



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 197 OF 2021

SCHON AHMED NOORANI.....APPELLANT

VERSUS

RAJENDRA RATILAL SANGHANI.....RESPONDENT

RULING

1. This ruling is the outcome of two applications. One is dated 28th May 2021 taken out by the Appellant herein and supported by the grounds set out on its body and the facts deponed in the affidavit of Schon Ahmed Noorani. The appellants seek to stay the proceedings and orders issued by Honourable Kagoni in Milimani CMCC E6567 of 2021 and one dated 12th August 2021 filed by the Respondent seeking to set aside orders issued by this Honourable Court on 28th June 2021 which stayed the proceedings and execution of orders issued in Milimani CMCC E6567 of 2021 pending the hearing and determination of the substantive Appeal.
2. In opposing the said Motion, the respondent filed the replying affidavit of Rajendra Ratilal Sanghani to which Schon Ahmed Noorani rejoined with her supplementary affidavit sworn on 3rd November, 2021.
3. On the 4th of October, the parties agreed to jointly have the applications heard and at the same time treat the application dated 12th August 2021 as a response to the Appellant's application dated 28th May 2021. Consequently, the parties put in written submissions on the same.
4. I have considered the grounds featuring on the face of the Motions; the facts deponed in the supporting, replying and supplementary affidavits respectively; in response thereto; and the rival written submissions placed before me.
5. A brief background of the matter is that the respondent instituted a suit against the applicant seeking *inter alia*, various forms of damages and an order for mandatory and permanent injunctions compelling the appellant to publish an apology and restraining him from publishing defamatory articles.
6. The respondent further filed an application dated 19th March 2021 before Hon. E. Kagoni who granted the orders of injunction restraining the Appellant from further publishing any defamatory and threatening material.
7. Being aggrieved by the aforementioned decision, the appellant filed the appeal herein and subsequently this application dated 28th May 2021 which was allowed *ex parte* by this court who stayed Hon. E. Kagoni orders and proceedings in MCCC E6567 of 2020 pending the hearing and determination of this Appeal.
8. According to the appellant's submissions, the Respondent seeks to set aside the orders issued by this court on June 29, 2021 on the sole ground that the Respondent was not properly served with the appellant's pleadings, and that the email info@kiharanjugunaads.co.ke through which service was effected is no longer functional.
9. The Appellant submitted that the Respondent has not adduced any evidence to demonstrate to this court how they have suffered prejudice since 28th June 2021 when this court issued the orders for stay of proceedings and for stay of execution.
10. The appellant argued that if the said orders are not granted the substance of the Appeal shall stand trifled and futile as the Appeal seeks to impugn the ruling and consequential orders issued in the lower court. On this the appellant relied on the case of **Stanley Kangethe Kinyanjui v Tonny Ketter & 5 Others (2013) eKLR** in which the court held that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible or whether damages will reasonably compensate the party aggrieved.
11. In its submissions, the respondent argued that the appellant's advocate did not properly serve the Respondent's advocates therefore the said *ex parte* orders were issued irregularly. They contend that the *ex parte* orders will gravely prejudice the Respondent because the said

orders tend to allow the Appellant to publish defamatory and threatening material against him.

12. The Respondent submitted that the errors and mistakes of the advocate ought not to be visited on the client and that indeed the Respondent's advocates did provide the said email address as info@kiharanjugunaads.co.ke in the pleadings however upon realizing the said email was not functional they informed the Appellant of the same and the change of email address.

13. The Respondent submitted that the Appellant has failed to show adequate cause why the Orders of March 19, 2021 should be stayed, such that this court is convinced that substantial harm would arise if the orders are not stayed.

14. The Respondent contends that the exparte orders should be set aside in the interest of justice since the Respondent has offered significant and compelling reasons that are demonstrable and convincing to the court as to why their advocate was unable to be in court. As a result, they request that the application dated August 12, 2022 be granted with costs

15. I have considered the grounds stated on the face of the application, the affidavits both filed in support and against the application plus, the submissions filed as well as the authorities cited and relied upon.

16. The granting of an order for stay of proceedings is purely a matter of judicial discretion. The principles surrounding the granting of an order for stay of proceedings were aptly discussed by the court in the case of **William Kamunge & 2 others v Muriuki Mbithi [2016] Eklr** inter alia as follows:

“...it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

17. The first principle is whether the application was filed in a timely manner. The application was filed quickly because the lower court's instructions were issued on March 19, 2021, and this application was filed two months later on May 28, 2021. The point of contention is that the Respondent wants the orders for stay of proceedings and the exparte orders set aside because they were not properly served with the pleadings, particularly because the service by the Appellant was ineffective.

18. After considering the explanation provided above, the Respondent should have informed the Appellants of the change of email address in a timely manner, as it would be adverse to both parties if the same was not communicated to the Respondent. Furthermore, the Respondent has not presented any evidence that the aforementioned email was not functional.

19. I don't believe the lack of service was a factor in the application being delivered exparte. The Respondent, in my opinion, has not shown sufficient evidence to show that they were not served.

20. The *second* principle concerns itself with whether the applicant has an arguable appeal with reasonable chances of success. The appellant is of the view that their appeal raises arguable grounds and has high chances of success, and that if the order sought herein is denied, thereby rendering the appeal nugatory.

21. From my study of the grounds featured in the memorandum of appeal, it is apparent that the appeal seeks to challenge the ruling delivered by the trial court, the orders of injunction restraining the Appellant from further publishing any defamatory and threatening material.

22. In my view, I am satisfied that the appellant has demonstrated that the appeal raises prima facie arguable points of law and fact and that if an order for a stay of proceedings is denied and the suit proceeds for hearing, there is a likelihood that the appeal will be rendered nugatory.

23. The *third* principle touches on the interest of justice vis-à-vis the subject of prejudice, the appellant states and submits that they will be greatly prejudiced if the order sought is denied, thereby denying them their constitutional right to a fair hearing, while stating that the respondent does not stand to be prejudiced if the order for stay of proceedings is granted.

24. Concerning the *fourth* principle on the expeditious disposal of cases vis-à-vis proper use of judicial time, upon considering the foregoing circumstances, I find that it would only be a practical and proper use of judicial time for the parties to first pursue the appeal before undertaking any further proceedings in the present suit.

25. In the end therefore, the Motion dated 28th May, 2021 is hereby allowed on merit. Consequently, there shall be a stay of all further proceedings in Milimani CMCC NO. E6567 of 2020 pending appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF DECEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent