



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 169 OF 2018

ROYAL MEDIA SERVICES LIMITED.....APPELLANT

VERSUS

NEHEMIAH STONEBIC MISIANI

T/A STONE BIC HIGH SCHOOL.....RESPONDENT

(Being an appeal from the judgment and decree of the chief Magistrate's Court at Nairobi by Hon. P Muholi –SRM in CMCC Number 1004 Of 2013 Delivered On 21ST March, 2018)

R U L I N G

1. Nehemiah Stonebic Misiani t/a Stonebic High School, the Respondent herein filed an action against Royal Media Services Ltd, the Appellant/applicant herein vide the plaint dated 28th February, 2013 before the Chief Magistrate's Court, Milimani Commercial Court, Nairobi. In the aforesaid plaint, the Respondent alleged that on 15th March, 2012 that the Appellant/applicant published defamatory words of and concerning him by Television Broadcast, Citizen Nipashe.

2. The Appellant/Applicant denied the Respondent's suit by filing a defence.

3. The suit was heard and determined in favour of the Respondent who was awarded Ksh.4,400,000/- for both general and aggravated damages plus costs and interest vide the judgment delivered on 21st March, 2018.

4. The Appellant being dissatisfied, preferred this appeal and put forward the following grounds of appeal: -

i) The learned magistrate erred in holding that the failure to enjoin Mr. Robert Atindi Omoi was not fatal to the Respondent's case as there was no point to enjoin a party who had amicably settled the issue and sought forgiveness.

ii) The learned magistrate erred in holding that the Respondent had established his case on a balance of probabilities.

iii) The learned magistrate wholly misunderstood the Defense of responsible Journalism or Reynold's privilege.

iv) The learned magistrate erred in not holding that the Appellant had established the Defense of Responsible Journalism or Reynold's Privilege.

v) The learned magistrate ignored the fact that the Appellant had made the broadcast as a matter of public interest namely, the way students are handled in schools around the country and a holding and recognition in England, South Africa, New Zealand and Australia of a Defense based on a responsible journalism in a matter of public interest.

vi) The learned magistrate erred in that he applied the wrong concept of the Defence of Justification/Truth in that he failed to consider that for a Defense of Justification/Truth to succeed, the Appellant need not to prove the Truth of the whole of the defamatory statement.

vii) The learned magistrate erred in failing to consider the Defences of a Fair Comment on a matter of public interest in good faith, the Freedom of Press/Media Freedom, Privilege and Qualified privilege raised by the Appellant as enshrined in both the Defamation Act, Cap 36 of the Laws of Kenya and the Constitution of Kenya, 2010.

viii) The Learned magistrate erred in holding that the words allegedly broadcast in Sheng were admissible despite the fact that they did not contain a translation of the same.

ix) *The learned magistrate erred in holding that a certificate accompanying the CD was produced as per Section 106 of the Evidence Act.*

x) *The learned magistrate erred in holding that the alleged words spoken referred to the Respondent.*

xi) *The learned magistrate erred in holding that the contents as aired were reckless, malicious and published to serve other purpose other than that entrusted to the Appellant by the Constitution under article 34(1) of the Constitution.*

xii) *The award made was so excessive as to manifest error in awarding damages.*

xiii) *The award of ksh.4,400,000/- as damages is manifestly too high in the circumstances of this case.*

xiv) *The award made by the magistrate's court is now threatening to stifle freedom of expression because of its failure to apply the doctrine of constitutional privilege of Reynold's Privilege recently recognized in democracies in protection of press freedom.*

5. The Appellant has now taken out the motion dated 20th July, 2018, the subject matter of this ruling in which it sought for the following orders:-

a) *That there be a stay of execution of the judgment delivered herein on 21st March, 2018, pending the hearing of this application or until further orders of this honourable court.*

b) *That there be as stay of execution of the judgment delivered herein on 21st March, 2018, pending the lodging, hearing and determination of the Appellant/applicant's intended appeal to this Honourable Court.*

c) *That costs of this application be provided for.*

6. The aforesaid motion is supported by the affidavit of Njenga Njihia.

7. The Respondent filed a replying affidavit he swore to oppose the motion.

8. When the motion came up for inter-parties hearing, the parties were invited to make oral submissions.

9. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion.

10. I have further considered the oral submissions made by Kamau Kuria, learned Senior Counsel, who appeared for the Appellant/Applicant and the submissions made by the Respondents in person.

11. It is the submission of the Appellant/Applicant that unless the order for stay of execution of the decree is granted, it would suffer substantial loss, in that, the Respondent will execute the resultant decree from the judgment delivered on 21st March, 2018.

12. The learned Senior Counsel, cited the case of **African Safari Club Vs Safe Rentals Ltd, Civil Appeal, Nairobi Civil Application No. 53 of 2010** in which the Court of Appeal stated *inter alia*: -

“that courts are enjoined to so act as to enable parties to exercise their appellate rights by acting fairly and justly by having regard to the substantive justice of the matters before them and weigh the relative hardships of the parties before them.”

13. The Applicant further argued that its right of appeal will be rendered nugatory if the Respondent executes the judgment during the pendency of the appeal, therefore the orders should be granted so as to preserve the subject matter of the appeal.

14. The Respondent on the other hand urged this court to dismiss the motion arguing that the Applicant failed to show the substantial loss it would suffer if the order for stay is denied. It was pointed out that there is no possibility of the Applicant's appeal being rendered nugatory if the same succeeds.

15. The Respondent further argued that he is in a position to refund the decretal sum if the appeal turns successful.

16. When the parties appeared before this court to make oral submissions, they each regurgitated their arguments set out on the face of the motion and averred in the affidavits.

17. The second issue argued by the parties is in respect of the kind of security to be provided for the due performance of the decree. On the face of the motion, the Applicant stated that it is ready and willing to furnish a reasonable security for the due performance of the decree.

18. In the supporting affidavit, Njenga Njihia averred in paragraph 9 that the applicant is ready and willing to furnish security in the event of the court requiring one to be furnished. However, in his oral submissions, the learned senior counsel submitted that due to the turbulent times the economy is undergoing, the Applicant is ready to deposit half the decretal sum as security for the due performance of the decree.

19. The Respondent on the other hand is of the submission that if the court is inclined to grant the order for stay, the Applicant should make an offer to deposit the entire decretal sum in court or in an interest earning account.
20. The principles to be considered in an application for stay of execution pending appeal are well settled.
21. **First**, an Applicant must show the substantial he would suffer if the order for stay is denied. **Secondly**, the application for stay must be filed without unreasonable delay. **Thirdly**, that the provision for security for the due performance of the deed should be taken into consideration.
22. In this matter, I prefer to start with the last issue as to whether or not the application for stay was timeously filed. The parties did not address this court over the issue. The record shows that upon the delivery of judgment on 21st March, 2018, the Appellant/applicant was granted an order for stay to last for 30 days.
23. The memorandum of appeal was filed on 3rd April, 2018. The application for stay was filed on 24th July, 2018. It is apparent that the application for stay was filed without unreasonable delay.
24. The second issue to be considered is whether or not the Applicant has shown the substantial loss it would suffer if the order for stay is denied.
25. I have already considered the submission of the Applicant. The Applicant's advocate simply stated that the Applicant will suffer substantial loss because the Respondent will execute the judgment. The Applicant did not specify the kind of substantial loss it would suffer.
26. It has not been alluded that the Applicant is not in a position to raise the judgment sum neither has it been alleged that the Respondent would not be in a position to make a refund of the amount if the appeal turns successful. There is a mention of the fact that this country's economy is undergoing turbulent times and therefore, all enterprises in the country are experiencing cash constraints.
27. The Applicant has not come out expressly to say that it is not in a position to raise the decretal sum.
28. The wording of Order 42 Rule 6(2) (a) of the Civil Procedure Rules is to the effect that no order for stay shall be made unless the Applicant shows it would suffer substantial loss.
29. In the application before this court, the Appellant/Applicant failed to discharge the burden imposed upon it to enable this court exercise its discretion in its favour.
30. The final principle this court is required to consider is the sort of security the Applicant should give for the due performance of the decree.
31. I have already shown that in the supporting affidavit of Njenga Njihia, the Applicant has clearly stated that it is ready and willing to furnish security in the event the court makes the order.
32. On the face of the motion, the Applicant avers that it is ready and willing to furnish a reasonable security for the due performance of the decree.
33. However, Mr. Kuria, Learned Senior Counsel beseeched this court to permit the Applicant to make a deposit of the half the judgment sum as the due performance of the decree. When it comes to the issue touching on the sort of security to be given, this court is given an unfettered discretion.
34. The Applicant merely argued that the economy is undergoing turbulent times and that virtually all enterprises are experiencing cash constraints. The aforesaid averments were not backed with any credible data to show that the applicant is undergoing turbulent times.
35. However, in view of the fact that the Respondent did not controvert the Applicant's averments, I have no reasonable doubt the veracity of the Applicant's averments. Had the Applicant succeeded in showing it would suffer substantial loss if the order for stay is denied, I would have granted an order for stay pending appeal on condition that it **Deposits Half the Judgment Sum** and to provide a **Bank Guarantee** or an **Insurance Bond** for the balance.
36. Having failed to prove the substantial loss, I find the motion dated 20th July, 2018 to be without merit. It is dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 21st day of September, 2018.

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J K SERGON

JUDGE

In the presence of

Karanja for the Appellant/Applicant

Respondent in person