



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAROK SUB-REGISTRY**

**CIVIL CASE NO. 1 OF 2016**

**(Formerly Naivasha HCCC No. 10 of 2015**

**and**

**Nakuru HCCC No. 204 of 2009)**

**TOYO MOYO CO. LTD.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**ABDUL AZIM KASSAM (Sued as the legal Representative of the Estate of Hussein**

**Haji Issa.....DEFENDANT/RESPONDENT**

**BADRUDIN HUSSEIN HAJI ISSA.....APPLICANT**

**CONSOLIDATED WITH CIVIL CASE NO. 2 OF 2016**

**(Formerly Naivasha HCCC No. 11 of 2015**

**and**

**Nakuru HCCC No. 168 of 2009)**

**MUMTAZ ANWARALI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**ABDULGANI KASSAM.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**(Suing as legal representatives of the estate of Kassam Ismail Anwarali)**

**-VERSUS-**

**ABDUL AZIM KASSAM (Sued as the legal Representative of the Estate of Hussein**

**Haji Issa.....DEFENDANT/RESPONDENT**

**BADRUDIN HUSSEIN HAJI ISSA.....APPLICANT**

**CONSOLIDATED REASONS FOR RULING DELIVERED AT NAROK ON 27<sup>TH</sup> OCTOBER,**  
**2016**

1. The two Motions which were the subject of the ruling delivered on 27<sup>th</sup> October 2016 were filed simultaneously on 17/10/2016 in **HCC 1 of 2016** and **HCC 2 of 2016** by **Badrudin Hussein Haji Issa (Badrudin)** sued in both matters in his former capacity as the administrator of the estate of his late father **Hussein Haji Issa (Deceased)**.

2. Following the revocation of the grant in his favour in the relevant Succession Cause, the said Applicant was replaced in the two civil suits by the current administrator **Abdul Azim Kassam (Abdul)** a grandson to the deceased. A subsequent application by Badrudin to be enjoined as a co-defendant in the two suits was dismissed by this court through its ruling delivered on 1<sup>st</sup> July 2016. Upon delivery of the ruling, the court noting the age of the two suits (filed in 2009 as **Nakuru HCC 168 of 2009** and **HCC 204 of 2009**), set hearing for 27<sup>th</sup> October, 2016. Thus the Notices of Motion which are the subject of these reasons were filed about 8 days to the hearing date.

3. Expressed to be brought under Order 51 Rule 15 of the Civil Procedure Rules the motions' live prayers for purposes of this ruling are number 3 and 4 which seek that :

**“3. THAT this Honourable Court be pleased to set aside its order substituting the Applicant with the Defendant/ Respondent.**

**4. THAT all proceedings taken in respect of the Defendant/Respondent as a representative of the estate of Hussein Haji Issa (the deceased) since 22<sup>nd</sup> November 2010 be expunged from the records.”**

4. The key grounds which are fleshed out in **Badrudin's** affidavit are that he was a beneficiary and original legal representative of the deceased's estate. That the grant in his favour was revoked in 2010 but that he successfully moved the court subsequently and on 22<sup>nd</sup> November 2010 the subsequent grant in favour of **Abdul** was stayed by **Emukule J.** Annexed to the affidavit is the copy of the said order in **Nakuru HC Succession Cause No. 444 of 2010** in the Matter of the estate of Hussein Haji Issa (now Naivasha HC Succession Cause 129 of 2015).

5. **Badrudin** claims he had no notice that **Abdul** had applied to substitute him in the civil causes whose files were reconstructed after the original files went missing in Nakuru. In **Badrudin's** view, the present Defendant/administrator has no capacity to be sued herein as the orders of 22<sup>nd</sup> November 2010 still subsist.

6. Through Messrs Kiptoo and Ombati for the Plaintiffs and Defendant in the two suits respectively, opposed the application terming it in their Grounds of Opposition as *res judicata*. They assert that the stay order relied on by **Badrudin** lapsed and the parent application related thereto withdrawn on 21<sup>st</sup> June 2015 before the same could be heard.

7. Although the Notices of Motion were set for hearing on 24/10/2016, it was not until the morning slated for the hearing of the suits that **Badrudin's** Advocate, Mr. Leteipa indicated readiness to proceed having caused adjournment on two occasions since 24<sup>th</sup> October 2016 for various reasons including malingering and false reasons on 25<sup>th</sup> October 2015. A letter of even date from Narok Cottage Hospital where the counsel had been said to be admitted on 25<sup>th</sup> October 2016 disputed the assertion.

8. Reiterating the interim stay orders of 22/11/2010 in the succession cause, Mr. Leteipa for **Badrudin** asserted that the said order was still in force and that **Abdul** has no capacity to represent the estate of the deceased in the two civil suits herein.

9. Responding, Mr. Kiptoo stated that the question of the administrator of the estate of the deceased was settled in the succession cause in 2010, and that the subsequent stay order of 22/11/2010 was temporary and lapsed as the connected application was never prosecuted on 14/12/2010 or at all. Hence **Abdul** was by operation of the law reinstated as the administrator of the estate. He also pointed out that on the 21<sup>st</sup>

June 2016 the then advocate for **Badrudin** withdrew all pending applications in and to pave way for the determination of the succession cause, now pending ruling.

10. Referring to the earlier dismissed application by Badrudin to be enjoined in the subject civil suits, Mr. Kiptoo stated that the present application was filed to delay the hearing of the causes on 27<sup>th</sup> October 2016. Mr. Ombati for **Abdul** associated himself with the above submissions by the Plaintiffs, adding that **Badrudin's** previous application for joinder was an acknowledgment that he was not a party herein; that **Abdul's** position as administrator has never been challenged in court.

11. In the same proceedings on 26<sup>th</sup> October 2016, Mr. Leteipa confirmed to the court that there was doubt regarding whether he had a current practicing certificate. Although he promised to avail evidence that he had paid fees in respect of the same at the hearing of **HCC 4 of 2015 (Narok)** on the same date, he subsequently stepped down from the latter cause citing lack of evidence of payment. He neither attended to the two civil causes herein thereafter, nor HCC 4 of 2015 (Narok).

12. Having duly considered the two Notices of Motion, I was persuaded that they had no merit and had been brought with a view to delaying the trial. The Notices of Motion were brought under Order 51 Rule 15 of the Civil Procedure Rules which states:-

**“The court may set aside an order made *ex parte*.”**

13. Firstly, it is evident that the present files and pleadings were reconstructed pursuant to an order by Maranga DR on 9/10/2014, upon confirming that the original files went missing. Hence there are no proceedings predating the application for reconstruction made in August 2014. It is also difficult to tell whether the certified copies of previous pleadings subsequent to inception were all reconstructed.

14. Suffice to say however, that on 10<sup>th</sup> December 2014, four years after the order of **Emukule J** (22<sup>nd</sup> November 2010) the application for substitution dated 18<sup>th</sup> June 2013 was allowed by **Mulwa J**. A copy thereof is on the record and whilst I have not seen a certified copy of the resultant order, it would seem that the said application, and the one dated 19/6/2014 were set for hearing on the same date as per the letter dated 11<sup>th</sup> August 2014 by Kiptoo Advocate, and filed on 13<sup>th</sup> August 2014. The request for hearing contained in that letter is endorsed vide the registry memorandum on the record dated 22/10/2014.

15. **Badrudin** now says he was unaware of the application for substitution in the civil causes. On 6<sup>th</sup> October 2015 **Badrudin** filed an application to be enjoined as an Interested Party herein but before it was heard, he filed a further application on 3/12/2015 to set aside the substitution order. The former application was heard and determined on 1<sup>st</sup> July 2016. The latter application remained on record unheard.

16. Aggrieved with the said dismissal, it seemed that **Badrudin** desired to file an appeal but his application for stay pending appeal filed on 19/7/2016 was found incompetent and no orders were issued. The Applicant then filed the application dated 17<sup>th</sup> October, 2017 seeking the same orders in the unprosecuted application dated 3<sup>rd</sup> December, 2015.

17. Apart from the obvious incompetence of the present application for that very reason, there is no reason given for the failure to file or prosecute the application for setting aside the substitution earlier. Further there is no evidence that **Badrudin** was not represented at the hearing of the substitution application before **Mulwa J** on 10/12/2014 being the Defendant on record at that date. The proceedings of 10/12/2014 do not support his assertions.

18. Besides, regarding the stay orders in **Succession Cause number 129 of 2015** given on 22/11/2015 these were temporary pending hearing on 14/12/2010 as the court directed. The record in the Succession Cause confirms that the said application was never heard and was among pending applications withdrawn by Mr. Githui acting for **Badrudin** therein, on 21/3/2016.

19. This means that contrary to Mr. Leteipa's novel submissions, the orders of 22/11/2010 lapsed when the matter failed to proceed to hearing on 14/12/2010 and that subsequently the grant issued to **Abdul** was rendered effective or reinstated. Hence the subsequent substitution in the two civil suits.

20. This court does not wish to comment further on the Succession Cause which is pending ruling on 25/11/2016. Suffice to say that the present applications are improperly hitched to the ceased order therein given on 22/11/2010.

21. Regarding the civil suits and the two subject Motions it is my view that **Badrudin** brought them to circumvent this court's order dismissing his previous application for joinder. That application was itself an admission of the capacity of the current administrator. The current Notices of Motion are incompetent there being a similar application that he has failed to prosecute since 3/12/2015. Moreover, the latter was filed nearly a year since the impugned substitution and the current application filed 2 years since the substitution.

22. The two Civil Causes are over six years old. All are replete with applications and counter applications. Litigation must come to an end, and courts do not act in vain. Even assuming that the impugned substitution was made in the absence of **Badrudin**, one wonders what difference his presence would have made. The order of 22<sup>nd</sup> November had already lapsed and **Abdul** reinstated as the administrator in the succession cause.

23. In my considered view, the timing of the subject Notices of Motion was intended to derail the hearing of the civil suits. The applicant has been indolent in prosecuting his myriad applications, filed always under Certificate of Urgency. The Law Society website confirms that the counsel for the Applicant, **Alex Simel Leteipa** has not held a practicing certificate since 2015. With full knowledge of this fact, he has continued to appear in court in this and other matters before this court, in addition to misleading the court and delaying the matters. Such conduct is reprehensible.

24. In view of all the foregoing, the court was satisfied that the two Notices of Motion were not only incompetent but also lacking in merit and an abuse of the court process. I will hereby direct further that, for good order the applications filed in the two civil causes on 6/10/2015 be marked as struck out. Ditto the application filed on 19<sup>th</sup> July, 2016 which has been overtaken by events, and which Mr. Leteipa was reluctant to withdraw on 26/10/2016.

Delivered and signed at Naivasha this **4<sup>th</sup>** day of **November, 2016**.

In the presence of:-

N/A for the Applicant

N/A for the Plaintiff

N/A for Defendant

Court Assistant: Barasa

**C. W. MEOLI**

**JUDGE**