



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION – MILIMANI**  
**CIVIL CASE NO.612 OF 1998**

**BULLION BANK LTD :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::PLAINTIFF**

**VERSUS**

**WORLDINTOURS & TRAVEL :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::1ST DEFENDANT**

**PRARALINANJI JUMA::::::::::::::::::::::::::;:::::::::::::::::::::::::::::::::::::::::2ND DEFENDANT**

**ASMINA JUMA HERNANDEZ:::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::3RD DEFENDANT**

**RULING**

This application dated 14th July 2004 is seeking two main orders and one order in the alternative. The two primary orders are that the Court determines whether or not execution can issue as against the 2nd Defendant who is now deceased and in the meantime there be a stay of execution pending determination of the first question. In the alternative the Applicants seek an order to strike out the suit against the 2nd Defendant. The application is by the 1st and 3rd Defendants. The grounds for the application are:

1. *That the 2nd Defendant died in January 2003 before part judgment was entered in this suit.*
2. *That the 2nd Defendant died intestate and left neither a will nor any known property.*
3. *That there is no known legal representative of the 2nd Defendant.*
4. *That the Plaintiff has not taken any steps to move the Court in terms of order XXIII of the Civil Procedure Rules.*

The application is not opposed. The facts as deponed to by the 3rd Defendant are therefore uncontrverted. Exhibit “AHJI” is a copy of a Certificate of Death in respect of the 2nd Defendant. It shows that the 2nd Defendant died on 1st January 2003. Exhibit “AHJ2” is a copy of the Warrant of Attachment of movable property in execution of a decree for money. This Warrant of Attachment gives the date of the decree as 30th April 2003. The Warrant itself is dated 23rd June 2004 and is expressed to have been issued to all the Defendants including the 2nd Defendant who was deceased by the time the decree was passed and execution issued. This was not lawful and contravened the provisions of Section 37 of the Civil Procedure Act which reads:-

*“37 (1) where a judgment debtor dies before the decree has been fully satisfied the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of such deceased or against any person who has intermeddled with the estate of such deceased.*

*(2) Where the decree is executed against such legal representative, or against any person as aforesaid, he shall be liable only to the extent of the property of the deceased which has come to*

*his hands and has not been duly disposed of;”*

The Applicants have stated that the 2nd Defendant died on 1st January 2003 and that he died intestate. They have further deponed that the 2nd Defendant left no known property and further that no legal a representative has been appointed to his estate.

Counsel for the Applicants relied on the case of NJOROGE –V- MBITI (1986) KLR for the preposition that on the death of a judgment debtor proceedings could only be continued against a personal representative to the estate of the deceased.

I agree with Counsel for the Applicants that the decree holder could only continue with execution against the deceased heir who had obtained Letters of Administration or an executor or executrix.

In the result I allow the Applicant’s Application dated 14th July, 2004 and find and hold that execution should not have issued as against the 2nd Defendant who is deceased.

The Applicants will have the costs of this Application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY 2005.

**F. AZANGALALA**

**JUDGE**

Read in the presence of :-