



**REPUBLIC OF KENYA**

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

**Civil Appeal 349 of 2005**

**KABIR SHAMJI t/a EUROPA SUIT SHOP..... APPELLANT**

**VERSUS**

**SIR HENRY'S LIMITED.....RESPONDENT**

**RULING**

The Notice of Motion herein, under Order 44 r.1 of the Civil Procedure Rules and S.3A of Cap. 21, dated 7/7/06 seeks:

**1.....}**

**2.....} Already spent**

3. Review of this court's Ruling dated 25/7/06, which dismissed the application dated 25/5/05.

4. Costs of this application.

Supported by Kabir Shamji's Affidavit, the application is on the grounds, **inter alia**, that:-

(i) There is an error apparent on the face of the Record since the Ruling and order of 20/3/06 had granted the application dated 25/5/05 and reserved the reasons for 25/6/06.

(ii) That subsequently, a Ruling and order was delivered on 25/7/06, dismissing the application.

(iii) The order of 20/3/06 has not been reviewed or set aside.

(iv) The ruling and order dated 25/7/06 is contradictory to the order of 20/3/06 since it dismissed the application dated 25/5/05 which had earlier been granted by the court.

(v) Applicant stands to suffer substantial loss should the Respondent proceed with execution and his intended appeal and this application would be rendered nugatory unless stay is granted as prayed for herein.

In opposition, the Respondents aver, **inter alia**, that:

a) On 20/3/06 this court was heard to give a temporary stay, pending the delivery of a Ruling in the matter, and not pending appeal;

- b) The subsequent Ruling in which the court dismissed the appellant's application was well thought out and contains no contradictions at all.
- c) The appellant, in his affidavit dated 25/5/05, particularly paragraph 7(b), admits that he owes the Respondent the amount claimed;
- d) The court ought to stick to the letter of the Ruling, in accordance with the provisions of Order 20 r. 3 (3) of the Civil Procedure Rules. In fact the court cannot change the Ruling.

After careful perusal of the pleadings herein, and considering the submissions by learned counsel for both sides, I have reached the following findings and conclusions.

The relevant part of the provisions of Order 44 rule 1 of the Civil Procedure Rules, under which this application for review is brought, reads as follows:

**“Any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred.....and who....on account of some mistake or error apparent on the face of the record.....desires to obtain a Review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.”**

The order sought to be reviewed is dated 25/7/06, and this application is dated, and filed, on 7/8/06. The tenet of timeliness is thus met by the applicant.

On 20/3/06, this court, upon hearing the application dated 25/5/05, and considering the submissions by the two learned counsels for both sides, ruled as follows:

- 1 “.....**This court grants stay of execution pending appeal.**
- 2 **The court will give its reasons on 25/6/06 at 3p.m.”**

From the foregoing, it is beyond any dispute that the Ruling and the final determination of the application for stay, dated 25/5/05, was sealed in the Ruling dated 20/3/06. What was left, and reserved for the 25.6.06, were the reasons for the grant of the stay of execution, pending appeal, NOT whether to grant or not to grant the stay order.

The above is the case for the applicant/appellant herein.

At the other end of the scale, it is the Respondent's contention that the court's Ruling, giving the reasons, is so detailed that, the decision to dismiss the application for stay of execution, pending appeal, was correctly arrived at. This is borne out by the court's examination and analysis, at pages 2 to 3, where it is clear that an applicant for a stay of execution order, must meet all the tenets of order 41 Rule 4 of the Civil Procedure Rules.

Order 41 rule 4(2) of the Civil Procedure Rules, under which the stay application, dated 25/5/05, was brought, provides:

**“No order for stay of execution shall be made....unless the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and such security as the court orders for the due performance of such decree as may ultimately be binding on him has been given by the applicant.”**

In this court's Ruling, giving reasons, on 25/7/06, it is clear that the appellant/applicant had not met the tenet of substantial loss, and as this court has consistently held, **all the four tenets** of Order 41 rule 4(2) of the Civil Procedure Rules, **not one**, or **some**, must be met, as a condition precedent to a grant of a stay of execution order, pending appeal.

On the basis of the foregoing, the application herein, for Review, is dismissed with no orders as to costs. Not because the court cannot change its Ruling, or any of its Rulings or orders. But because under Section 99 of the Civil Procedure Act, Cap. 21, Laws of Kenya, it is provided as under;

**“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of the parties.”**

From my reading of the two apparently conflicting rulings and orders, it is clear that there is in the unreasoned, ruling of 20/3/06, an omission of the words **does not** before **court grants**. Failure to make such a correction would lead to the Ruling of 20/3/06 flying against the provisions of Order 41 rule 4 (2) of the Civil Procedure Rules, as well as the countless authorities of this court, and, those of the Court of Appeal, on the point of meeting all the conditions of Order 41 rule 4(2).

All in all therefore, the application for Review herein, is dismissed, with no order as to costs due to the circumstances surrounding this application and by invoking the provisions of the proviso to Section 27(1) of the Civil Procedure Act, Cap. 21, Laws of Kenya.

**DATED and delivered in Nairobi, this 22<sup>nd</sup> day of February, 2007.**

**O.K. MUTUNGI**

**JUDGE**