



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 24 OF 2016**

**ANIKET MANDEVIA.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**THE NATION MEDIA GROUP LIMITED...1<sup>ST</sup> DEFENDANT/APPLICANT**

**BRIAN WASUNA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. The defendants/applicants have lodged the Notice of Motion dated 13<sup>th</sup> March, 2019. The Motion is supported by both the grounds laid out on the body thereof and the facts deponed in the sworn affidavit of *Sekou Owino*. The applicants are seeking an order FOR be a stay of execution of the ruling and order issued by this court on 28<sup>th</sup> February, 2019 pending the hearing and determination of an appeal against the same plus costs.

2. The respondent opposed the motion by filing Grounds of Opposition dated 4<sup>th</sup> April, 2019 and the replying affidavit sworn by the plaintiff/respondent on like date.

3. The application was argued orally before this court on 11<sup>th</sup> July, 2019. I have considered the grounds set out on the face of the Motion; the facts deponed in the affidavits filed in support of and in opposition thereto plus the Grounds of Opposition and the rival arguments.

4. The brief background of the matter is that the respondent previously brought an application before this court, seeking injunctive orders and for an order that the applicants do expunge from their website certain articles published in relation to the respondent in a defamatory sense, pending the hearing and determination of the defamatory suit instituted by the respondent against the applicants.

5. This court, upon hearing the parties on the application, granted an injunctive order and an order for expungement of the relevant articles pending the hearing and determination of the suit vide its ruling of 28<sup>th</sup> February, 2019. The applicants in this instance have expressed their desire to lodge an appeal against the aforesaid ruling and order.

6. It is clear that the application now before this court concerns itself with the granting of an order for a stay of execution. In that case, the relevant provision is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the conditions to be met when it comes to an application for a stay of execution as follows:

***a) The application must be brought without unreasonable delay;***

***b) The applicant must demonstrate that substantial loss may result; and***

***c) Provision should be made for security.***

7. I will begin with the first condition on whether the application has been timeously filed. As earlier mentioned, this court delivered its ruling on 28<sup>th</sup> February, 2019. The present application was filed on 13<sup>th</sup> April, 2019 which is less than two (2) months later. I am thus convinced that there is no indication of unreasonable delay in bringing the application.

8. This brings me to the second condition of substantial loss. On the one part, *Miss Olung'a* counsel for the applicants has taken the position that the said applicants are likely to suffer substantial loss unless an order for a stay of execution is made. This was in reiteration of the facts deponed in the affidavit of *Sekou Owino* in support thereof, where he asserts that once the links to the relevant articles are withdrawn, it will be technically difficult to reconfigure and restore the same in the event that the appeal succeeds. The deponent goes further to state that such withdrawal would require the consent of certain parties and that this would take time which could then render the applicants at a risk of falling in contempt of the court order of 28<sup>th</sup> February, 2019.

9. On the other part, the respondent states in his reply that the applicants have not demonstrated the substantial loss they stand to suffer, further averring that the particulars of the alleged technical difficulties in expunging the links to the article have not been availed to this court, maintaining that reconfiguration of such links can easily be done by any person with the necessary expertise.

10. The respondent also asserts that either way, the technical difficulties being referred to by the applicants cannot in themselves amount to substantial loss. This position was reinforced by Mr. *Gichangi*, learned advocate for the respondent through the oral arguments made before this court.

11. The relevance of substantial loss in any application for a stay of execution was aptly addressed by the Court of Appeal in the case of *Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* thus:

***“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”***

12. Further to the above, the courts have stated that substantial loss entails that which has to be prevented by maintaining the status quo of the parties involved, otherwise the appeal will be rendered nugatory.

13. I have noted that in the present instance that whereas the applicants have argued that they stand to suffer substantial loss, this has not been demonstrated. The technical difficulties being predicted are not supported by any form of evidence.

14. Furthermore, it has not been shown that if such difficulties do in fact exist, they will have an irreparable effect. If anything, from my understanding of the applicants’ averments, while the process of expunging the links and restoring them if the appeal succeeds may appear tedious, there is nothing to show that the same will result in irreparable loss to the applicants. In the circumstances, I find that substantial loss has not been demonstrated.

15. On the third condition, given that the order made by this court is non-monetary in nature, the condition for the provision of security would not arise here.

16. The upshot is that the Motion lacks merit and the same stands dismissed with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 27<sup>th</sup> day of September, 2019.

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendants/Applicants