REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 174 OF 2020

NATION MEDIA GROUP.....APPELLANT

- VERSUS –

CHILD WELFARE SOCIETY OF KENYA.....RESPONDENT

RULING

The appellant vide its application dated 24th February, 2021 seeks the following order: -

> **"That there be a stay of proceedings and the orders issued in the ruling delivered on 4th August 2020 in CMCC No. 7192 of 2019 pending the hearing and determination of this appeal."**

The application is supported by the affidavit of **Emmanuel Juma** who is a journalist working with the appellant. The respondent filed a replying affidavit sworn by **Irene Mureithi** who is its Chief Executive Officer. The applicant filed its written submissions dated 14th July, 2021 in support of the application while the respondent's submissions are dated 26th August, 2021.

The applicant submit that the application seeks stay of the proceedings before the trial court. It is also submitted that the dispute relates to punishment for contempt of court and if the proceedings are not stayed, the applicant will suffer as there is a possibility of the appellant's employee's suffering personal liberty. Reference is placed on the case of **RELIANCE BANK LIMITED –V- NORLAKE INVESTMENTS LTD (2002) I EA, 227** where the court stated:-

> **"To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined."**

The applicant also made reference to the case of **JUSTUS KARIUKI MATE & ANOTHER –V- MARTIN NYAGA WAMBORA & ANOTHER (2014) eKLR** where the court held:-

> **"Indeed, if this court declined to maintain the *status quo*, the High Court would proceed to take mitigation, and then sentence the Applicants. There is a likelihood, in that case, that the Applicants would be incarcerated, and the substratum of the Appeal-cause would have been spent. In the event that this Court eventually finds in favour of the Applicants, it would be impossible to compensate them by way of costs. In the alternative, if the Court finds in favour of the Respondents, no harm would have been occasioned to them."**

It is the applicant's contention that the respondent is seeking to punish the alleged contemnors while the appeal is pending. The issue of service is in dispute and the applicant is entitled to seek for a second determination by a higher court. Counsel for the applicant relies on the case of **ELENA C. KORIR –V- KENYATTA UNIVERSITY (2012) eKLR** where the court stated:-

> **"The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs. Thornton & Turpin Ltd where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that "The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay. The applicant must furnish security, the application must be made without unreasonable delay."**

The application is vehemently opposed. It is submitted by the respondent that the court's discretion to grant the application must be exercised

judiciously and in accordance with the principles of law. The applicant must show sufficient cause. Counsel referred to the case of **VISHRAM RAVJI HALAI –V- THORNTON & TURPIN (1990) KLR 365** where the Court of Appeal held:-

> **"Whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay."**

Reference is also made to the case of **BUTT –V- RENT RESTRICTION TRIBUNAL (1979) eKLR** where the Court of Appeal held:-

> **i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
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> **ii. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.**
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> **iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
>
> **iv. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.**

The respondent maintain that the applicant and the contemnors have refused and or failed to purge the contempt and the offensive items are still published on its official twitter handle. This proves that the applicant and the contemnors have not deemed it appropriate to obey the court order yet they are seeking an equitable relief from the court. According to the respondent, the applicant and the contemnors are undeserving of the orders being sought and also ought to be denied audience before the court. Counsel relies on the case of **KENYA UNION OF POST PRIMARY TEACHERS & 3 OTHERS –V- NJERU KANYAMBA (2018) eKLR** where it was held:-

> **In this jurisdiction, this Court has emphasized the sacrosanct nature of the right to be heard in the context of contempt of court applications. Speaking for the majority, Githinji, JA expressed himself as follows in Rose Detho v. Ratilal Automobiles Ltd & 6 Others, CA No. 304 of 2006 (171/2006 UR):**
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> **"Thus, there is no absolute legal bar to hear a contemnor who has not purged the contempt...and whether the court will hear the contemnor is a matter for the discretion of the court depending on the circumstances of each case."**
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> **The reason why, depending on the circumstances of each case, the court must retain the discretion, albeit to be exercised sparingly, to decline to hear a contemnor is because our entire constitutional edifice is predicated on respect for the rule of law. The moment a party hacks at that foundation, the entire system is threatened."**

Further reliance is placed on the case of **FRED MATIANGI, The Cabinet Secretary, Ministry of Interim and Co-ordination of National Government –V- MIGUNA MIGUNA & 4 OTHERS** where the Court of Appeal held:-

> **"In deserving cases, this Court has itself set its face firmly against granting contemnors audience until and unless they first purge their contempt and it shall continue to do so in such cases as evince a headstrong contumaciousness proceeding from a bold impunity, open defiance or cynical disregard for the authority of the Court and the integrity of the judicial system. Such pernicious conduct cannot be countenanced and those hell-bent on it will find neither help, nor refuge under a convenient and self-serving appeal to natural justice when their impudent conduct threatens the very foundation of the rule of law. While the right to fair hearing is sacrosanct and is one of the non-derogable rights in Article 25 of the Constitution, we affirm with this Court in A. B. & ANOTHER vs. R.B. 2016 eKLR that there may be instances where due to the risk of the rule of law being deliberately undermined, such right may be denied and the hearing of an application for stay denied until there is full compliance with the orders of the High Court.**"

It is also contended by the respondent that the appellant and the contemnors were served with the court orders restraining them from publishing the impugned information but went ahead and published the information, have remained unperturbed, exhibited total disregard for the rule of law and are making a mockery of the administration of justice. Counsel relies on the case of **RWN –V- EKW (2019) eKLR** on the issue of the court's power to grant an order staying execution where it was held:-

> **"The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.**
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> **Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."**

Analysis and Determination

The applicant seeks an order staying the proceedings before the trial court. The background to the dispute is that the respondent instituted Civil Suit number 7192 of 2019 before the Chief Magistrate's Court, Milimani Commercial Courts. The court issued an order restraining the appellant from publishing certain information relating to the respondent. It was the respondent's case that despite the court order having been served upon the appellant, the alleged defamatory information was published and disseminated. The trial court found the appellant and some of its employees to be in contempt of court. The applicant filed a Notice of Motion dated 12th August, 2020 before the trial court seeking stay of proceedings as well as stay of execution of the trial court's orders which found the appellant and its employees to be in contempt of the court orders. The trial court dismissed that application vide its ruling delivered on 24th February, 2021. The appeal is against the earlier ruling delivered on 4th August, 2020 which found that the appellant and its employees were properly served with the court order which restrained them from publishing the alleged defamatory information and were therefore in contempt of the court order.

The applicant now seeks a stay of the proceedings before the trial court. It is contended that the matter is now listed for mitigation and sentence. The applicant and its employees who have been found to be in contempt will suffer substantial loss if the orders are not granted and the appeal will also be rendered nugatory.

Counsel for the respondent is of the view that the applicant having failed to purge the contempt, does not deserve the court's audience. This line of thought was also expressed by Mutungi J (as he then was) in the case of **TRUST BANK LIMITED –V- SHANZU VILLAS LIMITED & 3 OTHERS (2004) 2 KLR, 299** where he held:-

> "**When allegations of contempt of the court are raised, the alleged contemnor must either be purged of the contempt allegation or punished for it, if proved, before he/she can continue to have audience before the said Court or tribunal**."

It is evident that the trial court is about to render its sentence having found the appellant and the alleged contemnors guilty of contempt of court. The proceedings specifically relating to the issue of contempt of court are quasi criminal in nature. The applicant's apprehension that there is a likelihood of the contemnors being denied their personal liberty through a custodial sentence is quite true. There is no guarantee that the trial court will simply condemn the contemnors to pay a fine and in default serve an alternative prison sentence. I do find that the applicant has established that there is likelihood of a substantial loss being suffered should the orders being sought be denied. I see no good reason as to why the applicant should be denied audience. There has been no persistent pattern exhibited by the applicant indicating that even if the appeal is dismissed, still the contempt will not be purged.

In the case of **HADKINSON –V- HADKINSON 91952) 2 ALL E.R. 567, at page 575** Lord Denning made the following observation:-

> **"I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues it impedes the cause of justice by making it more difficult for the court to ascertain the truth or to enforce orders which it may make, then, the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed".**

In the same case of **HADKINSON V HADKINSON (supra)** the court further emphasized on the need to obey court orders and stated as follows:-

> **"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, L.C., said in Chuck –vs- Cremer (1) (1 Coop. temp.Cott 342):**
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> **"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it… It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed."**

The Memorandum of Appeal dated 6th August 2020 mainly deals with the issue of service of the court orders upon the appellant and its staff. The appellant maintain that there was no disobedience of the court orders and that it has no control on what is posted on the social media.

In the case of **MANDAVIA V. RATTAN SINGH s/o N. SINGH (1962) E.A. 730, Newbold J.A** (as he then was) made reference to the case of **WILTSHIRE –V- FELL (3) 1959** where the court held:-

> **". . .the committal order which has been made must stand and can only be revoked on appeal. That does not in any way take away from the learned judge the power to vary the effect of the order, or to suspend its operation, or in any way remove his control of the case."**

Contempt of court proceedings have the underlying concept of upholding the rule of law and maintaining the dignity of the court. In my view, a person found to be in contempt of court orders ought to be granted audience before the court unless it can be established that such a party is in all manners out to demean the dignity of the court and undermine the rule of law. Further, before such a party suffers the wrath of the court through the imposition of a penalty, she/she ought to be allowed to contest the orders which found him/her guilty of contempt upto the last appellable superior court. There should be no hurry on the part of the court in imposing a sentence before the contemnor exhaust his right of appeal.

In the case of **KASTURILAL LAROYA –V- MITYANA STAPLE COTTON CO LTD & ANOTHER (1958) E.A. 194**, the Court of

Appeal of East Africa & Sir Audley McKijack, C.J. made the following observation at page 196:-

> **"Recourse ought not to be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the late Master of the Rolls in the case of Re Clement seem much in point: 'It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction."**
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> **In the result, therefore, I find that the conduct of the respondents (on the assumed facts) does not amount to an obstruction of the course of justice to prejudice to the decree holder's interests, and the mere fact that there has been disobedience to an order of the court does not, in those circumstance render the respondents liable to be dealt with as for a contempt."**

The applicant's employees have already been found guilty of contempt of court. They are likely to suffer the consequences of that finding. The court should not be in a hurry to punish the contemnors before they finalize their constitutional right of appeal.

The applicants contend that the appeal may be rendered nugatory. In the case of **RELIANCE BANK LTD –V- NORLAKE INVESTMENT LTD** (supra), the court explained the term "nugatory" and stated as follows:-

> **"The term „nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.**

If the contemnors are sentenced to a term in prison, it may take sometime before they are released on bond. On the other hand, if trial court imposes a fine, the amount paid can be refunded. The circumstances of the case raises a picture whereby it might be difficult to reverse the situation should the trial court impose a custodial sentence. This goes on to establish the requirement for sufficient cause being established by the applicant for the court to grant an order of stay of execution. I do find that the applicant has shown sufficient cause and that substantial loss will be suffered if the trial court's proceedings are no stayed. Further, the appeal will be rendered nugatory if the trial court completes the exercise. If that was to happen, it will lead to the filing of a second appeal in the same cause even before the trial court has fully heard and determined the main suit.

I am satisfied that the application herein is merited and is hereby granted as prayed. I do further direct that the appellant/applicant do file the Record of Appeal within sixty (60) days hereof.

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF SEPTEMBER, 2021.

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S. CHITEMBWE

JUDGE