



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1829 OF 1999

SHAH HARJI MANEK LTD. PLAINTIFF

VERSUS

AMRATLAL STORES LIMITED 1ST DEFENDANT

BAMBI AGENCIES LIMITED 2ND DEFENDANT

HARISH DEVANI 3RD DEFENDANT

RULING

On 29.1.2000 the defendants who are judgment debtors in this case lodged a Notice of Motion application under a certificate of urgency pursuant to O. XLII Rule 1 O. XLI Rule 4 of the Civil Procedure Rules for two substantive orders namely:-

- (a) That they be granted leave to appeal against the judgement entered against them on 17.1.2001; and
- (b) That execution of the decree passed against them be stayed pending the filing, hearing and determination of an appeal against the decision intended to be preferred to the Court of Appeal.

When the application came up for hearing on 30.1.2001 before me, Mr. Wamalwa for the plaintiff who is the decree holder in the suit raised a preliminary objection in which he contended that the application was improperly before the court and therefore incompetent for two reasons.

The first reason was that an application under O. XLI rule 4 was required to be brought by Chamber Summons and not by Notice of Motion. In advancing this reason, learned counsel for the plaintiff/decreed holder overlooked one fact namely that the application was under two rules namely O. XLI rule 4 and O. XLII Rule 1. As correctly observed by Mr. Wamalwa, O. XLII rule 1 provided that an application for leave to appeal shall be by summons. However O. XLI rule 4 does not make provision for the mode of making an application under the rule. The effect of that omission is that O. L rule 1 applies and the application has to be made by Notice of Motion.

In the case of Johnson Joshua Kinyanjui & Another V. Rachel Wahito Thande & Others (Court of Appeal, Civil Appeal No. 284 of 1997), it was held:-

“If an application is brought under different rules, one calling for a notice of motion application and another calling for a chamber summons application then the party applying has a choice to use a notice of motion procedure.”

In view of that decision, I find that the applicants were entitled to bring the application by way of

Notice of Motion.

The second objection was based on the claim that the application for stay pending appeal was premature on account of the same having been made before a notice of appeal had been lodged. Although I agree with Mr. Wamalwa that Rule 4 of O. XLI envisages the filing of an appeal before any application under the rule can be made, there is in my view nothing in O. XLI barring an interested party from the making of a formal application for stay of execution before the filing of an appeal. If a party can make an oral application for stay of execution before filing an appeal, I cannot see no logic in barring him from making a similar application in a formal manner. In the absence of a binding authority on the matter, I would not be prepared to support such an argument.

For the above reasons, I find the preliminary objection misconceived and I overrule it with costs.

Dated at Nairobi this 5th day of February, 2001.

T. MBALUTO

JUDGE