



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 332 OF 2005**

**RIDGE MOUNT HOLDINGS.....PLANTIF**

**-VS-**

**TELEPOSTA PENSION SCHEME..... 1ST DEFENDANT**

**JOHN WAWERU.....2ND DEFENDANT**

**DAVIDSON KAMAU.....3RD DEFENDANT**

**BENSON OKWARO.....4TH DEFENDANT**

**ELIUD NDEGWA.....5TH DEFENDANT**

**JOSEPHINE OWIYO.....6TH DEFENDANT**

**X SHINGIRA..... 7TH DEFENDANT**

**MS KHADIJA MIRE..... 8TH DEFENDANT**

**LLOYED MASIKA LIMITED..... 9TH DEFENDANT**

**SANNEX ENTERPRISES..... 1 0TH DEFENDANT**

**RULING**

By a notice of motion dated 9th December, 2005, the defendants in this matter filed an application for orders that, inter alia, this court be pleased to discharge, vary and/or set aside the orders of injunction that are in force herein. To this application, the plaintiff filed a preliminary objection on the ground that the application offends the mandatory provisions of O.L. rule 15(2) of the Civil Procedure Rules and that the same is fatally defective, hence incurable. It was this preliminary objection which came for argument before me on 24th January, 2006.

At the hearing thereof, Mr. Musyoka-Annan appeared for the objector while Mr. Khayega appeared for the respondent. Mr. Musyoka-Annan referred to O.L. rule 15(2), which sets out the words which should be stated at the foot of every motion and chamber summons. He argued that those words did not appear at the foot of the notice of motion dated 9th December, 2005, and submitted that the omission was

fatal since the requirement for the inclusion of those words was mandatory. He referred the court to **PRIME BANK LIMITED v. SHREEJI TRANSPORTERS (1990) LIMITED & ANOR.** (Milimani) HCCC No.118 of 2001 in which the court struck out an application for failing to abide by the mandatory dictates of O.L. rule 15(2).

Opposing the application, Mr. Khayega for the respondent submitted that Rules of procedure are supposed to guide the court in administering justice, and that the mischief which was intended to be addressed by the requirement of O.L. rule 15(2) was that a party who is served and fails to attend is forewarned of the consequences of non-attendance. He further submitted that a party who is served and then attends cannot raise an objection that the application served on him did not notify him of the consequences of failure to attend. Secondly, he argued that before the court can determine whether failure to comply is fatal, it should be established that the party who has been served with such a notice has been prejudiced. No such prejudice has been demonstrated in the instant matter. Mr. Khayega then referred to **CASTELINO v. RODRIGUES [1972] E.A 223** as an authority for the proposition that irregularities of form may be ignored, but where there is prejudice they may be cured by amendment. He urged the court to dismiss the preliminary objection and determine the application on merit.

In reply, Mr. Musyoka-Annan submitted that rules are there to be followed otherwise it would be a mockery to have them in the first place. There has been no effort to amend in order to comply with a mandatory requirement. It is not denied that the Rule was not complied with and this renders the notice of motion fatally defective and it should be struck out.

I have considered the rival submissions of counsel and the respective authorities cited in support thereof. O.L. rule 15(2) is in the following words-

**"Every motion and summons shall bear at the foot the following words-**

**If any party served does not appear at the time and place abovementioned such order will be made and proceedings taken as the court may think just and expedient."**

Inasmuch as the language employed in this rule is that every motion and summons shall bear the stated words, the use of the word "shall" makes it mandatory that this provision be honoured in observance. There is no dispute that in the instant matter, they have not been so honoured. Instead, they have been breached. Following in the footsteps of Justice Emukule in **PRIME BANK LIMITED v. SHREEJI TRANSPORTERS (1990) LIMITED,** (Milimani) HCCC No. 118 of 2001, I find that failure to abide by mandatory rules of procedure renders an application incompetent. Such an application ought to suffer only one fate i.e. to be struck out.

Having said that, I am also mindful of the stance taken by the Court of Appeal for Eastern Africa in **CASTELINO v. RODRIGUES.** [1972] E.A. 223. In that case, the said Court of Appeal was of the view that where an irregularity is innocuous, it may be ignored; but where it is prejudicial to the other side, it may be amended. Delivering the considered judgment of the court, spry, V.P., said at p.226-

**"Of course, rules are made to be observed, but irregularities of form may be ignored or cured by amendment when they have occasioned no prejudice."**

In my view, every case should be considered on its own merits. The nature of the matter raised in the application which is sought to be struck out is such that if the application is not heard and determined on its merits, there is a likelihood that greater injustice might result. The duty of the court is to do justice to all the parties.

In the circumstances of this matter, I don't think that the objector has been prejudiced in any way. In order, however, to ensure that the spirit of the law is appeased by due compliance at this interlocutory

stage, defendant is hereby granted leave to file and serve an amended application within 7 days from today. The defendant will meet the costs of the preliminary objection in any event. It is so ordered.

Dated and delivered at Nairobi this 14th day of February, 2006

**L. NJAGI**

**JUDGE**