



**The Star Newspaper & another v Muhoho (Civil Application
E036 of 2021) [2022] KECA 581 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 581 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E036 OF 2021
K M'INOTI, J MOHAMMED & S OLE KANTAI, JJA
APRIL 28, 2022**

BETWEEN

THE STAR NEWSPAPER 1ST APPLICANT

MKAMBURI MWAWASI 2ND APPLICANT

AND

GEORGE MUHOHO RESPONDENT

*(An application for stay of execution of the judgment of the High Court of Kenya at Nairobi
(Thuranira Jaden, J.) dated 15th October, 2020) in High Court Civil Case No. 137 of 2015)*

RULING

Background

- 1) Before us is a Notice of Motion dated 3rd February, 2021 in which The Star Newspaper and Mkamburi Mwawasi (the applicants) seek orders in the main: that pending the hearing and determination of the appeal, this Court be pleased to grant a stay of execution of the judgment of the High Court at Nairobi (Thuranira Jaden, J.) delivered on 15th October, 2020 in HCCC No. 137 of 2015 - George Muhoho vs. The Star Newspaper & Another, and of any decree and orders that may ensue therefrom; and that costs of this application to abide the outcome of the intended appeal.

George Muhoho is the respondent herein.

- 2) A brief background to the application is that the respondent filed a defamatory suit against the applicants in the High Court. The respondent sought general and aggravated damages as against the applicants. The applicants defended the suit vide a statement of defence. Upon hearing the suit, the learned Judge found for the respondent and awarded Kshs 6,500,000.00 as damages for defamation. Aggrieved by that decision, the applicants filed a notice of appeal and the instant application.



- 3) The application is brought under Rule 5(2) (b) of the *Court of Appeal Rules* (this Court's Rules) and is premised *inter alia* on the grounds that the High Court delivered a ruling on 15th October, 20120 in favour of the respondent and the learned Judge made an award of Kshs 6,500,000.00 as damages; that the applicants are aggrieved by the entire decision and intend to appeal against it and have expressed their intention to appeal by filing a notice of appeal in this Court; and that the applicants' intended appeal is arguable and has very high chances of success.
- 4) Further, that the applicants have started the process of taxation of their costs at the High Court; that the applicants are apprehensive that unless this Court grants the orders sought, the respondent will make good his threat and proceed with the execution process; that the applicants are apprehensive that if the applicant proceeds with the execution proceedings, the intended appeal, if successful, will be rendered nugatory; that the respondent will not suffer any prejudice if the orders sought are granted as the applicants are willing to comply with such orders regarding security as the court may order; and that it is in the interest of justice and fairness that the orders sought be granted.
- 5) The application was supported by the affidavit of Ms. Linda Musita, the 1st applicant's legal counsel who reiterated the grounds on the face of the application. Ms. Musita further deponed that it is just and fair that the instant application be allowed so as to protect the substratum of the appeal.
- 6) The respondent opposed the application and filed a replying affidavit deponing that he is a man of means and is able to repay the decretal sum should the intended appeal be successful; that the balance therefore tilts in favour of the respondent; and that the applicant should forthwith pay the decretal sum.
- 7) The respondent further deponed that if the court is inclined to allow the instant application, it should also order the applicants to deposit the judgment sum, the taxed costs and interest as at 15th March, 2021 in Court or in a joint interest earning account in the parties' advocates' names within thirty (30) days as a pre-condition pending hearing and determination of their intended appeal.

Submissions by Counsel

- 8) The application was heard by way of written submissions with oral highlighting. Learned counsel for the applicants, Messrs Mohammed Muigai LLP submitted that the respondents will commence execution against the applicants as soon as the taxation proceedings before the High Court are complete; that the respondent may execute against the applicants for Kshs 6,500,00.00 plus costs thereby rendering the intended appeal nugatory; and that the intended appeal is arguable *inter alia* on the ground that the High Court erred in law and fact in failing to find that the impugned article, though incorrectly referred to the respondent, could not be taken in their ordinary meaning to be defamatory of the respondent.
- 9) Counsel further submitted that the intended appeal, if successful, will be rendered nugatory absent stay; that the applicants are apprehensive that the amount in question is colossal which the respondent might not refund if it is paid to him; that the award of Kshs 6,500,000.00 forms the subject matter of the intended appeal and if the respondent executes against the applicants, the appeal will be an academic exercise; that the respondent has not demonstrated to the Court, by way of evidence that he has the means to refund the decretal sum in case the applicants' intended appeal is successful; and that the respondent has stated that he is a man of means without substantiating by evidence that he is actually a man of means.
- 10) Counsel cited *Nation Media Group Ltd & Another vs. Chirau Ali Mwakere* [2010] eKLR where this Court granted an order for stay where the respondent, a Member of Parliament and a Minister in the



Government of Kenya at the time had similarly alleged to be a man of means. This Court held that if the orders of stay were not granted, and the intended appeal was successful, the applicant would be faced with a difficult task of recovering the decretal sum and any other sum that the respondent may execute against it.

- 11) Counsel also cited *Kenya Hotel Properties Limited vs. Willisden Investments Limited & 6 Others* [2013] eKLR where this Court cited the case of *ABN Amro Bank, NV vs. Le Monde Foods Limited*, Civil Application No. Nai. 15 of 2002 in support of the proposition that once the applicant in an application for stay expresses doubts the respondent's ability to refund the decretal sum, the burden shifts to the respondent to rebut that submission.
- 12) Counsel further submitted that requiring the applicants to deposit the entire decretal sum as a condition for the grant of stay orders would be onerous as the amount is colossal and would be tantamount to denying them the opportunity to exercise their right of appeal.
- 13) Learned counsel for the respondents, Messrs Lutta & Co Advocates submitted that the intended appeal is devoid of merit and frivolous; that in the event that this Court finds that the applicant has an arguable appeal, the application should be allowed on condition that the applicant deposits in Court the judgment sum of Kshs 6,500,000.00, interest as at 30th March, 2021 and Kshs 325,000.00 and costs, pending the hearing and determination of the intended appeal.

Determination

- 14) We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction of this Court under Rule 5(2) (b) of this Court's Rules is discretionary and guided by the interests of justice.
- 15) The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2) (b) of this Court's Rules are well settled as was observed by this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

- 16) On the first principle as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicants to warrant ventilation before this Court. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR, this Court described an arguable appeal in the following terms:

- “vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
- viii) In considering an application brought under Rule 5 the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”



- 17) We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, it is arguable inter alia whether the learned Judge erred in law and in fact in failing to make a finding of which words in the article were defamatory of the respondent or how the article was understood to be defamatory of the respondent. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
- 18) On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (*supra*) this Court stated that:
- “ ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- x) 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 reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
- 19) In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties, and each case has to be considered on its merits. From the record, the respondent’s counsel has commenced taxation of his Bill of Costs after which the execution process may ensue. Further, the applicants are apprehensive that if the decretal amount is paid to the respondent, he may not be in a position to make a refund. In the circumstances, we find that the intended appeal will be rendered nugatory, absent stay.
20. In the circumstances of the instant application, we are persuaded that the applicants have demonstrated an arguable appeal which would be rendered nugatory if the orders sought are not granted.
- 21) From the circumstances of the application before us, we are satisfied that the applicant has satisfied the twin principles for the grant of a stay of execution pending the hearing and determination of the intended appeal in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in the case of *Stanley Kange'the Kinyanjui* (*supra*).
- 22) The upshot is that the application dated 3rd February, 2021 is allowed. Costs shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

KATHURIMA M'INOTI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

