



**IN THE SUPREME COURT OF APPEAL**

**PRINCIPAL REGISTRY**

**MSCA CIVIL APPEAL NO. 8 OF 2022**

**(Being High Court Matrimonial Cause No. 8 of 2016)**

**BETWEEN:**

**KAYISI SADALA.....APPELLANT**

**AND**

**ELUPHY SADALA.....RESPONDENT**

**CORAM: THE HON. JUSTICE MR S.A. KALEMBERA**

: Mr Chidothe, of Counsel for the Appellant

: Mr Mwangomba, of Counsel for the Respondent

: Mr Chinkono, Recording Officer

**RULING**

***Kalembera JA***

This is the Respondent's Notice of Motion to Vacate Order Staying Execution Pending Appeal under Section 7 of Supreme Court of Appeal Act and Under Court's Inherent Jurisdiction. It is supported by an affidavit sworn by Happy Wongani Mwangomba, of Counsel for the Respondent, as well as skeletal arguments. In response the Appellant has also filed a sworn statement in opposition sworn by Cassius Omar Chidothe, of Counsel for the Appellant as well as skeletal arguments. Hence, this is the Court's ruling on the Respondent's Notice of Motion to Vacate Order Staying Execution Pending Appeal.

It is the Respondent's case as deposed that by judgment delivered on the 18<sup>th</sup> day of February 2019 the Court below distributed matrimonial property to the parties following dissolution of their marriage as follows:

To the Respondent herein:

- (a) 100% of the household items; namely, one double door refrigerator. One dining se, four centre flowers and ten burglar bars.
- (b) 50% of the proceeds of sale of Mpingwe House.
- (c) 25% of the value of matrimonial house.
- (d) 50% of the town houses.
- (e) 100% of the Sellakam Stationery.
- (f) 50% of Achima Investments.
- (g) Two motor vehicles, namely Toyota Noah and Mercedes Benz.

To the Appellant herein:

- (a) 50% of the proceeds of Mpingwe House.
- (b) 75% of the value of matrimonial house (including having first option to purchase the house).
- (c) 50% of the town houses.
- (d) 100% of the Kanjedza plot.
- (e) 100% of Mayani properties.
- (f) 100% of Area 22 house.
- (g) 50% of Achima Investments.
- (h) Two motor vehicles namely, Toyota Prado and KIA Sportage.

That the Appellant filed Notice of Appeal which was then served on the Respondent on 14<sup>th</sup> March 2019. The Appellant further applied for an order suspending the execution of the judgment on 18<sup>th</sup> February 2019 pending appeal. The order was granted on 17<sup>th</sup> July 2020 suspending the execution pending appeal. The Court prepared record of appeal which was served on the parties on 20<sup>th</sup> April 2022. Despite a reminder to Counsel for the Appellant from Counsel for the Appellant to comply with Practice Direction No. 1 of 2010 by serving the Appellant's skeletal arguments, nothing was done. The Appellant was further reminded by letter dated 24<sup>th</sup> August 2022 but nothing was done by 14<sup>th</sup> November 2022 the time the Respondent filed this Notice of Motion.

It is the Appellant's case as deposed that the Appellant has since filed and served his skeletal arguments for appeal and other required documents. That the Appellant served the same before being made aware of the application herein. That the Appellant is ready with his appeal. That the application to suspend the enforcement

of the judgment on distribution of property was made by the Court below after hearing both parties. That the application to vacate cannot be made before this Court at first instance. That it was supposed to be made before the Court below first. That the Respondent could only come before this Court by way of Appeal. The Appellant further contends that this application is misconceived and that the law under which it is made does not govern applications of this nature.

Thus the Appellant prays that this application be dismissed with costs.

The Respondent has brought this Notice of Motion under and relied on Section 7 of the Supreme Court of Appeal Act which provides as follows:

*“A single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal.*

*Provided that –*

- (a) In criminal matters, if a single member refuses an application for the exercise of any such power, the applicant shall be entitled to have his application determined by the Court;*
- (b) in civil matters, any order, direction or decision made or given in pursuance of the powers conferred by this section may be varied, discharged or reversed by the Court.”*

The Appellant contends that the Respondent cannot rely on the said section 7 and bring this application before this Court. The Respondent has countered that argument by relying on Order III, r. 19 of the Rules of the Supreme Court.

The said Order III, r. 19 of the said Rules provides as follows:

*“After an appeal has been entered and until it has been finally dispensed of, the Court shall be seized of the whole of the proceedings as between the parties thereto, and except as may be otherwise provided in this Order, every application therein shall be made to the Court and not to the Court below.”*

Thus the Respondent strongly argues and submits that this application is rightly before this Court and not the Court below. In the matter at hand a Notice of Appeal was duly filed and the record of appeal was also settled and served on both parties. Thus the appeal was duly entered and in accordance with the said Order III, r. 19 every application therei shall be made to this Court and not the Court below. I must therefore agree with the Respondent that the Respondent’s application is rightly before this Court.

Under paragraph 1 (a) (i) of Practice Direction No. 1 of 2010

*“the Appellant shall file with the Court skeleton arguments within fourteen (14) days after filing the appeal in this Court and shall during the same period serve a copy of the skeleton arguments on the Respondent.”*

That the Appellant filed Notice of Appeal which was then served on the Respondent on 14<sup>th</sup> March 2019. The Appellant further applied for an order suspending the execution of the judgment on 18<sup>th</sup> February 2019 pending appeal. The order was granted on 17<sup>th</sup> July 2020 suspending the execution pending appeal. The Court prepared record of appeal which was served on the parties on 20<sup>th</sup> April 2022. Despite a reminder to Counsel for the Appellant from Counsel for the Appellant to comply with Practice Direction No. 1 of 2010 by serving the Appellant’s skeletal arguments, nothing was done. The Appellant was further reminded by letter dated 24<sup>th</sup> August 2022 but nothing was done by 14<sup>th</sup> November 2022 the time the Respondent filed this Notice of Motion.

It is abundantly clear that the Appellant has not complied with Practice Direction No. 1 of 2010 as he failed to file and serve his skeletal arguments with 14 days of filing his Notice of Appeal. As earlier indicated herein, the Notice of Appeal was filed and served on 14<sup>th</sup> March 2019. The Appellants finally filed his skeletal arguments on 11<sup>th</sup> November 2022 well over three years after the required period within which to file and serve his skeletal arguments. This indeed proves that the Appellant was not interested in prosecuting his appeal as he had the order suspending the execution of the judgment on distribution of matrimonial property. I am aware though, that the Appeal has finally been set down for hearing, but that does not dissuade me from my views on this application which has been successfully argued by the Respondent.

I am therefore satisfied that the Notice of Motion to Vacate Order Suspending Execution of Judgment Pending Appeal ought to succeed, and I so order. Thus the Order Suspending Execution of Judgment on distribution of matrimonial property is hereby vacated with costs for the Respondent.

**MADE** this 7<sup>th</sup> day of February 2023 at Blantyre.

  
S.A. Kalembera

**JUSTICE OF APPEAL**