



**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.....DEFENDANTS**

**R U L I N G**

The applicant, **Kenya Commercial Bank Limited** has taken out this Notice of Motion seeking that this Honourable court be pleased to review the orders of stay of execution made on 9<sup>th</sup> February, 2000 and secondly, that the 2<sup>nd</sup> defendant be ordered to deposit security for costs. The application was premised on the grounds that the defendants had become indolent on orders of stay and that “**the stay encumbers the execution of orders of this court while no efforts of settlement has been made.**”

The application was further supported by the affidavit of one **Anthony Mwangi Ng’ang’a** learned counsel. In the main, counsel deponed that an order of stay of execution was made on 9<sup>th</sup> February, 2000 which was to last until further orders of this court. That since then the respondents and in particular the 2<sup>nd</sup> respondent has not made any effort to prosecute this case nor has he shown any interest in procuring a settlement of the decretal sum. Finally counsel deponed that the stay had encumbered the execution of the decree which is detrimental to the applicant and it is apparent that this is what the defendants all along intended.

The application was opposed. Through **Messrs Wahome Gikonyo & Co. advocates**, the respondents filed grounds of opposition pursuant to the provisions of *Order L rule 6* of the Civil Procedure Rules alleging that the application was misconceived, incompetent, bad in law and an abuse of the process of the court. It was further pointed out that there were no new matters of law or fact that had arisen in the suit and finally that the application was hopelessly belated and made with inordinate delay.

In support of the application, **Mr. Mburu**, learned counsel, orally submitted that since the order of stay was granted, the applicant has been unable to execute the decree. That judgment herein was entered way back on 19<sup>th</sup> July, 1996 and costs assessed by consent on 11<sup>th</sup> April, 1997. That the respondents have not shown any inclination towards prosecuting their case and or application.

In opposing the application, **Mr. Wachira** learned counsel submitted that the application on the face of it was incompetent as it was brought pursuant to *section 3A* of the Civil Procedure Act as if there were no other suitable provisions of the law under which the application could have been made. This was

fatal. In support of this proposition, counsel cited to court the following authorities,

**(i) Mediterranean shipping Co. SA. V International Agriculture Enterprises Ltd & ETCO(MSA) LTD (1990) KLR.183.**

**(ii) Alice Wangari Ndumo V Patrick Ngumi Githae & 2 others, Nyeri HCC Appeal No.28 of 2002 (unreported).**

I note that these authorities are all High Court authorities which are not binding on me. However they are of persuasive value to me only.

**Mr. Wachira** further submitted that since the application was for review there were no new and important matters that had arisen to warrant the instant application.

I have considered and evaluated the arguments that have been advanced by rival camps in favour of and against the application. I think that this application ought to fall on two broad grounds; incompetence and failure to meet the requirements set out under *Order XLIV rule 1* of the Civil Procedure Rules.

It is trite law that inherent jurisdiction of the court should not be invoked where there is a specific statutory provision which would meet the exigencies and or necessities of the case. *Section 3A* which grants this court the inherent jurisdiction should never be invoked by litigants in an application where a specific legislation confers jurisdiction. In the instant case, the application being one for a review of an order made earlier by this court, *Order XLIV Rule (i)* of our Civil Procedure Code automatically comes in to place as it specifically provides for how such an application should be made and the grounds upon which it should be entertained. There was therefore no need for the applicant to invoke the inherent jurisdiction of this court in the application. To do so in the presence of a specific legislation that deals with the matter would in my view render the application fatally incompetent. I am therefore in total agreement with **Justice Okwengu** when she states in the case of **Alice Wangari Ndumo (supra)** that

**“.....It is evident that the appellant erred in seeking reliance on section 3A of the civil procedure Act to bring her application. That section is inappropriate to invoke the inherent powers of the court where there are no specific provisions provided .....in the instant case there are clear provisions dealing with applications for setting aside orders of dismissal. Indeed the appellant cited the provisions which is order 1XB rule of the civil Procedure Rules .....It is evident that the appellant complicated her situation by citing section 3A of the civil Procedure act which was unnecessary. It is the bringing in of this section that rendered her application defective.**

I would adopt the same reasoning and rationale in the circumstances of this application. I would however substitute *order 1XB rule 8* with *order XLIV* as the latter order is cited by the applicant in his application.

For an application for review to succeed, the applicant must bring it within the perimeters set out under *order XLIV rule 1* of the Civil Procedure rules. The perimeters are.

**(i) That the applicant has just discovered new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or**

**(ii) On account of some mistake or error apparent on the face of the record, or**

**(iii) For any other sufficient reason.**

This application does not lie in line with any of the aforesaid preconditions. The mere fact that the applicant has been unable to execute the decree because of the stay order is not a new matter which the applicant has just discovered. Neither can it be claimed that it was not within its knowledge as at the time the order was made. I do not discern any mistake or error apparent on the face of the record pursuant to

the said order. The respondent may have become too comfortable with the order and does not see the need to prosecute the case. If that be the case then the applicant's remedy lies elsewhere rather in the instant application. Indolence therefore cannot be a ground upon which this application ought to be granted, nor can it qualify for any other sufficient reason. That being my view of the matter I think the applicant is underserving of the prayers sought and accordingly the application is dismissed with costs to the respondent.

*Dated and delivered at Nyeri this 18<sup>th</sup> day of July 2007.*

**M.S.A. MAKHANDIA**

**JUDGE**