

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE NO. 92 OF 1997(O.S)

JOHN MASKANA MASAMBAPLAINTIFF

V E R S U S

TOYA JUMA LUKOBA DEFENDANT

R U L I N G

The application by Chamber Summons dated 25th August, 2003 was served on the advocate on record for the defendant and subsequently the parties through their representatives met at the court registry on 10th November, 2003 and duly fixed the application for hearing by consent on 4th May 2004. When the application came up for hearing on that date, Mr. Mukavale, counsel for the Defendant/Applicant appeared but counsel for the Plaintiff/Respondent failed to appear. The court allowed the applicant to proceed with the prosecution of the application in absence of the Respondent/Plaintiff who had been served and heard it exparte.

The application was brought under Order XXIII Rule 3 of the Civil Procedure Rules and sought an order that it (the suit) had abated. The reasons given for the abatement in the body of the application and in the Applicant's affidavit in support of the application was in a nutshell, that the Plaintiff had died and as long ago as 24th June 2000 the advocates on record for the Plaintiff had written to the Applicant's advocate confirming that they would apply to substitute the plaintiff ostensibly with the personal representative of his estate. Upto the date of the hearing of the application, no application had been made in this regard. The allegations in the applicant's affidavit remained uncontroverted. Under Rule 3(1) of Order XXIII no application has been made for the legal representative of the estate of the deceased plaintiff to be made a party. As a period of more than one year has elapsed since the plaintiff died without such application being made, the suit has under Rule 3(2) of Order XXIII abated. Accordingly, I award the defendant costs of the suit which may be recovered from the estate of the deceased plaintiff. It is so ordered.

Dated at Kakamega this 17th day of June, 2005.

G. B. M. KARIUKI

J U D G E