



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO.59 OF 2005**

**PIUS KINYUA T/A SALAMBO PROPRIETARY CLUB.....PLAINTIFF**

**VERSUS**

**NATION MEDIA GROUP LIMITED.....DEFENDANT**

**RULING**

1. By way of **Notice of Motion** application dated **11<sup>th</sup> March, 2020** the Applicant seeks the following Orders:-

**a) Spent;**

**b) That further execution of the decree by way of removal of the proclaimed goods of the Defendant be Stayed pending hearing and determination of the application;**

**c) That the execution of the Decree be Stayed pending hearing and determination of this application;**

**d) That the Decree signed and dated by the Deputy Registrar on 4<sup>th</sup> February, 2020 be declared to have been issued irregularly and be expunged from the record for being inaccurate and for having been signed and sealed without reference to the Defendant's advocates;**

**e) That the execution of the Decree be Stayed pending hearing and determination of an Appeal by the Defendant to the Court of Appeal against the whole of the Judgment on condition that the Defendant provides a Bank Guarantee for the decretal amount to the Plaintiff;**

**f) Costs of this application be provided for.**

2. The application is premised on **Sixteen (16)** grounds on the face of the application and supported by the **Affidavit** of **Allan Olingo**, the Defendant's **Regional Editor – Coast**, sworn on **11<sup>th</sup> March, 2020** and is based on the grounds stated therein.

3. The Plaintiff has opposed the said application vide the **Replying Affidavit** sworn on **24<sup>th</sup> March 2020**.

4. In brief, the Applicant states that on **28<sup>th</sup> June, 2019**, this Court entered Judgment in favour of the Plaintiff against the Defendant for a total sum of **Kshs.6,500,000/=**, exclusive of the costs of the suit. On **1<sup>st</sup> July, 2019**, the Defendant's advocates lodged a **Notice of Appeal** and applied to be supplied with a copy of the proceedings, Judgment, and the Decree of the court for the purpose of lodging an **Appeal**.

5. The Applicant states that on **29<sup>th</sup> January, 2020** the Plaintiff's advocate wrote to them demanding a sum of **Kshs.7,676,570/=** within 10 days and that the Plaintiff has already executed the Decree vide **Proclamation of Attachment** to recover the sum of **Kshs.7,303,295/=**, the Auctioneer's fees of **Kshs.750,000/=** and further charges in disbursements of **Kshs.20,000/=** together with **Auctioneer's Invoice** of **Kshs.770,000/=** by attaching all the Defendant's tools of trade. It is for this reason that the Defendant has filed the current application seeking for a Stay of Execution pending the Intended Appeal.

6. It is the Defendant's case that if compelled to settle the Decretal amount, it will be difficult to recover the same because the Plaintiff lost his creditworthiness some 15 years ago. Further, the Defendant has annexed copies of its audited accounts to demonstrate its creditworthiness and states that it is one of the largest media houses in Kenya, therefore capable of settling the Decree should the Appeal fail.

7. The Defendant states that it is willing and ready to provide a Bank Guarantee from Standard Bank, Kenya Limited to cover the decretal amount and undertakes to file the Appeal as soon as it gets the typed proceedings.

8. In opposition to the said application, it is averred that the deponent, one **Allan Olingo**, does not have authority from the Defendant to swear the affidavit as he was not a witness during the trial, and is not schooled in law. That therefore, he cannot possibly have any knowledge with regard to matters mentioned at **Paragraphs 9, 10, 12 and 13** of the **Supporting Affidavit** and hence, the entire Affidavit ought to be struck out as being incompetent.

9. The Plaintiff avers that after **Judgment** was delivered on **28<sup>th</sup> June 2019**, his advocate on record then, filed a party-to-party **Bill of Costs**, and a **Ruling on Taxation** was made on the **28<sup>th</sup> January, 2020** by the Taxing Officer who is clothed with wide discretion under the **Advocates Remuneration Order** and such discretion cannot be challenged.

10. It is also averred that the Defendant's advocate have conducted themselves in a lackadaisical manner since filing of the suit and no effort has been made to follow up on the typed proceedings for the purposes of preparing the Intended Appeal since the delivery of the Judgment on **28<sup>th</sup> June, 2019**. It is further averred that the challenge on costs awardable is calculated to delay the conclusion of this matter. Furthermore, no Certificate of Delay has been obtained from the Deputy Registrar.

11. It is the Plaintiff's case that he operates a well-known restaurant in Nairobi and he is a successful farmer owning substantial acreage of land spanning over **200 acres**. Therefore, he is capable of refunding the decretal sum should the Appeal succeed.

12. The application was prosecuted by way of written submissions. The Defendant/Applicant filed its submissions on **22<sup>nd</sup> July, 2020** while the Plaintiff/Respondent filed its submissions in reply on **16<sup>th</sup> July, 2020**.

### **Determination**

13. I have considered the affidavits, as well as the respective submissions filed by both parties. The issue for consideration in this application is **whether the application has met the threshold for granting of Stay of execution?**

14. The granting of **Stay of Execution** pending **Appeal** by the High Court is governed by **Order 42 Rule 6** of the **Civil Procedure Rules**. It is granted at the discretion of the court when sufficient cause has been established by the Applicant that:-

*a) Substantial loss may result to the Applicant unless the Order is made;*

*b) The application has been made without unreasonable delay, and;*

*c) Such security as the court orders for the due performance of the Decree has been given by the Applicant.*

15. With regard to the Applicant suffering substantial loss, it is common knowledge that the Defendant's net worth is in terms of billions as illustrated in its **Annual Report and Financial Statements of 2018**, which has not been disputed. The Plaintiff's bone of contention is that the Defendant has not attached the **2019 Financial Statement**. It is therefore inconceivable that an amount of **Kshs.6,955,000/=**, if paid out would cause the Defendant substantial loss and damage.

16. Further, there is no substantial proof to the effect that the Plaintiff would not be in a position to repay the decretal amount in the event that the Appeal were to be successful. The Plaintiff has averred that he is the owner of a well known restaurant in Nairobi and has attached a **Title Deed** of his **land** in Laikipia measuring **33.20 Hectares** to show that they would have means to repay the decretal amount in the event that the Appeal is successful. Whatever the outcome of the Intended Appeal, one thing that is clear is that both parties have demonstrated that they have capacity to refund the decretal amount.

17. This Court is alive to the fact that a successful litigant should not be deprived of the fruits of Judgment in his favour without just cause. Therefore, at the end of the day this Court has a duty to balance the rights of the Defendant *vis a vis* those of the Plaintiff. This Court notes that the Defendant did not file the current application in good time. Nevertheless, the Defendant has demonstrated that it is ready to offer security in the form of a **Bank Guarantee** from **Standard Chartered Bank** for the due performance of the Decree. However, as has already been established, the Defendant has failed to prove that it will suffer substantial loss. The Plaintiff opposed the issue of furnishing a Bank Guarantee stating that no document or statement from the Bank has been attached.

18. It is noteworthy that this Court has no authority to determine whether or not there is an arguable Appeal in order to grant a **Stay of Execution** pending **Appeal**. This test is applicable where the Court to Appeal is exercising its appellate jurisdiction and is considering an application for **Stay of Execution** filed under **Rule 5** of the **Court of Appeal Rules**.

19. I am not particularly keen to look at the proposed **Grounds of Appeal** at this stage but I want to assume that the Intended Appeal is against the entire **Judgment** of this Court delivered on **28<sup>th</sup> June 2019**, the execution of which the Defendant now fears may result in it having to lose its tools of trade which have already been proclaimed by the Plaintiff.

20. On the dispute of party and party **Bill of Costs' Taxation**, this Court declines to entertain the same because it has not been properly moved by the Applicant herein.

21. In my considered opinion, the Applicant has offered a security for due performance. However, it is this Court's finding that the offer of a **Bank Guarantee** may not allow the decretal sum an opportunity to attract any interest. In the interest of justice and for the purposes of not

rendering the Appeal nugatory in case it is successful, I proceed to allow the application dated **11<sup>th</sup> March, 2020** and grant **Stay of Execution pending Appeal** on the following conditions:-

*a) That Applicant to pay the Respondent half the decretal amount of Three Million, Four Hundred and Seventy Seven Thousand, Five Hundred Shillings (Kshs.3,477,500/=)*

*b) That a further sum of Three Million, Four Hundred and Seventy Seven Thousand, Five Hundred Shillings (Kshs.3,477,500/=) to be secured by the provision of a Bank Guarantee from Standard Chartered Bank Limited within 30 days from today;*

*c) Costs to abide by the outcome of the Appeal.*

*d) The Appellant to move the court for hearing on the Appeal within 45 days.*

It is hereby so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA on this 17<sup>th</sup> day of November, 2020.**

**D. O. CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

**D. O. CHEPKWONY**

**JUDGE**