



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Civil Case 64 of 1995**

**KENYA COMMERCIAL BANK..... PLAINTIFF**

**VERSUS**

**DAVID GACHUIGA )**

**WASHINGTON NDERITU KARIMI )**

**GICHURU KARIUKI ) ..... DEFENDANT**

**RULING**

Judgment was entered against the 2<sup>nd</sup> defendant on 19<sup>th</sup> July 1996. The second defendant filed an application by way of Chamber Summons dated 29<sup>th</sup> November 1999 praying for stay of execution pending the hearing and determination of that application and for setting aside the judgment entered against the second defendant. The application was filed under Certificate of urgency. The record of proceedings does not show when it was presented before the court, but on 2<sup>nd</sup> December 1999 an order was made in the presence of the applicant's advocate and the respondent's advocate that temporary stay of execution do issue to subsist upto 9<sup>th</sup> February 2000. On 9<sup>th</sup> February 2000 in the presence of the advocate for the plaintiff and second defendant a consent order was recorded in the following terms;-

*“Order - By consent SOG. Stay of execution to remain in force until further orders of this court.”*

The plaintiff has now filed a Notice of motion dated 28<sup>th</sup> January 2008 which is the subject of this ruling. The plaintiff seeks for an order of dismissal of the second defendant's Chamber summons dated 29<sup>th</sup> March 1999 for want of prosecution. Although the prayer seeks the dismissal of the application dated 29<sup>th</sup> March 1999 in the supporting affidavit and the grounds of that application the plaintiff indicates that the application is dated 29<sup>th</sup> November 1999. Throughout the argument of the application it was clear that the parties were referring to the application dated 29<sup>th</sup> November 1999. It does therefore seem that the date in the prayer of the application is an error. The basis for the plaintiff seeking the dismissal of that application is that the second defendant has used that application to frustrate execution against him. It was argued that the second defendant has failed since the consent orders were recorded to fix that application for hearing. That the plaintiff's effort to recover the debt herein by exercising its statutory power of sale has also been unsuccessful because of the existence of the second defendant's application. The application was opposed by the second defendant. In opposing the application the second defendant relied on grounds of opposition. Looking at those grounds it is clear that the second defendant has included facts in those grounds which can only be done in an affidavit. For that reason the court strikes out grounds No. 3, 5 and 6. Ground 1 and 2 talk about the incompetence of the plaintiff's application. In the submission raised by the second defendant there was no indication of why the plaintiff's application is incompetent. Those grounds were therefore not proved. In the 4<sup>th</sup> ground the 2<sup>nd</sup> plaintiff stated that the application was frivolous and vexatious. This ground also the 2<sup>nd</sup> defendant failed to prove. The 7<sup>th</sup> ground was that the application does not meet the requirements of Order XVI rule 5 of the Civil Procedure Rules. It is correct that that order which was relied upon by the plaintiff relates to dismissal of suits for want of prosecution. I am of the view that reliance on that order does not render the plaintiff's

application to be incompetent. The 2<sup>nd</sup> defendant cannot be said to have been misled by reliance on that order to the extent that he did not know the application that he was meeting. It should be noted that the order of the court of 9<sup>th</sup> February 2000 quoted herein bore no relation to the 2<sup>nd</sup> defendant's application dated 29<sup>th</sup> November 1999. If it did the record does not bear that out. That as it may be parties are not entitled to file applications then go to sleep on them. The 2<sup>nd</sup> defendant approached the court in November 1999 with that application on a Certificate of urgency. There is no sufficient reason that was given to the court why the 2<sup>nd</sup> defendant has to date failed to fix the application for hearing. Much of the reason given by the 2<sup>nd</sup> defendant's counsel in submission relied on facts. There being no Replying affidavit such facts cannot be entertained. They simply are evidence from the bar. When parties come to court what they seek is justice. *Justice is defined in the Blacks Law Dictionary as;-*

*"The fair and proper administration of the law."*

It cannot be said to be fair in the administration of the law to allow the 2<sup>nd</sup> defendant's application to remain unprosecuted since November 1999 to date. It does seem that the 2<sup>nd</sup> defendant is mischievous in respect of that application. It was argued by the 2<sup>nd</sup> defendant that the plaintiff's application was Res judicata, in view of this court's ruling dated 18<sup>th</sup> July 2007 by the Hon. Mr. Justice Makhandia. I beg to differ. What was before the learned judge was an application to review the orders of 9<sup>th</sup> February 2000. What is before court the subject of this ruling is the dismissal of the 2<sup>nd</sup> defendant's application dated 29<sup>th</sup> November 1999. As I stated before going by the record that is the proceedings the order by consent made on 9<sup>th</sup> February 2000 had no relation to the application of 29<sup>th</sup> November 1999. It may have influenced the order of that day but that is not apparent from the record. I therefore find that the plaintiff's application is not Res judicata. On the whole the plaintiff's application dated 28<sup>th</sup> January 2008 is merited. I therefore grant the following orders;-

1. *That the 2<sup>nd</sup> defendant's Chamber summons dated 29<sup>th</sup> November 1999 is hereby dismissed for want prosecution.*
2. *That the cost of the application dated 29<sup>th</sup> November 1999 and of the notice of motion dated 28<sup>th</sup> January 2008 are hereby granted to the plaintiff as against the 2<sup>nd</sup> defendant.*

***Dated and delivered at Nyeri this 30<sup>th</sup> June 2008.***

**MARY KASANGO**

**JUDGE**