



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 95 OF 2003**

**MOHAMED BANDARI.....**  
**.....PETITIONER**

**VERSUS**

**ABDUL MOHAMED AHAMED.....**  
**RESPONDENT**

**R U L I N G**

The defendant has moved under O.50 r 1, O 41 r 4 Civil Procedure Rules and S. 3A Civil Procedure Act as per the application dated 16.9.03. It is therein sought that this court considers to grant him a stay of execution in Mombasa RMCC No.304/03.

The court was told and has gleaned from the affidavits and annexures here that the present respondent (plaintiff in the lower court) filed a suit and got a default judgment in absence of filing a defence. The claimed sum of Sh.90,000/- was given in the said judgment and on 14.3.03 that respondent notified the applicant herein (the defendant in the lower court) of the judgment and demanded for a total sum of Sh.118,290/- to be paid in that regard. That on 31.3.03 or thereabout the applicant filed a chamber summons in the lower court to set aside the said ex parte judgment and desired that his draft defence be deemed duly filed and served. The applicant swore an affidavit in support of his application which shall be reverted to presently in pertinent parts. That that application was heard and dismissed, and that that determination having displeased the applicant he has filed the present appeal. But he asks for stay of execution of the ex parte judgment.

That application to set aside in the lower court included a ground that the parties had agreed to settle the claim out of court and as such the applicant did not have reasonable time to file necessary (defence) papers. Mr. Murima posited that their appeal was arguable and that the intended defence raised triable issues. That the applicant stood to be thrown in civil jail for up to 6 months because the respondent had taken out a notice to show cause. And that the applicant is ready to give as security for due performance Sh.10,000/-.

Mr. Mutubia argued the grounds of opposition to the effect that this application was misconceived, incompetent etc. That the applicant had admitted being in-debted and that in any case he was properly served with due papers at every stage and he had no reason for failure to file his defence. That the applicant's intended appeal therefore had no chance of succeeding and no substantial loss, in case stay orders were not granted, was demonstrated. That the offer of security (Sh.10,000/-) from the bar, was inadequate. The respondent could only listen to orders here being granted if the applicant paid in court or in a joint income-earning account the whole decretal sum and also that the stay did not go beyond 4 months.

The court heard both sides and went over the pleadings, affidavits and annexures on this matter.

While the plaint averred that the sum of Sh.90,000/- was advanced to the applicant at his own request and he had failed to repay it, the draft defence in the main states inter alia that:

*“3. The defendant states that the alleged KSh.100,000/ - ---- was advanced to him in installments and that the payments of KSh.10,000/ - was made purely on a without prejudice basis.”*

This intended defence must be read in the light of other material put on record by the applicant. For this, read two paragraphs in the applicant’s affidavit in support of his application to set aside the ex parte judgment in the lower court:

*“2. That the plaintiff used to forward to me some money in bits for safe -keeping on an understanding that I can use the money for whatever project I deemed it and when he requires the same, we will sit down and come up with an appropriate mode of settlement. By around 1997 the Plaintiff had forwarded to me around Kenya shillings One Hund red Thousand (KShs. :100,000/-\_*

*3. That some times (sic) early 1997 or thereabout while in employment with Kenya Beach Hotel in the Accounts Department I was approached by a colleague whom I was aware that he had some problems with Auditors and I advanced him the plaintiffs Ksh. Seventy Thousand (KSh.70,000/ -\_ which the said friend Christopher Muzirai promised to pay by mid of (sic) 1997.”*

From these and the rest of the applicant’s affidavit the impression left is that the applicant ended by advancing Sh.100,000/- of the plaintiff’s money to Muzirai who has never paid it back.

First the service of the plaint and summons to appear was not put under attack. So, service was valid; the defendant entered appearance or whatever but did not file the defence. The usual time expired, the respondent requested for the default judgment and the lower court being satisfied of the whole process, gave that judgment. So on all accounts that judgment was valid and the lower court properly refused to set it aside.

The applicant now appeals against that refusal claiming that his appeal is arguable. Agreed, an appeal upon which one seeks stay orders need not be frivolous. It is not a condition under O 41 r 4 Civil Procedure Rules yet this court does not see much substance in whatever appeal as intended having set out the part of the draft defence and relevant paragraphs in the supporting affidavit in the lower court. In essence the debt is admitted.

But that aside, the applicant has not shown this court what substantial loss he will suffer if stay orders are not given. He fears being thrown in civil jail yes, but he can as well pay the money which he had from the respondent, and he advanced to Muzirai who has since failed to repay.

Indeed the offer of Sh.10,000/- for security seemingly, made from the bar did not sound serious at all.

All in all the prayers sought here are refused. The application is dismissed with costs.

**Orders delivered on 17th March 2004.**

**J.W. MWERA**

**JUDGE**