

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 330 OF 1999

ALICE MBETE SILA ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

JOSEPH MAKAU KIMOLO ::::::::::::::::::::::::::::::::::::::: DEFENDANT

Coram: J. W. Mwera J.
10 Makau J. Advocate for Applicant
Makundi Advocate for Respondent
C.C. Muli

RULING

The present application dated 15.3.2001 and brought under O. 9 B r. 8, O 22 r. 22 (1), O 21 r. 25, O 39 r. 5, O 44 r. 1 (1) Civil Procedure Rules and S. 3A Civil Procedure Act seeks several orders among them to stay execution in this file pending the inter partes hearing of this very application; to review this court's ruling of 14.3.2001 and thus to allow the defendant/applicant to set down and prosecute his 20 application dated 16.11.2000. It was stated in the grounds in support of this application and as Mr. J. Makau argued it that the defence that was struck out on 14.3.2001 raised triable issues; that the plaintiff's application dated 14.12.99 did not seek orders regarding the prayers in the plaint. That the present applicant had in fact sworn an affidavit in reply to the application dated 14.12.99 only that it was not served by his lawyer on the present plaintiff/Respondent. That this was followed by an application of 16.11.2000 seeking to extend time to file and serve that replying affidavit but by mistake or misapprehension the applicant failed to set that application down for hearing. And finally that the suit concerns a partnership and the present defendant/applicant claims that fake documents feature in the alleged partnership. There was a lengthy affidavit in support and in return an affidavit in reply sworn on 30.3.2001. The respondent did not see anything faulty with the ruling of 14.3.2001 and she maintained that there was always a partnership in existence between her and the defendant/applicant. She did not see a ground for review as sought. It was added that after the ruling of 14.3.2001 a decree was extracted. That all along M/s P. T. M. 10 Kisongoa Advocate was on record for the defendant/applicant so she wondered how M/s Makau and Company Advocates appeared for the same litigant, if it may be said, in contravention of O 3 R. 9 A Civil Procedure Rule

Stopping here for a while, it looks like Mr. Makau had earlier had wind of this and on 26.3.2001 filed what was termed:

NOTICE OF APPOINTMENT TO ACT JOINTLY.

By this Mr. Makau appeared to have been going round the claim that with a decree 20 already on the file, he could not come on to represent the defendant – applicant on his own as he had a notice filed on 19.3.2001 on account of the said O 3 r. 9 A Civil Procedure Rules. But even amid the confusion about representation the file bears a decree dated 14.3.2001. It does not appear that it was approved by Mr. Kisongoa for the defendant and he wrote to the deputy registrar on 23.3.2001 to say so. It therefore appears that Mr. Makundi got the deputy registrar to approve and seal that decree without reference to the other side for approval. This looks anomalous and leaves the validity of that decree in some considerable doubt.

Having heard both sides, this court has gone over its ruling of 14.3.2001. It sees no reason to review

it under O. 44 r. 1. No material has been placed before this court to warrant a review. It is claimed solely on the basis that there were mistakes and misapprehensions on the part of Mr. Kisongoa. If so the same reigned unexplained even by the time the ruling and order of 14.3.2001 was made. The same remain so now.

In sum the orders prayed are refused with costs.

Orders accordingly.

Delivered on 9th May 2001.

J. W. MWERA

JUDGE