



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 1 OF 2020

WEST FM MEDIA.....APPELLANT/APPLICANT

-VERSUS-

JOSEPHAT MATASIO KOFU.....RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated **14 January 2020**. It was filed simultaneously with the appeal herein by the appellant, **West FM Media**, pursuant to **Article 159(2)** of the **Constitution**, **Sections 1A, 1B, 3, 3A and 65** of the **Civil Procedure Act**, **Chapter 21** of the **Laws of Kenya**, as well as **Order 42 Rule 6** and **Order 51 Rule 1** of the **Civil Procedure Rules** for the following orders:

[a] That the Court be pleased to stay the execution of the Judgment and Decree of the lower court pending the hearing and determination of the appeal; and

[b] That costs of and incidental to the application be provided for.

[2] The application was premised on the grounds set out on the face thereof; and on the averments contained in the Supporting Affidavit sworn on **14 January 2020** by the appellant's Administration Manager, **Violet Murumba**. It was the averment of **Ms. Murumba** that the appellant was sued by the respondent before the lower court; and that the lower court delivered its Judgment on **9 December 2019** in which it found for the respondent and awarded him **Kshs. 1,000,000/=** as general damages for defamation, together with interest and costs of the suit. It was further averred that the appellant, being dissatisfied with that Judgment, has filed the instant appeal, seeking to have the whole of that decision overturned.

[3] It was further the contention of the appellant that the appeal has overwhelming chances of success; and that unless execution of the subject decree is stayed, the appeal will be rendered nugatory. The appellant further asserted that it stands to suffer substantial loss, granted that the respondent sued a non-existent entity and yet is intend to levy execution against **West Media Limited**. In support of the averments in the Supporting Affidavit, the appellant annexed several documents, including a copies of the pleadings, witness statements and written submissions filed before the lower court as well as a letter dated **10 December 2019**, forwarding the respondent's Bill of Costs to the appellant's advocates for consideration.

[4] The respondent opposed the application vide his Grounds of Opposition dated **27 January 2020**, contending that:

[a] The application is incompetent;

[b] The application does not meet the prerequisites of **Order 42 Rule 6** of the **Civil Procedure Rules**;

[c] The affidavit in support of the application is incompetent;

[e] The applicant has not given any security for the due performance of the decree;

[f] The applicant is delving into the merits of the appeal instead of confining itself to the application for stay pending appeal.

[5] Directions were then given on **22 February 2020** that the application be canvassed by way of written submissions. Thus, the respondent's written submissions dated **27 January 2020** were filed herein on **29 January 2020** by **M/s Mwinamo Lugonzo & Company Advocates**, while the appellant's written submissions were filed herein on **27 October 2020** by **M/s Wekesa & Simiyu Advocates**. In its written submissions, the appellant reiterated its contention that the respondent sued a non-existent party; and that although he had occasion to

amend his Plaintiff before the lower court, this anomaly was not addressed. Counsel further argued that, having taken the conscious decision to sue a non-existent party, it would be injudicious for execution to be levied against the appellant. The case of **Kenya Medical Laboratory Technicians and Technologists Board & 6 Others vs. Attorney General & 4 Others** [2017] eKLR was relied on to support this argument.

[6] In support of the argument that the appellant stands to suffer substantial loss, **Mr. Wekesa** urged the Court to find that the decree involves a huge sum of money; and that the appellant is apprehensive that the respondent is unlikely to refund the same in the event of the appeal succeeding, since he is of doubtful financial means. Counsel relied on **Abdulla Said Salat vs. Ugas Sheikh Mohammed** [2016] eKLR; **Esther Wanjiru vs. Jackline Arege** [2014] eKLR and **Tassam Logistics Ltd vs. David Macharia & Another** [2018] eKLR to support his submission that, in terms of substantial loss, it was sufficient for the appellant to demonstrate that it is unlikely for the respondent to repay the funds in the event that the appeal is successful.

[7] Counsel likewise urged the Court to note that the application was filed without unreasonable delay; and that the appellant is willing to furnish security by way of a guarantee for the due performance of the decree; and that this is a sign of good faith on the part of the appellant, as it shows that the application for stay is not intended to deny the respondent the fruits of his judgment. To buttress this argument, counsel referred the Court to **Focin Motorcycle Co. Ltd vs. Ann Wambui Wangui & Another** [2018] eKLR. He therefore urged the Court to find that the appellant has met the threshold for the grant of stay of execution pending appeal.

[8] On his part, counsel for the respondent impugned the Supporting Affidavit and argued that it is incompetent for the reason that it was sworn by a person other than a director of the appellant and should therefore be struck out along with the application for being incompetent. He also submitted that this being a money decree, the appellant should be required to deposit the entire decretal sum plus costs in a joint interest earning account as security for the due performance of the decree. He took the view that a guarantee would not suffice; pointing out that the appellant's assets and net worth are unknown; and therefore that the appellant could well be incapable of satisfying the decree should the appeal be dismissed. Counsel urged the Court not to look at the merits of the appeal as was urged by the appellant, but to confine itself to the conditions set out in **Order 42 Rule 6** of the **Civil Procedure Rules**.

[9] I have given due consideration to the application, the grounds set out therein as well as the averments in support as deposed to by **Violet Murumba**. I have also considered each of the Grounds of Opposition and the respective written submissions filed by learned counsel. The brief background to the application is that the appellant was sued by the respondent before the lower court for defamation of character in **Eldoret CMCC No. 1148 of 2016: Josephat Matasio Kofu vs. West FM Media**. The respondent's cause of action was that the appellant had published words over the radio that were false, malicious and calculated to injure the reputation of the respondent and cause him pecuniary, professional and emotional damage. Accordingly, the respondent prayed for:

- [a] General, exemplary, punitive and aggravated damages;
- [b] Costs of the suit;
- [c] Interest on (a) and (b) above; and,
- [d] Any other or further relief as the court may deem fit to grant.

[10] The appellant denied the claim and put in a Defence in which it pointed out, *inter alia*, that although served with the Plaintiff, it was not the defendant as impleaded; and therefore that it was non-suited. The appellant further denied that it had aired or broadcast any of the words complained of by the respondent. It accordingly prayed for the dismissal of the respondent's suit. The lower court thereafter heard the parties and found for the respondent, in a Judgment delivered on **9 December 2019**. The respondent was thus awarded **Kshs. 1,000,000/=** in general damages together with costs; which award provoked the instant appeal.

[11] There is no gainsaying that a successful litigant, such as the respondent herein, is entitled to the fruits of his litigation. This truism was aptly expressed in **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2)** [2002] KLR 63 thus:

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

[12] The foregoing notwithstanding, **Order 42 Rule 6(1)** of the **Civil Procedure Rules**, provides that:

"... 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..."

[13] Thus, the Court has the discretion to grant stay of execution where a justification has been made therefor. It is for this reason that **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, stipulates that:

- (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 applicant 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 applicant."

[14] In the light of that provision, it is incumbent upon any applicant, in an application such as this, to demonstrate the risk of substantial loss unless stay is granted; and be ready to furnish such security as the court may order. It must also be plain that the application was brought without unreasonable delay.

[15] Before delving into the merits of the application, it is imperative to pay attention to the technical points raised by the respondent; particularly with regard to the competence of the Supporting Affidavit and by extension, the application itself. Not much was said by counsel for the respondent in the written submissions about the said affidavit, save the assertion that:

"The affidavit in support of the application is sworn by one Violet Murumba an Administration Manager with the Appellant. The said Violet Murumba is not a director of the company and cannot be able to demonstrate the financial capacity of the Appellant."

[16] It is immediately manifest then that the objection has nothing to do with any breach of the rules of procedure. It is simply targeting the probative value of the declarations made therein and whether they furnish sufficient proof of the facts in issue in the application. I therefore have no hesitation in holding that the objection is misconceived, since the deponent made it clear in paragraphs 1 and 2 that she had the authority of **West Media Ltd** to swear the affidavit on behalf of the appellant.

[17] On the merits, there is no dispute that the application was brought within a reasonable period of time of the date of delivery of the lower court judgment. It was filed on **15 January 2020**; about 11 days or so from **9 December 2019**, bearing in mind that, by dint of **Order 50 Rule 4** of the **Civil Procedure Rules**, the period **between 21st December and 13th January** are to be excluded when reckoning time. It is also significant that the appellant expressed its willingness to furnish security for the due performance of the decree; and although it proposed to give a guarantee as security, it appreciates that, ultimately, it is in the discretion of the Court to determine the appropriate security.

[18] Thus, the only issue for determination is the question whether the appellant has demonstrated that it stands to suffer substantial loss unless an order of stay is granted. All the authorities cited in this regard by counsel, though of the persuasive kind, are all on point on the aspect of substantial loss. I particularly appreciate the expressions made in **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)** [2004] 2 EA 331 that:

"substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal."

[19] And, in **Kenya Shell Limited vs. Kibiru** [1986] KLR 410 the Court of Appeal held that:

"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."

[20] In the same vein, **Gachuhi, Ag.JA** (as he then was) at 417 held:

"It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

[21] The assertion by the appellant herein is that the respondent is a man of straw and therefore that he will not be in a position to refund the decretal sum should the appeal be allowed. It was expected then that the respondent would rebut these averments by way of a replying affidavit and allay the appellant's apprehensions. He opted, instead, to file Grounds of Opposition. In this regard, the Court of Appeal made it clear in **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another** [2006] eKLR, that:

"This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. 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."

[22] Accordingly, balancing the interests of both parties to the instant application, I am convinced that the interests of justice would best be served by a stay order pending the hearing and determination of the appeal. In terms of security, I am persuaded that, in the circumstances of this case, the proposal by counsel for the respondent that, instead of a guarantee, the decretal sum be deposited in a joint interest earning account pending the hearing and determination of the appeal, is reasonable and will take care of the interests of both parties.

[23] In the result, I find the application by the appellant meritorious. The same is hereby allowed and orders granted as hereunder:

[a] That appellant's application dated **14 January 2020** be and is hereby allowed.

[b] That an order of stay of execution be and is hereby granted staying the execution of the decree arising from the Judgment of the Senior Principal Magistrate dated **9 December 2019** in **Eldoret CMCC No. 1148 of 2016** pending the hearing and determination of this appeal on condition that the decretal sum of **Kshs. 1,000,000/=** be deposited in a joint interest earning account in the names of counsel for the parties within 30 days from the date hereof.

[c] That the costs of the application shall abide the appeal.

It is so ordered.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF FEBRUARY 2021

OLGA SEWE

JUDGE