



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Misc Civ Appli 231 of 2005**

**LEISURE LODGES LIMITED ..... APPLICANT**

**- Versus -**

**DR. LALIT D. KOTAK ..... RESPONDENT**

**Coram: Before: Hon. Justice Mwera  
Kibe for Applicant  
Asige for Respondent  
Court clerk –Kazungu**

**R U L I N G**

Before Mr. Kibe concluded his submission in support of the contempt proceedings herein against Dr. Kotak, the respondent, it transpired that he had annexed the court's order of 16/12/2003 as the one which the respondent had ignored to obey (see appendix to JKM 8). The correct order ought to have been that that was issued by the undersigned on 24/2/2005 granting a stay pending appeal and in essence reinstating an injunction order.

What took place at this juncture is that Mr. Kibe sought this court's leave to allow him by affidavit to bring in the present application the order following the ruling of 24/2/2005 in place that of 16/12/2003. He said that all this was by error or inadvertence and the court should grant that leave.

Mr. Asige resisted that application on the basis that there is no legal provision allowing for such a move in such proceedings and that the applicant should argue and head to the end of its submission strictly on the basis of the affidavit(s) plus annexures as per the notice of motion dated 3/5/2005 under review.

It is not in dispute that that application was brought under Section 5 Judicature Act (cap 8) and O.52 of the Supreme Court Practice of England. It is not the issue here as to why after forty years of independence and in the light of the developments in law in the U.K. and here, Kenya still has to follow the practice in the U.K. nonetheless due regard has been had before and now to that O.52 Supreme Court Practice Rules (above). In the White Book Service 2003 that Order is titled:

**COMMITTAL**

Going over this provision of law the court's eye fell on the following extracts which it considers relevant in the present circumstances regarding the Form of order for committal (para 52.1.4). It reads in part:

“Recent authorities ... give a court the power to rectify procedural defects both in the procedure leading up to the making of the order and after it has been made. That discretion must be exercised so as to best reflect the requirements of justice. The court must not only

take into account the interests of the contemnor but also the interests of the other parties and the interests of up-holding the reputation of civil justice in general ...

The court itself has a substantial interest in seeing that its orders are upheld. If orders are set aside on purely technical grounds this will undermine the system of justice and the credibility of court orders. As long as the order made by the judge is valid, the approach of the court will be to uphold the order in absence of any prejudice or injustice to the contemnor.”

The at paragraph 52.3.2 it is added that:

“The court has a complete discretion ... to perfect an invalid order in a contempt case ... to do justice.”

Further on under Practice Direction – Committal Applications it was noted that:

“... an amendment to the application notice can be made with the permission of the court but not otherwise.”

Having the foregoing in view, this court is minded to allow the applicant to rectify its application by bringing up, by an affidavit to be filed and served, the correct order following the ruling of 24/2/2005 which the respondent has allegedly refused or ignored to obey. It is in the interests of justice to do so and the respondent will not be prejudiced at all.

In any case it was submitted but not denied that that order was served on the respondent along with a copy of the application for leave to bring these proceedings. And most of all the respondent has not put forth any authority in law, practice or case barring amending a notice of motion as the applicant seeks to do here. In the sum the applicant is allowed to bring into the application the correct order following the ruling of 24/2/2005 in the next 5 days whereupon further dates will be set to complete the discourse herein.

Orders accordingly.

Delivered on 7th September 2005.

**J.W. MWERA**

**JUDGE**