



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 237 OF 2012

KENYA UNION OF SAVINGS & CREDIT CO-OPERATIVES

LIMITED (KUSSCO).....PLAINTIFF/RESPONDENT

VERSUS

NATION MEDIA GROUP LTD.....1ST DEFENDANT/APPLICANT

LINDA OGUTU.....2ND DEFENDANT/APPLICANT

RULING

1. This ruling is the outcome of the Notice of Motion dated 16th November, 2018 taken out by the defendants/applicants herein. It is supported by the grounds stated on the face of the application and the facts deponed in the affidavit filed in support of the Motion. The applicants are seeking for an order for a stay of execution of the judgment delivered by this court on 19th October, 2018.
2. The Respondent filed the replying affidavit of *George Ototo* to oppose the motion.
3. The Motion was canvassed through oral arguments, which I have considered together with the grounds stated on the face of the Motion and the facts deponed in the supporting and replying affidavits.
4. The brief background of the matter is that the suit was filed by the respondent against the applicants on 21st May, 2012 seeking compensatory and injunctive reliefs for malicious and defamatory publications made by the applicants.
5. In its judgment of 19th October, 2018 this court awarded the respondent the sum of Kshs.129,465,101/= as damages together with costs and interest thereon. This court also ordered the applicants to publish an apology to the respondent within 30 days from the above date, in default the applicants were ordered to pay to the respondent the sum of Kshs.2,000,000/= in lieu of the apology.
6. The abovementioned judgment is both the subject of the intended appeal and the application for a stay.
7. The guiding principles to be considered before granting an order for stay of execution are set out under *Order 42, Rule 6 (2)* of the *Civil Procedure Rules* 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.*
8. The first condition, it would seem, is uncontroverted. It has already been established that judgment was delivered by this court on 19th October, 2018 whereas the Motion was filed on 16th November, 2018; barely one (1) month later. There is not a hint of unreasonable delay in bringing the same.
9. The second condition relates to substantial loss. *Ms. Kemunto* counsel for the applicants submitted that the decretal sum is a colossal amount that will have the impact of crippling the applicants' business.
10. Further to the above, it is the applicants' apprehension that the respondent has not demonstrated its ability to refund the decretal sum once the same is released to it.

11. *M/s Oduor* learned advocate for the respondent contended that the respondent has availed a statement of account and audit report as evidence of its ability to refund the decretal sum, to which *Ms. Kemunto* countered by arguing that the statement of account availed by the respondent is neither proof of financial ability nor proof of assets.

12. *Ms. Kemunto* added that the audit report only accounts for the position as at December, 2017 and does not indicate the respondent's current financial position.

13. That said, the courts have stated on various occasions that the mere fact that the decretal sum is colossal is not sufficient cause on which to argue substantial loss.

14. I have looked at the respondent's financial and audit reports annexed as "GO 1(a) & (b)" respectively to the supporting affidavit; the said documents are a reflection of the respondent's assets and liabilities.

15. I have noted that the reports only revealed the respondent's financial position as at 31st December, 2017 and not its current status, thereby making it difficult to ascertain whether or not the respondent is in a position to refund the decretal sum if the appeal is successful.

16. It is the ordinary course of principle for a successful party to be granted the privilege of enjoying the fruits of his or her judgment. Nonetheless, the courts are called upon to create a level fighting ground for the parties, as was the position taken in *Machira t/a Machira & Co Advocates v East African Standard [2002] eKLR* cited by the respondent as well as *Edward Kamau & another v Hannah Mukui Gichuki & another [2015] eKLR*. In the latter case, the court held as follows:

"Therefore, to ensure that the parties to the suit fight it out on a level ground on equal footing, stay can be granted on terms, since there is no absolute guarantee that the appeal as filed shall be successful on all fours, while appreciating the respondent has a lawful judgment whose execution is being suspended. In the end, I employ a balancing act between two rights-that of appeal by the applicants and of enjoyment of a lawful judgment and not being discriminated for being of unknown financial means, for the Constitution commands that justice shall be done to all irrespective of status."

17. On the provision of security, *Ms. Kemunto* for the applicants demonstrated her clients' willingness to offer a bank guarantee as security for the due performance of the decree, while *M/s Oduor* for the respondent maintained that the security offered is neither sufficient nor appropriate.

18. Having considered the rival submissions, I am convinced that the defendant/applicant is entitled to the prayer for stay. I am also satisfied that the offer by the defendant/applicant to give a bank guarantee as security for the due performance of the decree is reasonable in view of the fact that the judgment sum is a colossal amount. Consequently, an order for stay of execution of the decree pending appeal is given on condition that the defendant/applicant provides a bank guarantee for the judgment sum within 30 days from the date hereof. In default, the application for stay will be deemed as having been dismissed.

Dated, Signed and Delivered at Nairobi this 2nd day of May, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the 1st and 2nd Defendants/Applicants