



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 60 of 2010

Editorial Summary

1. *Civil Case*
2. *Subject of main suit*

DEFAMATION

- 2.1 *Claim, plaintiff alleged on 3rd January 2008 defendant published defamatory words in a feature: "Election 2007."*
- 2.2 *Defence raised of qualified privilege to report issues of national security and public interest.*
- 2.3 *Judgment of court dated 15th July 2011 (Rawal J) award Ksh. 7 million to the plaintiff.*
- 2.4 *Taxation costs Ksh. 837,091/- (25th October 2012) (Deputy*

Registrar)

3. *Application dated 30th October 2012*
 - 3.1 *Stay of execution of judgment/decree pending the lodging, hearing and determination of intended appeal.*
 - 3.2 *Loss to the appellant/respondent party may be occasioned.*

IN REPLY:

3.3 *No loss is occurred.*

3.4 *Delay inordinate.*

3.5 *No judicial reason is given.*

4. *Held:*

i) *Application for stay of execution granted.*

ii) *Sufficient cause shown.*

iii) *That decretal sum be deposited in a joint
interest earning account.*

5. *Case Law:*

Nil

6. *Advocates :*

i) *D. Oyatsi instructed by M/s Shapley Barret & Co Advocates
for plaintiff.*

ii) *W. Echesa instructed by M/s Ochieng, Onyango, Kibet & Ohaga
& Co Advocates for defendant*

HON. UHURU MUIGAI KENYATTA

..... **PLAINTIFF**

VERSUS

BARAZA LIMITED t/a KENYA TELEVISION NETWORK (KTN)DEFENDANT

R U L I N G

Stay of Execution Application

Dated 30th October 2012

I. BACKGROUND

1. The applicants/defendant M/s Baraza Limited t/a Kenya Television Network, were sued in this High Court on 2nd May 2008 for publishing defamatory words in a feature broadcasted "Election 2007." The suit was filed by Hon. Uhuru Kenyatta.

2. Whereas the applicant admitted that indeed the feature

"Election 2007" was published, they claimed a defense of "qualified privilege to report issues of national security and public interest."

3. Judgment of the court was delivered, after trial, on 15th July 2011

(Rawal J) in which the court awarded damages of Ksh. 7 million to the plaintiff/respondent and costs of Ksh. 837,091 also duly awarded.

(25th October 2011).

4. An application dated 30th October 2012 was filed seeking stay of execution.

5. The applicant sought orders of stay of execution of the judgment decree delivered on 15th July 2011 for the sum of Ksh. 7 million and costs of Ksh. 837,091/- pending the determination of the said application and the appeal in the Court of Appeal.

6. This court directed that the application be served. This was duly done on 1st November 2012. The parties were given time to confer on the application as this court noticed, in the affidavit, that the applicant were willing to deposit a decretal sum to an interest earning account.

7. The respondent plaintiff stated that they were willing to give an undertaking by way of a bank guarantee or issue bond once the money is paid to them.

8. The parties returned 2nd November 2012 where this argument was rejected by the applicant.

9. The application was argued in full by Hon. P. Muite leading W. Echessa for the applicant/defendants herein. The respondents were represented by D. Oyatsi.

ARGUMENTS

10. The applicants state that they would prefer if the sum of Ksh. 7 million is paid together with costs in the joint account of the two parties advocates.

11. They stated that this is what normally is done in courts. The issue of paying the decretal sum, then the respondent/plaintiff issues a letter of guarantee from the bank on the insurance company should not arise as it is irregular.

12. The applicant/defendants intends to appeal. This is because of Section 34 of the new constitution that upholds the issue of freedom of expression. The appeal to the Court of Appeal would touch on jurisprudence on liable and defamation.

13. In response, the respondent plaintiff claimed that from 15th July 2011 when the judgment was delivered to date there had been no application made. This was an inordinate delay. The applicant stated to this, that the taxation was done and decided on 25th October 2012. It is then that execution would take place, unless there was an application for leave to have the execution undertaken before taxation. No application had been filed. The said respondent/plaintiff stated that his clients had the means to repay back the said sums, if per chance the appeal was successful.

14. No judicial reasoning was given to have the said sum of moneys not paid pending appeal was given.

15. The issue of Article 34 was never a ground for stay of execution, although it was extensively raised by the applicant defendant, in the main suit. This point was dealt with by the Hon. Judge in her judgment at length.

16. The applicant prayed that the stay of execution be guaranteed having provided security.

II. OPINION

17. The applicant defendant being dissatisfied with the decision of the High Court intends to appeal to the Court of Appeal. They ask that pending the hearing of that appeal that they offer security to be deposited in an interest earning account in the names of both advocates.

18. The requirements for an application for stay of execution is that:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from.”

(Order 42 r 6 Civil Procedure Rules)

19. The exception in the rule is discretionary upon the court that the court for “sufficient cause” may order stay of execution.

20. The court would then require:

i) To satisfy itself that there would be substantial loss that may result unless the order is made.

ii) That the applicant provides security to court for the due performance of such decree or order as may be ultimately be binding on him has been given by the applicant.

iii) That the application has been made without unreasonable delay.

21. In this matter the issue of substantial loss is a matter that may be determined at the Court of Appeal. That the applicant requires to show that they were within their mandate to broadcast the alleged defamatory words. If they are permitted to pay the said sum pending appeal, the likelihood of loss as to their reputation would be realized. To safeguard this, a deposit of the said sum is recommended.

22. This is a matter of principle between the parties, as the issue indeed touches on the freedom of expression of the media. This is an important issue to determine in considering the fundamental rights raised. It is “a sufficient cause.”

23. It is for these grounds that I would hold that the security of the full decretal sum and costs having been offered, the same be accordingly provided and deposited in a joint interest earning account of both advocates till the finalization of the appeal before the Court of Appeal.

24. I would therefore allow the application as prayed with costs to the respondent.

DATED THIS 1st DAY OF NOVEMBER 2012 AT NAIROBI

M.A. ANG’AWA

JUDGE

Advocates :

- i) *D. Oyatsi instructed by M/s Shapley Barret & Co Advocates
for plaintiff.*
- ii) *W. Echesa instructed by M/s Ochieng, Onyango, Kibet & Ohaga
& Co Advocates for defendant*