Teikan (Sued in Person and as the Managing Editor of the Kajiado Star) & another v Metito & another (Civil Appeal E008 of 2025) [2025] KEHC 13658 (KLR) (25 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13658 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL APPEAL E008 OF 2025

CW MEOLI, J

SEPTEMBER 25, 2025

BETWEEN

JONATHAN TEIKAN (SUED IN PERSON AND AS THE MANAGING EDITOR OF THE KAJIADO STAR) ..... 1ST APPLICANT

KAJIADO STAR ..... 2ND APPLICANT

AND

HON. KATOO OLE METITO ..... 1ST RESPONDENT

JAMES MUTIIRA MUTEMBEI (SUED IN HIS PERSONAL CAPACITY AND AS THE PROPRIETOR OF MUTEMBEI T.V ..... 2ND RESPONDENT

RULING

1. For determination are two motions, the first to be filed by the Applicants is dated 12/3/2025 (hereafter the first motion) while the second, brought by the 1st Respondent is dated 29/4/2025 (hereafter the second motion). The key live prayer in the first motion seeks to stay execution of the Ruling delivered on 5.12.2024 and Orders made on 15.01.2025 in Ngong CMCC No E143 of 2024, pending the hearing and determination of the appeal herein. The motion is expressed to be brought under Articles 19, 20, 21, 22, 23, 24, 25, 33, 34, 48, 50 and 165 of *the Constitution* and Order 42 of the Civil Procedure Rules.

2. The first motion is premised on the grounds on its face, as amplified in the supporting affidavit sworn by Jonathan Teikan, hereafter the 1st Applicant. He averred that Katoo Ole Metito, (hereafter the 1st Respondent) instituted Ngong CMCC E143 of 2024 contending that a publication allegedly made by the 1st Applicant and the Kajiado Star (hereafter the 2nd Applicant) on 14/8/2024 in relation to matters concerning Rombo Ranch in Kajiado were defamatory of him. Therein seeking several prayers including, a permanent injunction, and by an application dated 15/8/24, he sought an interim injunction to restrain them from publishing defamatory words or any other statements connecting

the 1st Respondent to the illegal acquisition of Rombo Ranch pending the hearing and determination of the suit. He further deposed that on 16/8/24 the subordinate court granted an order barring the Applicants from publishing defamatory words or any other words or content connecting the 1st Respondent to the illegal acquisition of Rombo Ranch. It is the Applicants' contention that this order limits their freedom of expression.

3. The deponent further states that the 1st Respondent subsequently filed a contempt application dated 30/8/24 in respect of the orders issued on 16/8/24 and therein also sought an order to restrain the Applicants from publishing words connecting the 1st Respondent to the illegal acquisition of Rombo Ranch, Imbirikani Ranch and/or any other community lands within Kajiado County. And that by a ruling delivered on 5/12/24 both applications dated 15/8/24 and 30/8/24 were allowed and the Applicants were found to be in contempt of the initial injunctive orders. Further that vide an order issued on 15/01/25, the 1st Applicant was committed to civil jail and warrants of arrest issued.

4. The Applicants are aggrieved with this outcome, which in their view will impact upon their work as a leading newspaper and amounts to a violation of the freedom of media and the duty of the press to publish pertinent matters pertaining to the 1st Respondent, a public figure in the position of State House Comptroller. Hence, their appeal via the memorandum of appeal dated 28/1/25. The Applicants assert that their freedom of expression will be further unjustifiably curtailed unless the first motion is granted. Thereby exposing them to substantial loss that cannot be compensated by an award of damages, whereas the Respondents would suffer no prejudice if the orders sought are granted.

5. By his replying Affidavit dated 25/4/2025, the 1st Respondent opposed the first motion. He described it as an abuse of the process of the court, aimed at frustrating and undermining the court orders that were issued as a consequence of due process in his defamation suit in the subordinate court against the Applicants, wherein a temporary injunction against the Applicants and the 2nd Respondent was granted. And that despite being served with these orders, the Applicants and James Mutiira Mutembei (hereafter the 2nd Respondent) had willfully disobeyed the orders and continued to publish defamatory statements against the 1st Respondent. He contended that the Applicants and 2nd Respondent should have appealed against the said orders if dissatisfied.

6. Further contending that rights under Article 33 of *the Constitution* are not absolute, and did not extend to incitement to violence, hate speech, defamation or statements that endanger national security or the rights and reputation of others. Further, he argued that granting of the orders sought by the Applicants would preempt the outcome of the pending appeal and render it nugatory. And that the balance of convenience tilts in his favour, rather than the Applicants, as his reputation has been harmed by the defamatory remarks by the Applicants.

7. The second application by the 1st Respondent seeks that the first motion be struck out for being vexatious and an abuse of process of the court and is expressed to be brought under Order 2 rule 15(b) (c) and (d) and order 51 rule 1 Civil Procedure Rules.

8. The application is supported by the grounds on the face of the application and the supporting affidavit sworn by the 1st Respondent. To the following effect. That the Applicants have colluded with the 2nd Respondent to frustrate him through their malicious defamatory publications and the appeal is a clear attempt to forum shop; that the 2nd Respondent also moved the trial court vide an application dated 10/2/2025, currently pending ruling before the lower court, seeking the review and setting aside of the same ruling and orders that is the subject of the first motion; and that Order 45 rule 2 bars a party from pursuing both an appeal and review simultaneously over the same subject matter and on similar grounds. Hence, the actions by the Appellants and 2nd Respondent amount to gross abuse of judicial process through duplication of proceedings leading to wastage of judicial time.

9. The Applicants opposed the second motion through the replying affidavit sworn by the 1st Applicant. Therein asserting that the first motion was filed in good faith and in exercise of their right of appeal and to seek preservation of the status quo pending determination of the appeal. Furthermore contending that the Applicants being separate and distinct entities from the 2nd Respondent, are not parties to or in control regarding the latter party's decision to seek review. And hence ought not to be penalized for actions taken independently by another litigant, and which cannot render their application for stay incompetent.

10. Reiterating that the first motion raises substantial legal and constitutional issues, such as the freedom of expression and media under Articles 33 and 34 of *the Constitution* and the right to fair trial under Article 50 of *the Constitution*, the Applicants also affirm their right to appeal against the lower court orders, which they view as a disproportionate gagging order. They dispute the merits of the second motion which they urge the court to dismiss with costs.

11. The 2nd Respondent did not respond to either motion, despite service.

12. Both motions were canvassed by way of written submissions. On the part of the Applicants, it was argued that stay of execution is granted where the conditions prescribed in Order 42 Rule 6 (2) of the Civil Procedure Rules have been met. They cited the decision in Dominic -vs- Muyienda (suing as personal representative and administrator of the Estate of Nicholas Maraga(deceased)) (2023) KEHC 26969 KLR where the Court considered the legal principles that guide the grant of stay pending appeal.

13. Concerning the likelihood of substantial loss, the Applicants asserted that the ruling and orders which are the subject of the motion and appeal constitute a limitation to their right to fair hearing under Article 50 of *the Constitution*. In particular, citing different facets thereof, they attacked the ruling of 5/12/24 as representing a premature final disposition of the suit, hence impacting upon their right to a fair hearing. It was contended that the resultant orders unjustifiably limited the Applicants' freedom of expression and of the media as guaranteed by Article 33 and 34 of *the Constitution*. Finally, stating that the first motion was timeously filed, and that they have an arguable appeal, the Applicants expressed willingness to furnish security for costs as may be directed by the Court.

14. The 1st Respondent's submissions addressed the merits of the two motions. On the first motion it was contended that the principles for stay of execution pending appeal are well settled, and cited the Court of Appeal decision in Stanley Kangethe Kinyanjui V Tony Ketter & 5 others [2013] KECA 378 (KLR), where the Court of Appeal expressed the twin principles to be satisfied in a stay application, namely whether there was an arguable appeal, and secondly, whether the intended appeal would be rendered nugatory if stay was denied. Asserting that the applications in the lower court leading to the ruling dated 5/12/24 were unopposed, the 1st Respondent stated that the lower court orders only restrained the Applicants from publishing of defamatory words or statements against the 1st Respondent.

15. And regarding the contempt orders counsel submitted that these were essentially negative orders and therefore not amenable to be stayed. Here citing the Court of Appeal decision in Pulei & 5 others v Pulei (Suing as Personal and Legal Representative of Kasaine Pulei alias Kasaine Ole Pulei - Deceased) & 2 others (Civil Appeal (Application) E340 of 2023) [2023] KECA 1132 (KLR). In support of the proposition that an application seeking to stay a negative order is incompetent, there being nothing to stay in such order. The 1st Respondent further pointing out that the Appellants have complied with the orders of 15/1/25, having paid the fine imposed. In the 1st Respondent's view therefore, the Applicants have not satisfied the conditions for the grant of an order to stay execution pending appeal and the first motion ought to be dismissed.

16. In support of the second motion, the 1st Respondent contended that the first motion is fatally defective and an abuse of judicial process, and reiterating his affidavit material on this score, asserted that the Applicants' conduct contravenes the provisions of Order 45 Rule 1(2) of the Civil Procedure Rules. Counsel here relying on the case of Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Ltd &2 Others [2020] eKLR, where the Court of Appeal held that that the legal policy behind Order 45 of the Civil Procedure Rules is to prevent a party, against whom judgment or order has been passed, from availing himself of two simultaneous remedies. That is, to seek review in the court below while his appeal is pending in the Court of Appeal; a situation not contemplated by the Civil Procedure Rules and the Court of Appeal Rules.

17. The 1st Respondent reiterated that the Applicants and the 2nd Respondent are intentionally pursuing simultaneous proceedings in different courts, hence undermining the authority of the court. Thus, their litigation is without good faith and the first motion ought to fail.

Analysis and Determination

18. The court has considered the material canvassed in respect of the two motions is of the view that the second motion is essentially a legal objection to the first motion. Hence, the court proposes to first deal with the second motion.

19. The motion is expressed to be brought under Order 2 Rule 15 (1)(b)(c)(d) of the Civil Procedure Code which provides for the striking out of pleadings. The Rule grants power to the court to strike out pleadings as follows; -

    1. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

        a. it discloses no reasonable cause of action or defence in law; or

        b. it is scandalous, frivolous or vexatious; or

        c. it may prejudice, embarrass or delay the fair trial of the action; or

        d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

    2. .....

    3. ....."

20. By the second motion, the 1st Respondent alleges collusion between the Applicants and the 2nd Respondent, in pursuit of which the latter party has also applied for review in the subordinate court during the pendency of the present appeal, thus the existence of two parallel proceedings in respect of the same matter. The Applicants' answer was that they are distinct entities from the 2nd Respondent and that had no control over its decision to seek review.

21. The power to strike out pleadings is a discretionary and exercised within settled principles. The principles governing applications for striking out of pleadings were spelt out by Madan JA (as he then was) in D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR. The Court stated therein that: -

> " A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it.

> No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

22. These principles have held sway in subsequent years and have been applied consistently in our jurisdiction. In Kivanga Estates v National Bank of Kenya Limited [2017] eKLR, for instance, the Court of Appeal echoing the dicta in D.T Dobie (supra) stated; -

> "It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction capable of bringing a suit to an end before it has even been heard on merit. Yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations ... Striking out a pleading though draconian, the Court will in its discretion resort to it, where, for instance the court is satisfied that the pleading has been brought in abuse of its process or where, it is found to be scandalous, frivolous and vexatious".
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> See also: - Crescent Construction Co. Ltd v. Delphis Bank Ltd [2007] eKLR and Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR.

23. The key ground upon which the second motion is premised is the fact that the 2nd Respondent, which has not participated in the present motions had filed an application for review of the subject ruling of the lower court before the said court. It is trite that a party who has filed an appeal from an order or decision of a lower court cannot simultaneously apply to review the same decision or order before the said lower court.

24. In the case of Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Ltd &2 Others [2020] eKLR, the Court of Appeal held as follows:

> "In concluding this limb of the judgment, it has to be stressed that the legal policy of Order 45 is to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal."
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> See also; - Chairman Board of Governors Highway Secondary School v William Mmosi Moi [2007] eKLR.

25. Applying the foregoing principles to this matter, it is the court's view, firstly, that the 1st Respondent's material does not demonstrate that the first motion herein and the review application filed by the 2nd Respondent are the products of collusion between the Applicants and the said 2nd Respondent.

The copies of the lower court pleadings annexed to the 1st Respondent's affidavits indicate that the Applicants and the 2nd Respondent were sued as separate individuals in their personal capacities and as managing editor and proprietor respectively, of the Kajiado Star and Mutembei T.V. No proof has been tendered that the Applicants had any role in the filing of the review motion before the lower court. Besides, the 2nd Respondent has despite service of the motions herein eschewed any participation before this court.

26. On the plain facts of this case, the Applicants being aggrieved with the ruling and orders of lower court opted to pursue the remedy of appeal while the 2nd Respondent approached the lower court seeking review. In the circumstances, the parallel proceedings by the two separate parties do not render the first motion vexatious or an abuse of the process of the court, therefore liable for striking out. The second motion must fail and is hereby dismissed with costs to the Applicants.

27. Turning now to the merits of the first motion, it has been repeatedly held that the power of the court to grant stay of execution pending appeal is discretionary. However, the discretion should be exercised judiciously. See Butt v Rent Restriction Tribunal [1982] KLR 417. The Applicant's prayer for stay of execution pending appeal, is brought under Order 42 Rule 6 of the Civil Procedure Rules which provides that:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
>
> (2) No order for stay of execution shall be made under subrule (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".

28. The key considerations under the Rule above are whether an applicant has demonstrated substantial loss and proffered security. These considerations somewhat differ from the considerations applicable in an application to the Court of Appeal for stay of execution under Rule 5(2)(b) of the Court of appeal Rules, namely whether an applicant has demonstrated an arguable appeal and that the appeal would be rendered nugatory if the stay order is denied. See Stanley Kangethe Kinyanjui V Tony Ketter & 5 others (supra). The parties before this court have attempted by their arguments to canvass issues relating to the viability of the appeal which have no place in an application seeking stay filed before this court. At this stage, this court is not concerned with the merits of the appeal.

29. One of the most enduring legal authorities on the question of substantial loss is the case of Kenya Shell Kenya Ltd v Kibiru & Another [1986] KLR 410 The principles enunciated in this authority are as follows:

> "1. .....
>
> 2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
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> 3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
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> 4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."

30. The decision of Platt Ag JA(as he then was), in the Shell case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Judge stated inter alia that:

> "The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in the two courts... (emphasis added)"

31. The learned Judge continued to observe that: -

> "It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money." (Emphasis added).

32. There is no money decree involved in this case, the subject matter of the first motion being the lower court's ruling of 5.12.2024 and the order of 15.01.2025 condemning the Applicants to pay a fine in the sum of 100,000/- or suffer imprisonment, having been found guilty of contempt of court. Evidently, the fine has already been paid by the Applicants and indeed a copy of an apology by the Applicants to the 1st Respondent is included in the material on record. Thus, so far as the order of 15.01.2025 is concerned, there is nothing to be stayed.

33. As regards the ruling of the subordinate court, the Applicants assert that it will have the effect of adversely impacting their work as a leading newspaper and curtail their freedom of expression thereby exposing them to substantial loss that cannot be compensated by an award of damages. The merits

of the ruling aside, the resultant orders specifically restrained the Applicants, pending determination of the suit, from publishing defamatory statements against the 1st Respondent in connection with illegal acquisition (of land) and or interference with the matters of Rombo Ranch. Beyond making bare statements that their rights as media practitioners would be curtailed, the Applicants did not demonstrate how they stand to suffer substantial loss incapable of being compensated by damages as a consequence of these circumscribed orders, and how their appeal would thereby be rendered nugatory.

34. In George Gathura Karanja v George Gathuru Thuo & 2 Others [2019] e KLR, the Court of Appeal stated that:

> " An appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible. See the case of Stanley Kangethe Kinyanjui versus Tony Ketter & 5 Others, Civil Appeal No. 31 of 2012 where this Court stated inter alia thus:
>
> > "Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is irreversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party."

35. In the result, the court finds that the Applicants have failed to discharge the onus to demonstrate the likelihood of substantial loss. As stated in the Shell case (supra), substantial loss in its various forms, is the cornerstone for granting stay; and where there is no evidence of substantial loss to the applicant, it would be a rare case that an appeal would be rendered nugatory by some other event.

36. Considering all the foregoing, the court is of the firm view that the first motion must fail. Consequently, the motion is hereby dismissed with costs to the 1st Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 25TH DAY OF SEPTEMBER 2025.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Mr. Muoki

For the 1st Respondent: Mr. Wambui

2nd Respondent: N/A

C/A: Lepatei