



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
CIVIL APPEAL NO. E061 OF 2021

**HAMISI SAIDI RANZUGA.....APPELLANT/APPLICANT**

**VERSUS**

**MLONGO KUTO .....RESPONDENT**

**RULING**

1. The application for consideration before this court is the Appellant's **Notice of Motion** dated **27<sup>th</sup> April, 2021**. The same is brought under **Sections 1A, 1B and 3A and 65**, all of the **Civil Procedure Act** and **Order 42 and 51**, both of the **Civil Procedure Rules** and enabling provisions of the law. By the Application, the Appellant/Applicant seeks the following orders: -

**1. Spent;**

**2. That this Honourable Court be pleased to order a stay of execution of the orders made on the 7<sup>th</sup> of April 2021 pending the hearing and final determination of the Applicant's Appeal;**

**3. Spent;**

**4. Spent;**

**5. That the costs of this application be provided for.**

2. The **Motion** is supported by the grounds presented on its body and the Affidavit of **Hamisi Saidi Ranzuga**, the Appellant/Applicant. He averred that on the **25<sup>th</sup> September, 2019**, Judgment was entered in **Kwale CMCC No.453 of 2018** wherein he was ordered to pay the Respondent the decretal sum of **Kshs.294,070/=** plus costs of the suit.

3. **Mr. Hamisi** depones that he filed an application to set aside the Judgment delivered on **25<sup>th</sup> September, 2019**. It was stated that he was not served to appear before the trial court, but only became aware of the suit when he was served with the Proclamation and Warrant of Attachments.

4. He averred that his application to set aside the judgment, was heard and was dismissed by the trial court vide a Ruling delivered on **7<sup>th</sup> April, 2021** to that effect.

5. The Appellant/Applicant stated that being aggrieved and dissatisfied with the Ruling delivered **7<sup>th</sup> April, 2021**, he instructed his Advocates to Appeal the said decision. A Notice of Appeal was filed to that effect on the **28<sup>th</sup> April, 2021**.

6. **Mr. Hamisi** averred that he is apprehensive that if the decretal amount is paid to the Respondent, the Respondent would be in no position to refund the same if the intended Appeal is successful.

7. He also averred that unless stay pending the hearing and determination of the intended appeal is granted, the Respondent will move to enforce the Judgment delivered on **25<sup>th</sup> September, 2019**, and render the appeal nugatory and he will suffer irreparable loss and damage that cannot be compensated by costs.

8. The Application was opposed vide a **Replying Affidavit** sworn on **4<sup>th</sup> May, 2021** by **Kariuki Gathuthi, Counsel for the Respondent**. He averred that the Appellant/Applicant had filed a similar application before the Senior Principal Magistrate Court at Kwale and it was

dismissed for being a non-starter.

9. He stated that the application herein is an attempt to mislead the court as the Appellant/Applicant confirmed that he was served with pleadings and forwarded the same to his insurance of choice, Invesco Insurance Company Limited.

10. It was deponed that the Appellant herein in his indolence never entered appearance nor defended his right. That he filed the application to set aside the Judgment one (1) year later and only after he was served with Proclamation and Warrant of Attachment.

11. Mr. Kariuki deponed that the Appellant/Applicant has previously issued cheques for the settlement of the judgment, although faulty, the cheque shows that they had no intention of set aside the said Judgment.

12. According to the Respondent, litigation must come to an end and the Respondent allowed to enjoy the fruits of his Judgment. Lastly, he depones that the application herein is made in bad faith, is an abuse of the court process and should be dismissed with costs to the Respondent.

13. Despite the various directions from this court that parties file written submissions in canvassing the application, they did not do so. Instead, the Respondent indicated to Court that he would rely on his Reply as filed.

#### **ANALYSIS AND DETERMINATION**

14. Having considered all the pleadings by the parties, I find the issue that arises for determination is whether this court can issue stay of execution of the **Ruling** and **Orders** granted on **7<sup>th</sup> April, 2021** pending the hearing and determination of the intended Appeal.

15. **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** specifies the circumstances under which the court may order Stay of Execution of a Decree or Order pending an Appeal. It provides that an Applicant must demonstrate the following: -

**a. Substantial loss may result to the applicant unless the order**

**“...The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only...”**

22. In light of the above authorities, there is nothing to stay in the present matter and the application dated **17<sup>th</sup> April, 2021** is hereby dismissed.

23. Each party to bear their own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29<sup>TH</sup> DAY OF JUNE, 2021**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

**Mr. Oyas counsel for Appellant/Applicant**

**No appearance for and by Respondent**

**Court Assistant - Bancy**