



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL CASE 48 OF 1994**

**JAMES OBANDE OWUOR ..... PLAINTIFF**

**VERSUS**

**KALARA OYUGI ANG'AWA ..... DEFENDANT**

**RULING**

The applicants/Plaintiff application is for an order by the Court declaring that the consent order dated 19th June 2003 and filed on the same day is valid thereby invalidating orders of arrest in execution. The plaintiff's case was dismissed by the court on 19th October 2000 under order 16 rule 6 CPC. On 28th January 2002 the plaintiff made an application to court to set aside the dismissal order and reinstate the suit. On 19th June 2003 counsels for both parties signed and filed a court order stating that the applicants/plaintiff application dated 28th June 2002 is allowed which in effect re-instated the suit. That order was filed but apparently it was not recorded by the Deputy Registrar as an order of the court. The defendant/respondent filed a Notice to Show Cause against the applicant and on 19/5/04 a warrant of arrest was issued. That is what prompted this application.

Mr. Kisera submitted that the court order reinstated the suit and as such no execution should take place. The court order was signed and filed and paid for though the order was not recorded. The mistake for not recording the consent was by the Deputy Registrar and not the applicant. The orders for warrant of arrest were therefore an abuse of the process of the court. Mr. Masese for Respondent admitted signing the consent order. He however said that he was duped by counsel for the applicant into signing it. He had no instructions from his client to enter into the court. On realizing this he promptly wrote to the court countermanding the consent and that is why it was not recorded.

There is no dispute that both consents signed the counsels signed the consent order and it was filed. However the same was never recorded by the Deputy Registrar as he should have done. It therefore as now do not form part of the court's record which means the dismissal order still stands. The suit was not reinstated. True the Deputy Registrar should have recorded the consent order once it was filed. However Mr. Masese explained that he wrote to him countermanding the consent and probably that is why it was never made part of the proceedings. Though filed it is of no consequence until it is recorded.

In the circumstances the application is dismissed with costs.

Dated this 8th December 2004

**KABURU BAUNI**

**JUDGE**