



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 586 OF 2010**

**NATION MEDIA GROUP LIMITED.....APPELLANT**

**VERSUS**

**KENNETH SIMIYU KANGUKHA..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 6<sup>th</sup> March 2019, the appellant, *Nation Media Group Limited* (hereinafter the applicant) moved this court seeking orders of stay of execution pending the hearing and determination of its intended appeal against the judgment delivered by this court on 13<sup>th</sup> February 2019.

2. The application is expressed to be brought under *Order 42 Rule 6* and *Order 51* of the *Civil Procedure Rules, 2010*. It is premised on grounds stated on its face which are replicated in the depositions made by the applicant's learned counsel *Mr. Timothy Mukungu* in his supporting affidavit sworn on 6<sup>th</sup> March 2019.

3. In the supporting affidavit, *Mr. Mukungu* depones that the applicant is aggrieved by the judgment of this court dated 13<sup>th</sup> February 2019 which dismissed the applicant's appeal and thereby upheld the *ex parte* judgment entered by the trial court in CMCC No. 1287 of 2009 in which the respondent was awarded KShs.350,000 together with costs and interest; that the applicant is desirous of appealing against the whole of this court's judgment and has already filed a notice of appeal; that if the stay sought is not granted, the respondent will revive the execution proceedings he had commenced before the trial court or move the court for release of the decretal amount which is held in a joint fixed deposit account in the names of the advocates on record pursuant to an order issued by *Hon. Ang'awa J* on 3<sup>rd</sup> June 2011.

4. The deponent further avers that the respondent is its former clerk and his financial means are unknown.

The applicant is apprehensive that if stay is not granted and the respondent is paid the decretal amount, the appeal which has high chances of success will be rendered nugatory as the respondent may not be capable of refunding the decretal amount in the event that its intended appeal is successful.

5. When served with the application, the respondent contested it by filing grounds of opposition on 13<sup>th</sup> March 2019 in which he contended *inter alia*; that the application does not meet the conditions for grant of orders of stay of execution; that nothing in the judgment of the court dated 13<sup>th</sup> February 2019 is capable of being stayed in the manner contemplated by the applicant; that the applicant has not demonstrated the loss it is likely to suffer if stay orders are not granted; that the application is brought in bad faith and was aimed at denying the respondent the fruits of his judgment ten years after the judgment was delivered by the subordinate court; that the application is misconceived and is otherwise an abuse of the court process.

6. By consent of the parties, the application was prosecuted by way of written submissions. Those of the applicant were filed on 10<sup>th</sup> April 2019 while those of the respondent were filed on 2<sup>nd</sup> May 2019.

7. I have considered the application, the rival submissions filed by the parties and the authorities cited by the applicant.

The principles which guide the court in the exercise of its discretion in deciding whether or not to grant stay of execution pending appeal are well settled. They are set out in *Order 42 Rule 6 (2)* of the *Civil Procedure Rules*. A reading of the provision reveals that for an applicant to be deserving of orders of stay pending appeal, he must demonstrate that he is likely to suffer substantial loss if stay orders are not granted; that the application had been filed timeously and that he is ready to provide such security as the court may order for due performance of the decree.

8. Though there is no doubt that the application was filed without unreasonable delay given that the judgment sought to be appealed against was delivered on 13<sup>th</sup> February 2019, from the material placed before me, I am not satisfied that the applicant has demonstrated that if stay orders as sought are not granted, it is likely to suffer substantial loss. I say so because the subject matter of the intended appeal is the judgment of this court dated 13<sup>th</sup> February 2019 which dismissed the applicant's appeal against the ruling of the lower court dated 25<sup>th</sup> November 2010 in which the trial court had refused to set aside an *ex parte* judgment entered in favour of the respondent against the appellant on 13<sup>th</sup> September 2010. It is thus clear that this court in its judgment did not make any order that is capable of enforcement by any of the parties. The court simply dismissed the appellant's appeal. The judgment gave rise to a negative as opposed to a positive order.

9. The Court of Appeal in *Kanwal Sarjit Singh Dhiman V Keshavji Jivraj Shah, [2008] eKLR* when dealing with an application for stay of a negative order stated as follows:

**“The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December, 2006. The order of 18<sup>th</sup> December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.”**

10. In *Western College of Arts & Applied Sciences V Oranga & Others, [1976] KLR 63*, the Court of Appeal held that it had no jurisdiction to issue stay pending appeal where there was nothing in the order of the High Court that can be enforced. Though the above cases related to applications for stay pending appeal filed in the Court of Appeal, I believe that the principle espoused by the Court of Appeal applies *mutatis mutandis* to applications of the same nature filed in the High Court.

11. In my view, the applicant's argument that it is likely to suffer substantial loss if the respondent proceeds with execution of the decretal amount is misplaced because the decree referred to by the applicant was issued by the lower court and not by this court. This court having dismissed the appellant's appeal did not make any orders that are capable of being stayed pending the appellant's intended appeal to the Court of Appeal.

12. For the foregoing reasons, I do not find merit in the Notice of Motion dated 6<sup>th</sup> March 2019. It is accordingly dismissed with costs to the respondent.

13. It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 11<sup>th</sup> day July, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Mburu for the appellant

Mr Makumi holding brief for Mr Masore Nyangau for the respondent

Ms Catherine Njeri: Court Assistant