



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 140 OF 2008

GIDEON MOSE ONCHWANIPLAINTIFF/RESPONDENT

VERSUS

KENYA OIL CO. LIMITED.....1ST DEFENDANT

NATIONAL MEDIA GROUP LIMITED.....2ND DEFENDANT/APPLICANT

RULING

1. The application dated 18th May,, 2017 seeks orders that:

“1. Spent

2. Spent

3. An order be issued setting aside the proclamation of attachment of movable property and warrant of attachment of moveable property dated 10th May, 2017;

4. An order be issued staying the execution of the Judgment of the honourable Lady Justice Roseline Aburili delivered on 2nd July, 2015 and of any decree that may ensue therefrom pending the hearing and determination of Civil Appeal No. 88 of 2016 – Nation Media Group Limited v Fideon Mose Onchwati & Kenya Oil Co. Ltd.

5. Costs of this application be provided for.”

2. It is stated in the grounds and the affidavit in support of the application that judgment was delivered herein on 2nd May, 2017 for a total of Ksh.15,500,000/= as damages for libel. The 2nd Defendant/Applicant is aggrieved by the said judgment and has filed an appeal. It is further state that the 1st Defendant obtained orders of stay of execution on 4th August, 2015 and it became unnecessary for the 2nd Defendant to apply for stay of execution. That while the appeal in the Court of Appeal had a hearing date, the Plaintiff without the leave of the court moved to execute against the 2nd Defendant. It is further stated that the amount of damages awarded herein is colossal and that the Defendants stand to suffer substantial loss as the Plaintiff will not be able to refund the same in the event that the appeal is successful.

3. The 1st Defendant in it's replying affidavit supported the application. It is stated that the Plaintiff commenced execution proceedings while there were interim orders of stay of execution inforce, thereby forcing the 1st Defendant to pay 21,1641,217 in settlement of the decretal sum and auctioneers charges. That the Plaintiff's advocate has claimed a further 150,000/= as the balance of the decretal sum and Ksh.17,805,613/= as party and party costs.

4. The application is opposed by the Plaintiff. It is stated in the replying affidavit that the 1st Defendant it not a party to the application at hand. It is further stated that the application herein is an abuse of the court process. That although the costs herein have not been ascertained, the court gave orders for execution before ascertainment of costs. The Plaintiffs view is that the Defendants intention is to obstruct the course of justice.

5. The 1st Defendant/Applicant filed a supplementary affidavit. It is averred that the 1st Defendant was unaware that the stay order of execution issued following the 2nd Defendant's application had lapsed. The Appellant is willing to deposit security for the due performance of the decree. That the appeal pending before the Court of Appeal is set down for hearing and will finally resolve the dispute herein.

6. The Plaintiff filed a further affidavit in response. It is stated that the Applicant was guilty of laches and was guilty of material non-disclosure when the interim stay orders were obtained herein.

7. The application was canvassed by way of written submissions. I have considered the said submissions.

8. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“No order for stay of execution shall be made under sub-rule (1) unless –

a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

9. The judgment herein was delivered on 2nd July, 2015. The application at hand was filed 22nd May, 2017. There was inordinate delay but the same has been explained. The court record confirms that the position given by the 2nd Defendant regarding the proceedings for review and setting aside the judgment. The stay and subsequent execution against the 1st Defendant is not denied.

10. The Respondent has not disclosed his resources to this court. The Applicant is apprehensive that the Respondent if paid may not be in a position to reimburse the decretal sum in the event that the appeal is successful. The Respondent has not disclosed whether he has the capability to refund. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another:**

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

11. The Applicant is willing to deposit security for the due performance of the decree.

12. To balance the competing interest of both parties, I allow the application on condition that the amount in contention be deposited in a joint interest earning bank account of the counsels for the Plaintiff and for the 1st Defendant or in court pending the hearing and determination of the appeal. The said deposit to be made within 21 days from date hereof.

Dated, signed and delivered in Nairobi this 5th day of Dec., 2018

B. THURANIRA JADEN

JUDGE