REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E269 OF 2020

THE KENYA BROADCASTING CORPORATION

T/A KBC RADIO TAIFA/KBC ENGLISH SERVICE

NICHOLAS OMONDI

GRACE MATENGO

MARTIN KINGASIA.....APPELLANTS/APPLICANTS

-VERSUS-

WILLIAM KIMUTAI B. KEITANY.....RESPONDENT

RULING

1. The appellants/applicants herein took out the Notice of Motion dated 28th July, 2020 and sought the substantive order of leave to lodge an appeal out of time against the judgment delivered on 30th April, 2020 in Milimani CMCC NO. 3524 of 2013 as consolidated with CMCC NO. 4457 of 2013 and CMCC NO. 4473 of 2013; and a further order for a stay of execution of the aforementioned judgment delivered and consequent decree, pending the hearing and determination of the appeal.

2. The Motion is supported by the grounds set out on its face and the facts stated in the affidavit of **Margaret Ochieng,** the Senior Legal Officer of the 1st applicant.

3. The respondent resisted the Motion by putting in a replying affidavit he swore on 4th September, 2020, to which **Margaret Ochieng** rejoined with her further affidavit sworn on 26th November, 2020.

4. At the *inter partes* hearing of the Motion, the parties filed and exchanged written submissions.

5. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing the Motion; the rival submissions and authorities cited therein.

6. The gist of the matter is that the respondent instituted defamatory claims against the applicants herein and other parties not before court. His claims were defended by the respective parties involved.

7. Upon hearing the parties, the trial court entered judgment in favour of the respondent and against the applicants and the other third parties, further awarding the respondent the respective sums of Kshs.1,500,000/; Kshs.500,000/ and Kshs.1,000,000/ on general, exemplary and aggravated damages in each of the consolidated cases. The impugned judgment has prompted the instant Motion.

8. It is clear that the Motion sought twin orders. I will first address the order touching on leave to file an appeal out of time.

9. **Section 79G** of the **Civil Procedure Act** sets the timelines for lodging an appeal against the decision of a subordinate court at 30 days from the date of the decree or the order being appealed against. The provision goes on to express that an appeal may be admitted out of time where sufficient cause has been shown.

10. Furthermore, under the provisions of **Section 95** of the **Civil Procedure Act** and **Order 50, Rule 5** of the **Civil Procedure Rules**, the courts have power to enlarge the time required for the performance of any act under the Rules even where such time has expired.

11. The guiding principles to be satisfied in an application seeking leave of the court to file an appeal out of time/for the extension of time were the laid out in the case of **Thuita Mwangi v Kenya Airways Limited [2003] eKLR** cited in the applicants' submissions, and were reaffirmed in the case of **Growth Africa (K) Limited & another v Charles Muange Milu [2019] eKLR**.

12. On the first condition on length of delay, the respondent is of the view that there has been an unreasonable delay in bringing the Motion, whereas the applicants are of the view that the Motion has been brought without unreasonable delay.

13. Upon my perusal of a copy of the impugned judgment annexed to the instant Motion, I note that it was delivered on 30th April, 2020 which is about three (3) months prior to the filing of the Motion. In my view, the delay is not unreasonable.

14. Concerning the reason(s) for the delay, Margaret Ochieng states in her affidavits on behalf of the applicants that at the time of delivery of the judgment, the courts had experienced closure owing to the Covid-19 pandemic and hence the applicants were unaware of the existence of the judgment. That their advocates only received a copy of the said judgment on 17th June, 2020 by which time the timelines for filing an appeal had lapsed.

15. The deponent further states that the delay was also occasioned by consultations undertaken in determining whether to lodge an appeal against the impugned judgment and by the preparations of the requisite documents for appeal.

16. In reply, the respondent states that the reasons afforded by the applicants are not sufficient enough to warrant a granting of the orders sought.

17. Upon considering the above, I am alive to the fact that the global Covid-19 pandemic disrupted the operations of the courts and the country at large since the month of March, 2020. I am also alive to the fact that there was temporary closure of the courts and a number of other offices thereafter, and that upon resumption of court operations, there were challenges setting up and adjusting to the online platforms for some time. Consequently, I find the explanation for the delay to be reasonable in the circumstances.

18. On the principle to do with whether or not an arguable appeal exists, the applicants are of the view that their intended appeal raises arguable grounds and has high chances of success. In their submissions, the applicants made reference *inter alia*, to the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR** in which the court stated as follows:

> ***"Lastly, looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is in-arguable. Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is not required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict."***

19. In contrast, the respondent is of the view that the trial court considered all relevant factors and legal principles, thereby arriving at a sound decision. The respondent therefore believes that the chances of the High Court overturning the impugned judgment are minimal

20. From my study of the grounds of appeal put forward in the draft memorandum of appeal annexed to the Motion, I observed that the appeal lies against the finding of the trial court on both liability and quantum, with the applicants arguing; among others; that the trial court did not correctly apply the principles governing the tort of defamation and that the court disregarded the evidence presented by the applicants. Taking these factors into account, I am satisfied that the applicants have established arguable points of law and fact in their draft memorandum of appeal.

21. Under the final principle on prejudice, the applicants contend that they stand to suffer a grave injustice if they are denied the opportunity to challenge the decision of the trial court on appeal, while contending that the respondent does not stand to be prejudiced in any manner whatsoever.

22. It is not in dispute that the judgment was entered in favour of the respondent. It is therefore only natural for the respondent to be lawfully entitled to enjoy the fruits of his judgment. Nevertheless, it would not be in the interest of justice to lock out the applicants who are clearly aggrieved by the judgment. I therefore find it reasonable for the applicants to be given the opportunity of challenging the subordinate court's decision on appeal, being supported by the case of **Blue Nile E. A. Ltd v Lydia Gode Yusuf & another [2018] eKLR** where the court held thus:

> ***"The right to be heard is a Constitutional right provided for under Article 48 of the Constitution of Kenya, and in all circumstances it will be in the interest of all parties to hear a matter on merit. The only consideration the Court ought to take into account is to balance the rights of both parties. I am therefore inclined to grant the Applicants an opportunity to file their Appeal out of time so that the same can be heard on merit."***

23. The second order sought is for a stay of execution of the judgment pending the hearing and determination of the appeal.

24. The guiding provision is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the three (3) conditions in determining an application for stay.

25. The first condition is that the application must have been made without unreasonable delay. I am satisfied that this condition has been sufficiently addressed hereinabove.

26. Under the second condition, the applicants are obligated to demonstrate to this court's satisfaction the substantial loss they would likely suffer if the order for stay is denied.

27. On behalf of the applicants, Margaret Ochieng avers that there is a likelihood that the respondent will not refund the decretal sum if the same is paid out to him and the intended appeal succeeds, further averring that the 1st applicant in particular stands to lose a substantial amount of money if the respondent proceeds with execution at this stage.

28. In response, the respondent has stated that the application is purely aimed at frustrating the execution process and that the applicants have not shown by way of evidence that he is not in a position to refund the decretal amount.

29. The legal position is that execution is a lawful process and hence a party cannot simply argue that a stay of execution is necessary in order to halt or prevent execution. It is on this basis that the court in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** referenced by the respondent, rendered itself thus:

> ***"The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail…"***

30. In the same light, the courts have previously discussed the question on who has the burden of proof on the issue of refund of the decretal sum. I am guided and bound by the Court of Appeal's analysis in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** when it determined that:

> ***"Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge…"***

31. In the absence of any indication on whether the respondent is in a financial position to refund the decretal sum should the circumstances require it, I am satisfied that the applicants have reasonably shown that they are likely to suffer substantial loss in the event the order is not given.

32. With regards to the final condition on the provision of security for the due performance of such decree or order, the applicants gave an indication as to their readiness and willingness to furnish a suitable security, whereas the respondent proposed that the applicants be ordered to deposit the decretal sum in a joint interest earning account.

33. Having taken the above into account, I deem it proper to allow the Motion dated 28th July, 2020 and to make the following orders:

> **a) The applicants shall file and serve their memorandum of appeal within 14 days from today.**
>
> **b) There shall be a stay of execution of the judgment delivered on 30th April, 2020 on the condition that the applicants deposit the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within 45 days from today, failing which the order for stay shall automatically lapse.**
>
> **c) Costs of the application to abide the outcome of the appeal.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2021.

……

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Mr. Wanda for the Appellants/Applicants

Ms. Ndirangu holding brief for Nderitu for the Respondent