



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE 249 OF 2006**

**BULK MEDICALS LIMITED (IN RECEIVERSHIP) ..... PLAINTIFF**

**VERSUS**

**PARAMOUNT UNIVERSAL BANK LTD ..... 1<sup>ST</sup> DEFENDANT**

**HARVEEN GADHOKE ..... 2<sup>ND</sup> DEFENDANT**

**DANIEL NDONYE ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

The Application before the court is brought by a Chamber Summons dated 16<sup>th</sup> November, 2009 and taken out under the provisions of **Sections 1A and 1B** of the **Civil Procedure Act, Order XXV Rule 5(1)** of the **Civil Procedure Rules** and all other enabling provisions of the law. By the application, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants apply for the following orders-

1. **That the suit filed by the plaintiff against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be dismissed**
2. **That the costs of the suit and this application be the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' in any event.**

The application is supported by the annexed affidavit of Allen Waiyaki Gichuhi, the Advocate having the conduct of this matter on behalf of the Applicants. It is also based on the grounds that-

- (a) **This honourable court on 18<sup>th</sup> March, 2009 ruled that the Plaintiff furnish security for costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the sum of Kshs. 2,500,000.00**
- (b) **It was ordered that the said sum of Kshs. 2,500,000.00 be deposited in a joint interest earning account in a reputable bank in the names of the counsels for the Plaintiff and for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants within thirty (30) days of the Ruling.**
- (c) **To date, the Plaintiff has not opened a joint account in the names of the counsels as ordered by the court, in non-compliance with the Ruling of the Court and has not invited the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to do the same.**
- (d) **The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have been exposed to colossal costs on a sham claim and it is in the interest of justice to have the suit struck out for non-compliance with the court's ruling as it is not fair and just for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to suffer any loss on account of costs brought about**

**by the present suit.**

**(e) The application should be allowed as prayed.**

In opposition to the application, the Plaintiff filed a replying affidavit sworn on 27<sup>th</sup> May, 2010 by Hitan C. Majevedia, the managing director of the Plaintiff Company (under Receivership). The thrust of the Respondent's case is that the Plaintiff/Respondent was aggrieved by the order for the Plaintiff to deposit Kshs. 4 Million within a month and had lodged an appeal in the Court of Appeal and also sought an injunction under **Rule 5(2) (b)** of the Court of Appeal Rules. The Plaintiff had also filed an application in this court seeking stay pending appeal but that application had been dismissed. The application in the Court of Appeal is yet to be fixed for hearing, and in the Appeal the Plaintiff prays that the order for payment of security for costs be vacated.

The respective parties filed written submissions. The Applicants contend that an appeal does not operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order. They submitted that **Order 41 Rule 4(1)** of the (old) **Civil Procedure Rules** (now replaced by **Order 42 Rule 6(1)**) cannot come to the Plaintiff/Respondent's aid as the Plaintiff confirmed that it refused to obey court orders to furnish security. They also referred to **Order XXV Rule 5(1)** of the (old) **Civil Procedure Rules** which makes it mandatory for the court to dismiss a suit for failure to furnish security.

The main artery in the Plaintiff's/Respondent's submission was that the receivership had a crippling effect on the business operations of the Plaintiff, leading to the filing of this suit. The logical consequence of the state of affairs was that the company had no funds to comply with the court orders.

After considering the application and the written submissions, I note that **Order XXV Rule 5(1)** of the (old) **Civil Procedure Rules** (now **Order 26**) is couched in mandatory terms. It states that-

**“5(1) If security for costs is not given within the time ordered and if the Plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit.”**

In the instant suit, the Plaintiff was given 30 days with effect from 18<sup>th</sup> March, 2009 within which to furnish security. That was never done, thereby disobeying the court order. Court orders must be honoured in observance and never in breach. By its failure to obey the order to deposit security for costs, the Plaintiff invited upon itself the wrath of **Order XXV Rule 5(1)**. Since that rule does not accord the court any discretion, I hereby order that this suit be and is hereby dismissed with costs. The Plaintiff will also bear the costs of this application.

Orders accordingly.

**DATED and DELIVERED at NAIROBI** this 19<sup>th</sup> day of July, 2012.

**L. NJAGI**  
**JUDGE**