATOR OF THE ESTATE OF**

**SHAMSUDEEM NIMJI (DECEASED)] .....DEFENDANT**

**RULING**

This Ruling is delivered in an application dated 18<sup>th</sup> May, 2006 wherein the widow and administratrix of the Estate of Shamsudeem Nimji seeks orders for the setting aside of an exparte default judgment entered in this suit on 14<sup>th</sup> April, 2005 and all consequential orders pursuant thereto.

The suit herein was filed against the deceased Shamsudeem Nimji on 6<sup>th</sup> July, 1989 and a Defence filed on 26<sup>th</sup> July the same year. On 10<sup>th</sup> December, 1991 this Honourable Court ordered the Defendant to file a bank/Insurance Guarantee for the sum claimed within 30 days. For reasons that are not material to this application the suit dragged on until the Defendant passed away sometime either in 1993 or 2003 [There is conflicting information on this in the Defendants former advocate's application to withdraw from acting dated 2<sup>nd</sup> September, 2005 and the Supporting Affidavit filed together therewith]. After successfully applying to withdraw from acting the said advocates are said to have closed and destroyed their office file. The widow and administratrix then instructed the firm of Waruhiu K'owade & Ng'ang'a to act for her after obtaining a Grant of Probate in respect of her husband's Estate on 15<sup>th</sup> March, 2004. The said advocates promptly filed their notice of Appointment together with this application on 18<sup>th</sup> May, 2005.

The application is opposed mainly on the ground that there has been delay in filing the same and that there is no real defence to the suit. Looking at the application itself and the affidavit in support together with the annexures thereto it is evidently clear that the deceased did secure from consolidated Finance Limited the Guarantee ordered by the court on 5<sup>th</sup> January, 1992 which was clearly within the 30 days ordered by the court on 12<sup>th</sup> December, 1991. The same is annexed to the Supporting Affidavit to the applicants' application as annexure **GSN-C** and confirmed to be valid and subsisting, by the Guarantor's successors, African Banking Corporation, in their letter of 24<sup>th</sup> October, 2005 annexed as "**GSN -B**".

It is common knowledge that matters of probate and estate administration can at times be complex and, even if the Court was to consider as true that the present Defendant was aware of the suit against her late husband prior to his demise, there is not much she could have done concerning the same prior to obtaining letters of Probate, particularly if the deceased's former advocates were not, as they appear, willing to assist her. Why the Guarantee was not filed in court as ordered cannot, in all fairness be blamed on the current Defendant but must be seen as an issue which could only be explained by the deceased and/or his advocates who are now no longer on record. I am persuaded that the interests of

justice would be better met if the present application is allowed, the exparte default judgment set aside and the suit is heard on its merits. The questions of whether the defendant has a valid defence to the suit or not can then be addressed at the trial.

Consequently, I allow the application and grant prayers 2 and 3 thereof. However, costs of the application shall be and are hereby awarded to the Plaintiffs.

Dated and delivered at Nairobi this 3<sup>rd</sup> day of November, 2006

**M. MUGO**

**JUDGE**

**Ruling delivered in the presence of:**

**Mr. Ongoya holding brief for Thiga for Defendant/Applicant.**

Ms. Ngugi for Plaintiff/Respondent