



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 91 OF 2013

(Being an appeal from the Judgment of Hon. E. K. Usui in Kwale PMCC NO. 89 of 2011 delivered on 25th July, 2013)

TOM OWITI APPELLANT

V E R S U S

GUILDERBERTO CUTURI RESPONDENT

RULING

1. Appellant seeks stay of execution of the judgment of SRMCC Kwale being **Civil Case No. 89 of 2011**. That judgment was entered exparte in default of an appearance of the Appellant.
2. Appellant filed an application before the Kwale Magistrate's Court seeking to set aside that judgment which application was dismissed on 25th July 2013. It is clear for both the Respondents and Appellants affidavit that the application was dismissed following the Appellant's or his Counsel's failure to attend Court on the date of hearing.
3. That dismissal is the subject of this appeal. The Appellant strangely by his Notice of Motion dated 5th August 2013 seeks stay of the order of the Kwale Magistrate's Court issued on 7th August 2013. From the Appellant's own exhibits attached to its Motion before this Court it would seem that the Order issued by the Kwale Magistrate's Court on 7th August 2013 was the order that dismissed his application to set aside the exparte judgment.

That dismissal was a negative order incapable of being stayed. Even if it is stayed it will not reinstate the Appellant's application to set aside the exparte judgment of the Kwale Magistrate's Court. The fact that a negative order is incapable of being stayed has been interrogated by Courts. In the case **MUNICIPAL COUNCIL OF MOMBASA -VS- SUMMIT COVE LINES COMP. LTD CIVIL APPL. NO. NAI 26 OF 2011** it was stated-

“The order of 4th February, 2011 dismissing the application to stay or discharge the

order of 31st January 2011 was a negative order which is not capable of being stayed.”

Also in the case of ANDREW OUKO -VS- KENYA COMMERCIAL BANK LTD & 3 OTHERS NAIROBI HCCC NO. 558 OF 2004 the Court stated-

“As their Lordship said in the case of VENTURE CAPITAL & CREDIT LIMITED – VS- CONSOLIDATED BANK OF KENYA CIVIL APP. NO. NAI. 349 OF 2003 (UR), “the prayer for order of stay of execution of the ruling is misconceived as the learned Judge never made any positive order in favour of the Respondent which is capable of execution. Rather, the learned Judge merely dismissed the application for interlocutory injunction with the result that neither party was given any interlocutory relief.”

Similarly, in the case EXCLUSIVE ESTATE LTD -VS- KENYA POST AND TELECOMMUNICATION & ANOTHER (2005)I E.A. 53 the Court stated-

“The order which dismissed the suit was a negative order which is not capable of execution.”

4. On that basis alone the Notice of Motion dated 5th August 2013 is misconceived and is dismissed with costs to the Respondent.

Dated and delivered at Mombasa this 31st day of October, 2013.

MARY KASANGO

JUDGE