



Nyakundi v Standard Group PLC & another (Civil Application E195 of 2021) [2022] KECA 430 (KLR) (4 March 2022) (Ruling)

Neutral citation: [2022] KECA 430 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E195 OF 2021
K M'INOTI, S OLE KANTAI & J MOHAMMED, JJA
MARCH 4, 2022**

BETWEEN

CYPRIAN NYAKUNDI APPLICANT

AND

STANDARD GROUP PLC 1ST RESPONDENT

ORLANDO LYOMU 2ND RESPONDENT

(Application for stay of execution and further proceedings pending appeal from the ruling and orders of the High Court at Nairobi (Mbogholi, J.) dated 27th May 2021 in HCCC 71 of 2020)

RULING

1. On 13th June 2021 the applicant, Cyprian Nyakundi took out the Motion on Notice before us under rule 5(2) (b) of the *Court of Appeal Rules* seeking stay of execution and further proceedings pending the hearing and determination of an intended appeal against the ruling of the High Court at Nairobi (Mbogholi, J., as he then was), dated 27th May 2021. The ruling in question found the applicant guilty of contempt of court and directed him to appear in court on a date to be determined, for mitigation and sentence.
2. The short background to the application is that the respondents sued the applicant for defamation and obtained interlocutory injunctions against him on 10th June 2020, pending the hearing and determination of their suit. Contending that the applicant, in utter disregard of the injunctions had continued to publish defamatory material of and concerning themselves, the respondents applied to the High Court on 11th September 2020 for committal of the applicant to jail for six months or for attachment of his property for contempt of court. The applicant resisted the application, contending, among others, that he had not been served electronically with the injunctive orders of 10th June 2020 as contended by the respondents because his email was down for a period of two weeks. He maintained



- that he only came to know of the injunction upon service on him of the application for his committal for contempt, and that he had purged the contempt.
3. The court found that the applicant was properly served through his email address because, unlike previous occasions, there was nothing to indicate that his email was functionally down when the order of injunction was forwarded to him on 12th June 2020. Accordingly, the court found the applicant guilty of contempt of court and summoned him for mitigation and sentencing on a date that is yet to be fixed.
 4. Agitating his application, the applicant contends, in succinct submissions and highlights, that he has filed a notice of appeal and has an arguable appeal which risks being rendered nugatory if he is sentenced to jail. He urges that it is an arguable point whether he was served, properly or at all, with the order of injunction; whether the respondents could sue without authority, and the exact legal status of section 5 of the Judicature Act which the court invoked in exercising contempt jurisdiction. This is because that section was repealed by the Contempt of Court Act, 2016, which in turn was declared unconstitutional by an order of the High Court.
 5. As regards whether the intended appeal will be rendered nugatory, it is the applicant's contention that his liberty is in jeopardy after the court found him guilty of contempt of court. He adds that even spending a day in jail would render his appeal nugatory if the appeal ultimately succeeded. He cites the decisions in *Philip J. Mainga v. Proscovia Vitsengwa & 4 Others [2020] eKLR*, *United Insurance Co. Ltd. v. Stephen Ngare Nyamboki, CA. No. Nai 295 of 2001*, *Dr Christopher Ndarathi Murungaru v. KACC & Another (2006) KLR 77* and *Rev. Jackson Kipkemboi Koskey & 7 Others v. Rev Samuel Muriithi Njogu & 4 Others, CA. No. Nai 311 of 2006*.
 6. The respondents, in equally succinct written and oral submissions, opposed the application on the basis that the intended appeal is not arguable. They argue that the standard of proof of service in contempt proceedings is well settled in *Shimmers Plaza Ltd v. National Bank of Kenya Ltd (2015) eKLR*, and that the declaration of the Contempt of Court Act unconstitutional, which repealed section 5 of the *Judicature Act* had the effect of restoring the status quo ante.
 7. On whether the intended appeal risked being rendered nugatory, the respondents are of the view that the application is mere speculation because the court is yet to commit or sentence the applicant. The respondents rely on the decision of this Court in *Wardpa Holdings Ltd & Others v. Emmanuel Waweru Lima Mathai & Another, CA. No. Nai. 351 of 2009* and the decision of the High Court in *Republic v. Director of Lands and Urban Planning, Government of Makueni County Ex parte Edward Mutinda & 15 Others [2015] eKLR*.
 8. Turning to the merits of this application, there is no doubt in our minds that the applicant's intended appeal is not frivolous and arguable. Already both parties have presented before us prima facie plausible arguments in support of their respective positions in the intended appeal. But at this stage, it is not for us to determine which position carries the day. That should be determined by the Court when it hears the appeal. That, in effect means the applicant has established that he has an arguable appeal and has thus satisfied the first limb under rule 5(2)(b).
 9. The second limb requires us to determine if successful, the intended appeal will be rendered nugatory. The applicant has argued his application on the footing that his committal to jail will render his intended appeal nugatory. He does not suggest that any other form of punishment for contempt will have the same effect. Thus, the applicant proceeds on the assumption that he has already been committed to jail or that committal to jail is the only option available to the High Court when he presents himself as directed.



10. While it is true that the respondents requested the High Court to commit the applicant to jail or to attach his property, the Court is not bound by the wishes of the respondents. Before it determines an appropriate sentence to mete out to the applicant, it will have to hear his mitigation. Already he has deposed that he purged his contempt the moment he became aware of the court order. These are issues the High Court will have to take into account before deciding an appropriate sentence. The court need not necessarily sentence the applicant to jail, attach, his property, or levy a fine. It can even discharge him, conditionally or unconditionally.
11. Clearly, at this point in time, the application is eminently speculative. It is not appropriate for this Court to second guess what the High Court will do to intervene when that court has not yet made any decision on sentence. The applicant has an automatic right to approach this Court if the High Court were to commit him to jail. That is yet to happen and we should not issue orders that may turn out to have been completely unnecessary. Ultimately, we are not satisfied, as of now, that the applicant's intended appeal will be rendered nugatory. Having failed to satisfy both limbs under rule 5(2) (b), the application fails and is hereby dismissed with costs. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF MARCH, 2022

K. M'INOTI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. Ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

