



**Nation Media Group Limited v Kambuni (Civil Application
E480 of 2022) [2024] KECA 344 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KECA 344 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E480 OF 2022
MA WARSAME, A ALI-ARONI & JM MATIVO, JJA
MARCH 15, 2024**

BETWEEN

NATION MEDIA GROUP LIMITED APPLICANT

AND

LUCY M KAMBUNI RESPONDENT

*(An application for stay of execution against the judgement of the High Court
(Githua, J.) at Nairobi delivered on 28th May 2020) in HCCC No. 430 of 2006)*

RULING

1. The applicant herein, Nation Media Group Limited, has called upon us to exercise our discretionary powers under Rule 5(2) (b) of the *Court of Appeal Rules* (the Rules) by issuing an order of stay of execution of a High Court judgement delivered on 28th May, 2020 in which, Lucy Muthoni Kambuni, the respondent, had sued for damages for libel.
2. The alleged libel was contained in various articles published by the applicant on various dates in 2006 and 2007 in two of its publications;
 - a. the East African, under the headlines “State Paid Six Nairobi Lawyers \$1m to Fight Five Day Case” and “Private lawyers earning millions from Kenya Government”
 - b. The Daily Nation under the headlines “Row Over Kshs.72m lawyers’ “fees” “Kshs.72m lawyers’ pay defended.”
3. The origin of the publications was the respondent’s appointment in August 2005 by the Hon. Attorney General to join a team of five other eminent lawyers appointed to represent the Government of Kenya in Misc. Civil Application No. 1216 of 2005, which sought to stop the constitutional review process and the scheduled referendum. She was also at the time acting in a related matter, Civil Case No. 677 of 2005, a suit that was filed by a network of civil society organisations with the same objective.



It was agreed that a total sum of Kshs.72 million inclusive of VAT would be paid to all counsel as a corporate entity. One of the issues arising in the proceedings was a preliminary objection challenging the continuation of Hon. James Orengo as counsel in the matter which was heard in five days.

4. However, according to the respondent, the publications were incomplete, false, exaggerated, and filled with innuendo. The gist of the publications by the applicant was that the respondent was suspiciously appointed, and that she was part of a small clique of lawyers in private practice, who monopolised government cases through their connections in the state law office, it implied that she was in cahoots with the Ministry of Justice given that her legal partner was the wife of Hon. Robinson Githae who was then an Assistant Minister in the Ministry of Justice-an utter falsehood and that she and the 5 advocates appointed to act on behalf of the state in the matter were paid Kshs.72 Million for a 5 day case. She contended that the publications that had a regional and international audience destroyed her good standing in society and the legal profession, she lost her reputation, was shunned by colleagues, and suffered great mental anguish and torture.
5. On its part, the applicant admitted to publishing the articles and denied that the articles were defamatory. It insisted that they consisted of true facts, that the words in the publications were published in good faith and with due care, and where they consisted of opinions, they were fair comments on a matter of public interest.
6. In a judgment dated 28th May 2020, the court found that the publications were reckless, malicious, and defamatory, that the applicant had failed to establish the defence of fair comment, and the applicant was entitled to a public apology. Taking various factors into consideration including her standing in society, that she was a senior counsel who had held key positions in private and public sector, the court awarded Kshs.10,000,000/= in general damages and Kshs.2,000,000/= as exemplary damages. It is to be noted that the matter was to be used as a test suit in similar cases filed by the 5 other advocates against the applicant.
7. In support of its application, the applicant contended that it has an arguable appeal in that the Learned Judge erred in holding that the publications were actuated with malice, that the publications did not lower the respondent's reputation in society as determined by the judge and that the learned judge completely erred in the assessment of damages.
8. The applicant is apprehensive that it is at risk of an impending execution of the decretal sum. In addition the respondent had already moved the taxing master who taxed the party and party bill of costs on 23rd June 2022 at Kshs.633,565/= and that the suit was scheduled for notice to show cause why execution should not be issued, on 23rd January 2023.
9. Lastly, the applicant conceded that it was willing to provide security as a condition for the orders sought.
10. In opposition to the application, the respondent filed a replying affidavit dated 19th January, 2023 and laid the ground for her stellar reputation by recapitulating her achievements and accolades both in the legal profession and in society. She conceded that even though the appeal may be arguable, the applicant had in no shape or form demonstrated that the appeal would be rendered nugatory if the orders sought are not granted. She confirmed that she was capable of refunding the decretal sum even though the allegation had not been raised by the applicant and accused the applicant of laches in filing the instant application and in following up with the court on the typed proceedings.
11. We have considered the application, submissions by counsel, and the law. Whenever we are faced with an application under Rule 5(2)(b), such as in this case, we have to satisfy ourselves that the applicants have demonstrated that they have an arguable appeal or an appeal that is not frivolous, and also that



if the orders sought are not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. See *Reliance Bank Ltd. (in liquidation) vs. Norlake Investments Ltd.* [2002] 1 EA 227. The applicant is obliged to satisfy both of those principles; it is not enough to satisfy only one of them. See *Peter Paul Mburu Ndururi vs. James Macharia Njore* [2009] eKLR.

12. Taking caution not to make determinations that would otherwise prejudice the hearing of the intended appeal, we are of the view that whether or not the publications were malicious and lowered the esteem of the respondent in the eyes of society and whether the defence of fair comment was available to the applicant given that the contents of the publication were issues of public interest warrant the consideration of this Court.
13. As for the nugatory aspect, we need to consider and balance the interests of the parties, and their respective positions and safeguard the same in the circumstances. On the one hand, the applicant alleges that execution is imminent and that the respondent has proceeded to tax the party and party bill of costs in the matter. On her part, the respondent insists that a litigant if successful should not be deprived of the fruits of a judgment in their favour without just cause.
14. Upon weighing the competing interests of the parties herein, we find that the intended appeal would be rendered nugatory if the orders sought are not granted. We say so taking into account that the suit before the trial court was a test suit to five similar cases involving senior Advocates and there is a real likelihood of execution to the detriment of the applicant.
15. The upshot of the foregoing is that the applicant's application dated 20th May, 2022 has merit and is hereby allowed. Costs to abide by the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH, 2024.

M. WARSAME

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

J. M. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

