



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 590 OF 1994

NATIONAL BANK OF KENYA LTD.....PLAINTIFF

VERSUS

JAMES ADOYO M. MARTIN.....DEFENDANT

RULING

This Application has been brought through Notice of Motion under Order LR.17 Order III R. 9A Civil Procedure Rules and Sec. 3 (A) Civil Procedure Act. and all enabling sections of the law. The said Application seeks the following Orders:

- *That leave be granted to M/s Kamonjo Kiburi and Co. Advocates to take over the conduct of this matter without notice to Counsel previously on record.*
- *That temporary stay of execution of the orders of the Court issued on 18th November, 2002 and all consequential orders be granted until this application is heard and determined or until further orders of the Court.*
- *Alternatively and without prejudice there be a stay of Sale of any properties attached by M/s Igare Auctioneers.*
- *The orders of the Court issued on 18th November, 2002 and all consequential orders be set aside unconditionally.*

The above application has been supported by the affidavit of one Joshua Nauwankas. The main thrust of the affidavit is that the Defendant allegedly died around 1996 and hence the prosecution of the suit and subsequent attachment without substitution is unlawful and unprocedural. In addition to the above, since the Defendant is dead, he was incapable of bringing the application dated 16th May, 2002. Besides the above, the deponent stated that since the claim was for Kshs.900,000/= the Costs of Kshs.362,000/= assessed was based on erroneous figures.

During the hearing of the application, Mr. Kiburi referred the Court to the annexed Death Certificate and a Confidential Report of Investigations "JN2". Paragraph (6) of the Report stated clearly the finding that the Defendant was dead and that the family was poor and could **not** afford to pay the debt. When Mereka & Co. Advocate received the above communication they closed the file and sent a Fee Note.

Mr. Kiburi posed the question of whom was Konosi Advocate representing when they appeared in Court on 18th November, 2002. It is due to the above that Mr. Kiburi has urged this Court to set aside the ex

parte orders.

On the other hand, Mr. Konosi has opposed the application while relying on the replying affidavit on record. Besides the above, he has also submitted that the names on the Death Certificate and the names in the pleadings do not tally up. He pointed out that only the names of James Odoyo tallies up with the Death Certificate. Besides the above, Mr. Konosi submitted that the Counsel had been served and that he never gave any explanation about his absence from the Court. Lastly, he reminded his colleague that what they were claiming was the sum of Kshs.900,000/= together with interest.

This Court has carefully perused the submissions by both Counsels. Apparently the main issue in this application is that the Defendant died way back on 7th July, 1996 and that when the orders were being issued on 18th November, 2002, Mr. Konosi did **not** have any client. Instead of Mr. Konosi addressing the issue head-on and confirm whether his client was dead or alive, he opted to argue that only three names of the Defendant were reflected on the Death Certificate. Assuming that his client was alive and kicking nothing would have been easier than for Mr. Konosi to avail him in Court.

Apart from the above, Mr. Konosi conveniently and neatly avoided to challenge the other facts in the said Death Certificate. The only conclusion that the Court can reach is that the said Death Certificate is valid and relates to the Defendant. Having stated the above, I hereby find that the orders obtained on 18th November, 2002 and all subsequent orders are a nullity **ab initio**. The same are hereby set aside to allow Counsel to apply for necessary substitution.

Costs to the Applicant in any event.

**MUGA APONDI**

**JUDGE**

Ruling read, signed and delivered in Open Court in the presence of M/s Kamonjo Kiburi & Co. Advocate for the Plaintiff.

**MUGA APONDI**  
**JUDGE**

**8TH APRIL, 2005**