



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE 1338 OF 1997**

ZULFIKAR ALI HASSANALLY .....1<sup>ST</sup> PLAINTIFF

NYOTA SERVICE STATION LIMITED.....2<sup>ND</sup> PLAINTIFF

VERSUS

WESTCO KENYA LIMITED.....1<sup>ST</sup> DEFENDANT

MWAI KIBAKI.....2<sup>ND</sup> DEFENDANT

KIBAKI MURIITHI.....3<sup>RD</sup> DEFENDANT

DR. JOHN KABIRU.....4<sup>TH</sup> DEFENDANT

**R U L I N G**

The application before the court for determination is the Notice of Motion dated 21<sup>st</sup> June 2013 seeking the following orders:

1. **That the second Defendant herein, Mwai Kibaki be reinstated as a party in this suit forthwith.**
2. **That the Applicant's cost of this application be provided for.**

The application is supported by the affidavit sworn by Rustam **Hiram** and executor of the estate of the late Abdul Karim Hassanally, the 1<sup>st</sup> Plaintiff.

The application was prosecuted by way of written submissions. The Applicants in their submissions stated that the claim against the Defendants is for Kshs.10,182,496.40, being money lent and advanced during the years 1988 and 1989 at the Defendants' request. The Applicants further stated that the matter could not proceed after the 2<sup>nd</sup> Defendant was appointed as the third President of the Republic of Kenya, as provided for under section 14 (2) of the Repealed Constitution of Kenya.

The Applicant submitted that the court should take judicial notice of article 159(1) of the constitution which states that justice shall not be delayed. The Applicant states that the time frame within which this matter has taken since 1997 should be taken highly into consideration and prays that the matter is not delayed any further.

The Applicant further argues in the submissions that despite the immunity provided under Section 14 (2), the law does not pardon a former President from facing proceedings which had been stayed as a result of

his intervening presidency according to a ruling dated 10<sup>th</sup> April 2003. The Applicants also state that the period of time during which a person holds or exercises the function of the office of the president shall not be taken into account in calculating any prescribed period of limitation for bringing criminal or civil proceedings against a person who becomes the president.

In conclusion the Applicant submitted that the rule of law should be upheld especially the letter and spirit of the provisions of section 14 of the repealed Constitution read with Article 143 of the 2010 Constitution by reinstating the 2<sup>nd</sup> Defendant into the case.

The 2<sup>nd</sup> Defendant on the other hand, submitted that the Plaintiff's case is based on an alleged guarantee given by the Defendants which he denies having ever personally guaranteed the 1<sup>st</sup> Defendant. The proposed 2<sup>nd</sup> Defendant also denied being a party to the alleged guarantee in any way. He submitted that since no guarantee has been produced by the Plaintiff, the existence of the proposed 2<sup>nd</sup> Defendant would not enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit as provided under order 1 Rule 10(2) of the Civil Procedure Rules. On this issue the proposed 2<sup>nd</sup> Defendant relied on the case of **Augustine Kimenteria Nthiga Vs David Ndubi Stower, Civil Case No. 933 of 2002** where the court reiterated the position that it has the power to remove parties improperly joined and to join those who should have been joined but were omitted. The proposed 2<sup>nd</sup> Defendant argued further that the guiding principle in deciding whether to add a party is, whether the presence of that party is necessary to enable the court to effectually and completely adjudicate upon all questions involved in the suit.

Secondly, the 2<sup>nd</sup> Defendant submitted that there is a pending a Chamber Summons application dated 31<sup>st</sup> August 2004 seeking to strike out and dismiss the suit against the 3<sup>rd</sup> and 4<sup>th</sup> Defendant for lack of evidence for personal guarantees from the proposed 2<sup>nd</sup> Defendant , 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The 2<sup>nd</sup> Defendant argues that if the application is heard and determined then there is no need of enjoining the 2<sup>nd</sup> Defendant in this suit. The 2<sup>nd</sup> Defendant urged the court to rule that his application be first heard to avoid further abuse of the court process.

I have carefully considered the submission from both sides. The issue for determination is **whether a party struck out under the provisions of Section 14 (2) of the repealed Constitution now Article 143 (2) of the Constitution 2010, can be re-instated.**

The Applicants case is that the immunity provided under Section 14 of the repealed Constitution does not extend after the term of office expires and the suit can be re-instituted in this case against the proposed 2<sup>nd</sup> Defendant. The Applicant's further argue that the case was filed in 1997 and the same has never been determined for reasons that the 2<sup>nd</sup> Defendant was elected as the President of the Republic of Kenya.

On the other hand, the 2<sup>nd</sup> Defendant case is that the re-institution of the case against him will not enable the court to effectually and completely adjudicate and settle the question of law involved in the suit since there is no evidence that the 2<sup>nd</sup> Defendant personally guaranteed the 1<sup>st</sup> Defendant.

It is common ground that that the suit against the proposed 2<sup>nd</sup> Defendant was struck out by virtue of Section 14(2) of the repealed constitution which is now Article 143 of the Constitution 2010. The relevant provision to this matter is Article 143 (2) which state:

**(2) Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.**

A plain reading of the provision shows that the President is immune from civil proceedings in respect of anything done or not done in exercise of his power under the constitution while in office. In my view, the

president can be sued upon leaving office. The high court in this country has dealt with that issue of the presidential immunity before.

In **Julius Nyarotho v Attorney General & 3 others [2013] eKLR**, the Applicant sought to have the President *made a party in Judicial Review proceedings*. *Gikonyo J held:*

**“.....I take the view that Article 143 of the Constitution protects a sitting President from legal proceedings. The Constitution has however, under sub-article (4) of Article 143, created an exception to the protection offered with regard to legal proceedings against the President for which the President may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity. In other words, except in those exceptions allowed under the law, a sitting President cannot ever be made a party to any legal proceeding in court. Any argument that would suggest a possibility of enjoining a sitting President as a party so that orders of judicial review can issue, to say the least, would be quite blind to the provisions of Article 143 of the Constitution. But it should be understood that the immunity in Article 143 of the Constitution only lasts for the time the President is in office.”**  
(Emphasis mine)

In the same vein in, the court of Appeal in **Otieno Mak’onyango Vs Attorney General & Another [2012] eKLR** the court was faced with the question whether the claim *against the 2<sup>nd</sup> Defendant (Daniel Arap Moi) contravened section 14 (2) of the Constitution of Kenya*. *Rawal J (as she then was) held:*

**“.....I shall also find from the plain interpretation of Sec. 14 (3) of the (repealed) Constitution, that the immunity under Section 14 (2) of the Constitution for the civil liabilities of the President is limited to the tenure of the holder of the post of the President.”**

Similarly, in **Republic Vs Chief Justice of Kenyan & others, Civil No. 764 of 2004**, Nyamu J, as he then was, Held that:-

**“It is clear that the presidential immunity in our constitution does indeed cover both official acts and unofficial acts while the president is in office. The president can be sued for the unofficial acts upon leaving office.”**

In the circumstances of this case the claim against the 2<sup>nd</sup> Defendant was unofficial. The Plaintiffs allege that the 2<sup>nd</sup> Defendant personally guaranteed the 1<sup>st</sup> Defendant money advanced to it by way of a loan. Since the 2<sup>nd</sup> Defendant has vehemently denied the allegation, the issue can only be resolved after hearing all the parties and their witnesses in this case. I therefore find there is a need to revive the case against the 2<sup>nd</sup> Defendant to enable the court to determine the dispute satisfactorily. This application accordingly has merit. It is granted with costs. Orders accordingly.

Dated and delivered at Nairobi this 14<sup>th</sup> day of May, 2015.

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**D A ONYANCHA**

**JUDGE**