

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 1504 of 2002

**RICHARD KIPCHIRCHIR TOO.....
PLAINTIFF/RESPONDENT**

VERSUS

**ELLI GERTZ.....
DEFENDANT/APPLICANT**

**JAMES BRESS MUTHEE.....
APPLICANT**

RULING

On 1st December 2005, the advocates on record for the parties herein appeared before me whereupon Mr. Gathaara for the Defendant notified the Court that he had filed an application (Chamber Summons dated 16th November 2005) on behalf of the Defendant herself who previously been represented by an Attorney. Mr. Gathaara informed the Court of his wish to argue the said application at the same time as a previous Chamber Summons dated 2nd March 2005 (filed by the Attorney).

When parties appeared before me again on 2nd February 2006 for the hearing of those two applications Mr. Gathaara sought leave to withdraw the previous Chamber Summons and proceed with the one of 16th November 2005 but the opposing Counsel could hear none of it. Mr. Gathaara also sought to be allowed to amend the second application at ground 7 to read as follows:

“The documentary evidence annexed to the Supporting Affidavit filed herewith were not in the possession of the Applicant James Bress Muthee at the filing of his application to set aside:

instead of:

“The documentary evidence annexed to the Supporting Affidavit filed herewith were not in the possession or knowledge of the Applicant James Bress Muthee at the filing of his application to set aside.”

The Respondents objected to the withdrawal of the application dated 2nd March 2005 and also to the amendment of prayer 7 thus rendering this Ruling necessary. With due respect to Counsel for the Respondent I find such objection unreasonable in view of the fact that the Respondent has filed substantive Grounds of Opposition to the application of 16th November 2006 which challenge the merits thereof. The previous application is basically the same as the one dated 16th November 2005 save only for the prayer for urgency contained in the latter and the fact that both applications are by two different persons. The Replying affidavit of 5th May 2005 was filed to challenge the power of Attorney relied upon by the Applicant therein and his capacity to make the application, which has now been overtaken by events. The withdrawal of the former application is a clear admission of the want for capacity on the part of the purported Attorney. Justice demands that there be an end to litigation and prolonged delays militate against the expeditious disposal of suits. I am of the considered view that parties ought to be more concerned at this stage to have the matter determined on merits once and for all and with speed. I therefore allow the application to withdraw the application of 2nd March 2005 and also the amendment to

prayer 7 of the application dated 16th November 2005. I do order however that costs of the application dated 2nd March 2005 be paid to the Respondents forthwith and in any event not later than 31st March 2006. Should the Respondents wish to file a Supplementary Affidavit as may be necessitated by the amendment, leave is hereby granted to him to do so. Parties will thereafter proceed to take a hearing date for the application dated 16th November 2005 at the Registry.

Dated and delivered in Nairobi this 24th day of March, 2006.

M.G. Mugo

Judge

In the presence of:

Mr. Nyaga h/b for Gathaara for the Applicant

Ms. Wanjiku h/b for Mburu for the Respondent