



REPUBLIC OF KENYA



**KENYA LAW**  
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**Tuko Media Limited v Pembe Flour Mills Limited (Civil Appeal  
E1002 of 2022) [2023] KEHC 18096 (KLR) (Civ) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18096 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E1002 OF 2022**

**AN ONGERI, J**

**MAY 29, 2023**

**BETWEEN**

**TUKO MEDIA LIMITED ..... APPELLANT**

**AND**

**PEMBE FLOUR MILLS LIMITED ..... RESPONDENT**

**RULING**

1. The application coming for consideration in this ruling is the notice of motion dated February 22, 2023 seeking the following prayers:
  - i. Spent
  - ii. That there be a stay of any further proceeding in MCCC/E1777/2022 Pembe Flour Mills Ltd V Tuko Media Limited pending the hearing and determination of this application.
  - iii. That there be a stay of further proceedings in MCCC/E1777/2022 Pembe Flour Mills Ltd V Tuko Media Limited pending the hearing and determination of the appeal filed herein
  - iv. That the costs of this application be provided for.
2. The application is supported by the affidavit of Hanningtone Gibendi Ramenya sworn on February 22, 2023 in which it is deposed that on November 11, 2022 Hon MW Murage (SRM) delivered a ruling on the respondent's interlocutory application dated March 31, 2022 allowing it in entirety.
3. His counsel thereafter lodged a memorandum of appeal against the said ruling but efforts to obtain certified copy of the ruling on November 24, 2022 have been frustrated by the registry until February 20, 2023.



4. That his appeal is arguable with high chances of success for reason that the ruling by the magistrate was conflicting. That the application for contempt in suit MCCC/E1777/2022 dated February 8, 2023 has been fixed for hearing on February 14, 2023.
5. He indicated that he is apprehensive that the application may be heard and determined before the appeal and hence render the appeal nugatory and prejudicial to the respondent.
6. The application was opposed by the replying affidavit of Saud Salim Abubakar dated March 15, 2023. In it he deposed that on 11/11/22 the court delivered a ruling granting an order to pull down the defamatory allegations posted on their website. That interlocutory injunction in defamation cases are treated differently from ordinary cases because they bring out a conflict between private and public interest.
7. He deposed that the appellants are keen on frustrating the respondent since the respondent negated and contravened court order by failing to pull down the said defamatory words. He added that the fact that mitigation is not expressly mentioned as a right in the constitution does not deprive it of its necessity and essence in the fair trial process and that the orders sought in the respondent application dated March 31, 2022 were based on the mitigation of the loss incurred and further loss that could be incurred as a result of the words in publication being left in circulation.
8. He indicated that the appellants state that the ruling contradicts what the trial magistrate stated in that the defamation will be considered and determined at trial since the magistrate went forward and ordered the respondent pull down the defamatory statement, giving the implication that the words published were defamatory before the main trial. That despite the error in wording, the intention of the application was to award the respondent injunctive orders.
9. The parties filed written submissions in the application as follows; the applicant in its submission indicated that the respondent has filed an application dated February 8, 2023 for contempt of court order against it. There is therefore eminent threat of rendering the application and appeal nugatory.
10. It was submitted that the ruling that the appellant has appealed against is worth the courts intervention as it rises arguable grounds such as that the magistrate alleged that the statement by the Respondent was defamatory interlocutory stage and that the magistrate issued two conflicting and self-contradictory orders in the same ruling.
11. It was submitted that the applicant moved with speed to lodge an appeal and subsequently moved with speed to file this application which was only delayed a bit because of failure to secure a certified copy of the ruling. That the appellant stands to be prejudiced greatly if the appeal is rendered nugatory.
12. The respondent on the other hand submitted that the applicant has not tipped the scales of justice sufficiently to show a cogent cause as to why the respondent should be denied the fruits of the sound ruling delivered by the lower court.
13. The respondent argued that the applicant has not proven any substantial loss that it is likely to suffer if the orders sought are not issued, neither has it shown that this appeal will be rendered nugatory if the orders sought are not granted. That in fact the person who stands to suffer is the respondent as the defamatory statements will remain on the applicant's website and social media platforms which negatively affect the respondents business.
14. The respondent argued that the application herein is only an afterthought brought by the applicant to sanitize its wrongdoings of failing to adhere to the lower court's orders. That the application was brought three months after the court's ruling and immediately after the respondent brought a contempt application against the applicant.



15. As to whether the failure to grant the orders in question is likely to render this appeal nugatory it was submitted by the respondents that pulling down of the defamatory statements are reversible and if this appeal is successful the applicant can upload again the defamatory statements.
16. The respondent argued that stay orders are equitable hence any litigant seeking the same must come with clean hands. The applicant herein has only brought this application in a bid to further frustrate the respondent and has further negated and contravened court orders ordering it to pull down the defamatory statements.
17. The issues for determination this application are as follows;
  - i. Whether the applicant is entitled to stay of proceedings in this case.
  - ii. Who pays the costs of this Application?
18. On the issue as to whether the applicant is entitled to stay of proceedings, I find that the conditions for grant of stay of proceedings are different from those for stay pending appeal.
19. The court in the case of *Kenya Wildlife Service vs James Mutembei* [2019] eKLR held that: -

“...Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent...”
20. In the current case, I find the applicant appealed against the court’s ruling which granted the respondent an injunction on the ground that the applicant did not meet the conditions for grant of an order of injunction.
21. The applicant was ordered to pull down the impugned statement before the full hearing of the case.
22. I find that trial court said that the issue as to whether the impugned statement was defamatory would be determined at the trial and yet went ahead to grant the order of injunction.
23. I find that is necessary in the circumstances for the Appellant to be granted stay of proceedings pending Appeal since the issue to be determined is whether the respondent established the grounds for grant of the mandatory injunction.
24. I allow the Application dated February 22, 2023 and direct that the appeal be prosecuted within 30 days of this date.
25. This case will be mentioned on June 27, 2023 for filing of the Record of Appeal and for directions.
26. The costs of the Application will abide the appeal.

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 29<sup>th</sup> day of May, 2023.**

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**A. ONGERI**

**JUDGE**

**In the presence of:**

.....for the Appellant



.....for the Respondent

