



REPUBLIC OF KENYA



**Njoroge v Nation Media Group Ltd & another (Civil Case 198 of 2017)  
[2023] KEHC 24203 (KLR) (Civ) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24203 (KLR)

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

**CIVIL  
CIVIL CASE 198 OF 2017**

**AN ONGERI, J**

**OCTOBER 27, 2023**

**BETWEEN**

**HON JOHN NJOROGE ..... PLAINTIFF**

**AND**

**NATION MEDIA GROUP LTD ..... 1<sup>ST</sup> DEFENDANT**

**KIPCHUMBA SOME ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application coming for consideration in this case is the one dated 27/4/2023 brought under Order 42 Rule 6 and Order 51 rule 1 of the *Civil Procedure Rules*, 2010, Section 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya and all other enabling provisions of the law seeking the following remedies
  - i. That this application be certified as urgent and service hereof be dispensed with in the first instance.
  - ii. That there be a stay of execution of the judgment delivered herein on the 11<sup>th</sup> November, 2022 and the ruling issued on 20<sup>th</sup> April, 2023 on costs pending inter-parties hearing and determination of the instant application.
  - iii. That there be a stay of execution of the judgment delivered herein on the 11<sup>th</sup> November, 2022 and the ruling issued on 20<sup>th</sup> April, 2023 on costs pending inter-parties hearing and determination of the appeal.
  - iv. That the costs of this application be provided for.



2. The application is based on the following grounds;
  - i. The judgment herein was delivered on the 11<sup>th</sup> November, 2022 and a ruling on taxation of costs was issued on 20<sup>th</sup> April, 2023 against the defendants/applicants.
  - ii. The defendants/applicants herein being dissatisfied with the said judgment have filed a notice of appeal against the judgment dated 22<sup>nd</sup> November, 2022 on 23<sup>rd</sup> November, 2022 and are currently awaiting in the process of filing the Record of Appeal upon receipt of the typed proceedings.
  - iii. That without an order for stay in place the plaintiff/ respondent is at liberty to proceed with execution upon obtaining the certificate of costs hence the urgency of this application.
  - iv. The defendants/applicants will suffer substantial loss if the orders sought herein are not granted.
  - v. The defendants/applicants are willing to abide by any conditions that this court may deem fit to impose on it.
  - vi. It is in the interest of justice that the orders sought are granted.
  - vii. Further grounds to be adduced at the hearing of this application.
3. It is supported by the supporting affidavit of SEKOU OWINO sworn on 27/4/2023 which reiterates the grounds upon which the application is premised.
4. The respondents filed a replying affidavit dated 28/6/2023 opposing the application in which it is deposed that the applicant has not demonstrated that they have an arguable appeal which would be rendered nugatory if the orders sought are not granted.
5. Further, the applicants have at prayer 3 of the application sought an order of stay of execution of the judgement delivered on 11/11/2022 and the ruling issued on 20/4/2023 on costs pending inter parties hearing and determination of the appeal but no appeal has been filed.
6. The parties filed written submissions which I have duly considered. The applicant submitted that judgement herein was delivered in 11/11/2022 where the court awarded the plaintiff Kshs. 4,600,000 together with costs of the suit. On 24/1/2023 the plaintiff filed his bill of costs and vide a ruling delivered in 20/4/2023 the plaintiffs bill was taxed at Kshs. 385,852. The application herein was filed on 27/4/2023 and therefore filed within reasonable time and without undue delay.
7. On substantial loss the defendant/applicant submitted that they stand to suffer substantial loss should the court fail to grant the orders sought herein. The defendant/applicant have reasonable and justifiable apprehension that they will be unable to recover the decretal amount from the plaintiff if the appeal filed successful as the plaintiffs have no known assets.
8. On security the defendant/applicant indicated that they are willing to abide by the conditions imposed on them by this honorable court.
9. The plaintiff/respondent submitted that the defendants/ applicants intended appeal is not arguable and in any event the applicant have not annexed any draft memorandum of appeal to the application herein and this this court is not in position to know which appeal they are referring to, and what its grounds of appeal are; and whether it has any chances of success and thus the court would not be in



a position to tell whether the Applicants have succeeded in proving by evidence that they have a good appeal with chances of success; and therefore whether there would be any substantial loss that would be suffered by the applicant in the event that his application is not allowed.

10. Further, while the Applicants have at prayer 3 of the Application sought an order of stay of execution of the judgment delivered herein on the 11/11/2022 and the Ruling issued on 20/4/2023 on costs pending inter partes hearing and determination of the Appeal, it should be noted that there is no appeal which has been filed. No evidence of existence of an appeal has been tabled. In absence of outlining grounds of appeal in the application this Court cannot discern, weigh or measure arguability of the intended Appeal. In essence, the Applicants have no arguable appeal and are merely seeking to hang on the stay of execution ad infinitum.
11. The issues for determination in this case are as follows;
  - (i) Whether the applicant should be granted leave to appeal out of time.
  - (ii) Whether the applicant should be granted stay of execution pending appeal.
12. The legal provision governing leave to appeal out of time is Section 79G which states as follows;

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal.”
13. The judgment was delivered on 11/11/2022 and this application was filed on 27/4/2023.
14. I find that the reason for delay has been explained.
15. On the issue of stay pending appeal, the governing provisions is Order 42 Rule 6 which states as follows;
  - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
  - (2) No order for stay of execution shall be made under subrule (1) unless—
    - (a) the court is satisfied that substantial loss may result to the Applicants unless the order is made, and that the application has been made without unreasonable delay; and
    - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicants”.



16. The duty of this court is to balance the interest of the parties. The applicant has a right to exercise his right of appeal while the respondent has a right to enjoy the fruits of his judgment.
17. This was the position of Warsame, J (as he then was) in *Samvir Trustee Limited vs. Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:
18. In the current case, the applicant is granted leave to appeal out of time and stay of execution on the following conditions;
  - i. That half the decretal sum is deposited in court within 45 days of this date.
  - ii. That the appeal be filed within 30 days of this date.
  - iii. That the costs of this Application to abide the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant

