



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. APPEAL NO. 706 OF 2017**

SHAHEED ALI KHAN.....1<sup>ST</sup> APPELLANT/APPLICANT

TARIQ KHAN.....2<sup>ND</sup> APPELLANT/APPLICANT

ASSAD MUGHAI.....3<sup>RD</sup> APPELLANT/APPLICANT

ROCKSTAR GROUP LIMITED.....4<sup>TH</sup> APPELLANT/APPLICANT

**-VERSUS-**

YASMIN KOUSER MUGHAL.....RESPONDENT

**RULING**

1. The appellants/applicants took out the Motion dated 26<sup>th</sup> July, 2019 in which they sought for an order for stay of the proceedings in CMCC No. 2228 of 2016 pending appeal. The motion is supported by the affidavit sworn by Shahed Ali Khan, the 1<sup>st</sup> appellant/applicant.
2. The respondent opposed the motion by filing Grounds of Opposition dated 5<sup>th</sup> August, 2019.
3. When the Motion came up for hearing learned advocates appearing in this matter opted to rely on the material placed before this court.
4. I have considered the grounds set out on the face of the Motion plus the facts deponed in the supporting affidavit and the Grounds of Opposition.
5. The principles to be considered in determining an application for stay of proceedings were restated by the Court of Appeal in the case of *UAP Provincial Insurance Company Limited v Michael John Becket [2004] eKLR* inter alia as follows:

***“In order for the applicant to succeed in an application for stay of proceedings pending appeal it is necessary for the applicant to satisfy the court, firstly that the pending appeal is an arguable one, which is not frivolous, and secondly that if the stay of proceedings is not granted the appeal when ultimately heard will be a futile exercise...”***

6. In the case of *William Kamunge & 2 others v Muriuki Mbithi [2016] eKLR* this court stated inter alia:

***“...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”***

7. The applicants have submitted that the application for stay of proceedings has been brought without unreasonable delay. The respondent is of the view that there has been an inordinate delay in filing the application and further pointing out that the same was filed as an afterthought.
8. I have examined the record of the trial court and find that the time taken between the delivery of the impugned ruling and the filing of the present Motion has been accounted for hence I am satisfied that the application before me has been brought without unreasonable delay.
9. The second factor relates to the question as to whether the applicants have brought forth a *prima facie* arguable appeal. The applicants are of the view that their appeal is largely premised on a jurisdictional issue, thus making the appeal arguable. On the other hand, the respondent

is of the submission that the application is an abuse of the court process.

10. It is not disputed that the claim filed by the respondent before the trial court is a claim based on the tort of defamation. The applicants seek to challenge the jurisdiction of the subordinate court to entertain defamation claims by way of a notice of preliminary objection which was heard and eventually dismissed hence this appeal.

11. It therefore follows that the appeal, being grounded on the issue

as to whether the subordinate court has jurisdiction to entertain defamation claims, does raise an arguable point of law.

12. I am convinced that it would be proper use of judicial time to first settle the issue on appeal since this will determine the course that the suit will take.

13. Accordingly, I will allow prayer 4 of the Motion and make the following consequent orders:

- a. There shall be a stay of proceedings in CMCC NO. 2228 OF 2016 pending the hearing and determination of the appeal.**
- b. The applicants shall thereafter ensure to prepare, file and serve their record of appeal within 30 days from today's date.**
- c. The applicants shall thereafter have the appeal set down for directions on its hearing within 30 days from the date of filing the record of appeal.**
- d. Costs of the Motion shall abide the outcome of the appeal.**

Dated, signed and delivered at Nairobi this 23<sup>rd</sup> day of October, 2019

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**J.K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellants/Applicants

..... for the Respondent