



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

**Civil Case 2828 of 1996**

**VERONICA MUTHONI KIARIE.....  
..... PLAINTIFF**

**-versus-**

**TERESIA WANJIKU GATATHA.....  
.....DEFENDANT**

**AND**

**KINYUA NDIRANGU**

**WAITHAKA GACHUKI**

**MAINA GATAMA**

**MUIRURI GACHUKI.....OBJECTORS**

**R U L I N G**

The Objectors/Applicants have moved the court by a Chamber Summons application dated the 29th July 2004 seeking, *inter alia*, that execution of an order of this court made on the 28th September 1999 be annulled as against the Objectors. The application is founded on the grounds set out therein and supported by the affidavit of the 1st Objector, Kinyua Ndirangu, made on the 29<sup>th</sup> July 2004.

Before the hearing of the application, and the Plaintiff/Decree Holder/Respondent having filed a replying made on the 24th August 2004, the Respondent took a preliminary point of law on grounds, amongst several others, that the application is incurably defective and incompetent as is more particularly set forth in the Notice of Preliminary Objection dated the 6<sup>th</sup> August 2004, the subject of this Ruling.

In his submissions, Mr. Gitau for the Respondent, urged (*inter alia*) that the application having being filed on the 2nd August 2004, the Objector had failed to comply with the mandatory provisions of order 21 rule 56 of the Civil Procedure Rules requiring the Objectors to take proceedings to establish their claim within ten days of service upon them of the notice of intention to proceed with execution pursuant to the rule aforesaid.

Ms. Guserwa, for the Objectors, while conceding that she may well have failed to file the application within the prescribed period, urged that the court ought to exercise its discretion in favour of the Objectors as an omission on the part of their Advocate should not be visited upon them.

With profound respect to Ms. Guserwa, no such discretion is available to me in the present circumstances. The proper course of action would have been for the Objectors to have moved the court to extend the time within which the application ought to have been filed and the court, if satisfied upon the grounds the application was made, would then have exercised its discretion accordingly and granted the sought.

Finding, as I do, that the application was, in fact, filed out of time and further that the Objectors would also appear to have failed to comply with the provisions of sub-rule (2) of rule 57 of the order aforesaid,

there is, in effect, no competent application before me and I therefore uphold the preliminary objection of the Respondent on this ground. Having so held, there is no reason for me to consider the other grounds set out in the Notice.

Consequently, it is ordered that the Chamber Summons application dated the 29th July 2004 be and is hereby struck out with costs to the Plaintiff/Decree Holder/Respondent.

Dated and delivered at Nairobi this Thirteenth day of October 2004.

P Kihara Kariuki

Ag. Judge