



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO.E059 OF 2021**

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

**VERSUS**

**CHIRUNGA DZOMBO.....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 has averred that a Judgment was entered in **Kwale CMCC No.441 of 2018** wherein he was ordered to pay the Respondent the decretal sum of **Kshs.292, 570/=** plus costs of the suit.

3. **Mr. Hamisi** has deponed that he filed an application to set aside the said Judgment. It has been stated that he was never served to appear before the trial court, and he only became aware of the suit when he was served with Proclamation and Warrant of Attachment.

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

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

6. **Mr. Hamisi** has 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 and render the appeal nugatory hence he will suffer irreparable loss and damage that cannot be compensated by way of damages.

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 has averred that the Appellant/Applicant filed a similar application before the Senior Principal Magistrate Court at Kwale and it was dismissed for being a non-starter.

9. He has 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 has deponed that in his indolence the Appellant herein never entered appearance nor defended their rights and only filed the application to set aside the judgment one (1) year later and the same was only done after he was served with Proclamation and Warrant of Attachment.

11. Mr. Kariuki has deponed that the Appellant/Applicant has previously issued cheques for the settlement of the Judgment, although faulty, which cheques show 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 has deponed 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, he did not do so. Instead the Respondent indicated to Court that he intended to 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**