



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 277 OF 2009

SIRBROOK (K) LIMITED.....PLAINTIFF

VERSUS

NAKURU INDUSTRIES LIMITED.....1ST DEFENDANT

DIRECT O. SERVICES.....2ND DEFENDANT

RULING

1. This Ruling relates to a Chamber Summons dated and filed on 2nd January 2014 (*the Application*) in which the First Defendant seeks a review of my Ruling delivered on 17th December, 2013.
2. The Application is supported by the Affidavit of Raj Shah the Managing Director of the First Defendant (*Applicant*) and the grounds on the face of it, and in particular grounds numbered K, M, N and O respectively which purport to set out errors on the face of the record, and which errors should be reviewed and reversed.
3. The Application was however opposed by the Replying Affidavit of Amritlal Motichand Shah, the Plaintiffs Managing Director sworn on 17th January 2014 and filed on 20th January 2014.
4. Under the former Order XLIV rule 1(1) of the Civil Procedure Rules, (now reproduced under Order 45 rule 1(1) of the Civil Procedure Rules 2010), there are three grounds upon which a review may be sought, and these are -
 - (1) where there is new and important evidence which after the exercise of due diligence was not within the knowledge of an applicant as the decree or order was passed or made;
 - (2) that there is a mistake or error on the face of the record, and
 - (3) for any other sufficient reason,
 - (4) the application has been made without undue or inordinate delay.
5. The Applicant does not rely on discovery of any new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant at the time when the decree was passed. The applicant's case is that there are errors apparent on the face of the record which it desires that should not be corrected, but rather "reversed", replaced with appropriate orders. These orders include -
 - (1) the order of payment into court of Ksh 4,152,000/= (ground K),

(2) promotion of unity between the Applicant and Respondent (ground L),

(3) absence of jurisdiction (ground M),

(4) observation that the application was made in bad faith and the ground of stay, notwithstanding the comment (ground N),

(5) the order of stay (notwithstanding the non-compliance with earlier orders- (ground O).

6. I have considered these grounds, and apart from ground M (lack of jurisdiction), the other grounds and indeed the entire tenor of the application are an acerbic and intemperate criticism of the Ruling, which by their very nature, can only be dealt by an appellate, and not the trial court. So I decline to answer them, and will deal with the question of jurisdiction to grant a stay.

7. A proper reading of Order 42 rule 6(1) shows that the jurisdiction to order a stay is dual, it is conferred upon both this court, and the Court of Appeal. This court, as the trial court, may order a stay, and if it is denied, an applicant is at liberty to apply to the Court of Appeal. It is not correct that this court had no jurisdiction to order a stay.

8. The criticism that this court took three months to render reasons for granting a stay is well taken. With all the Petitions which had to be completed within 6 months of the General Elections, all other matters were put to the back burner. The three months of delay, were within that period.

9. On the competence of the application, a great many counsel have thrown caution to the wind and treat procedural law as if it was no law at all. I do not think that the oxygen provisions of Sections 1 A and 1 B of the Civil Procedure Act, or Article 159(d) of the Constitution abolished Civil Procedure Rules, the hand maidens of justice. So where the Rules provide for a particular procedure to be followed it should be followed. The review of a judgment of a Ruling is a substantive issue that is why the Rules provide for the manner in which the court should be moved by a Notice of Motion, and not a Summons of parties. The discretion to deal with the matter substantively and not technically is that of the court, not the parties or their Advocates. The Applicants Chamber Summons for review was not in accord with the Order 51 rule 1 of the Civil Procedure Rules 2010- all applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.

11. Order 45 does not provide for any other method for making applications for review. The Applicant's Chamber Summons dated and filed on 2.01.2014 was to that extent incompetent and should be dismissed on that ground alone.

12. It is however dismissed with costs on the other substantive ground that, there are no errors on the face of the record, but rather observations and orders with which the Applicant and indeed the Respondent do not appear to agree with. Since these were my expressed views and orders, I cannot act as Judge of myself and reverse them. They are not errors. The Applicant's remedy is an appeal, not review.

13. For those reasons, the Applicant's Chamber Summons dated and filed on 2.01.2014 is dismissed with costs.

14. It is so ordered.

Dated, signed and delivered at Nakuru this 28th day of March, 2014

M J ANYARA EMUKULE

JUDGE