



**Omole v Odhiambo (Civil Appeal (Application) E304 of 2021)  
[2022] KECA 1172 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1172 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E304 OF 2021  
MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA  
OCTOBER 21, 2022**

**BETWEEN**

**BOOKER NGESA OMOLE ..... APPLICANT**

**AND**

**ELISHA OCHIENG ODHIAMBO ..... RESPONDENT**

*(An application for stay of execution pending the lodging and determination of an intended appeal from the Judgment and Decree of the High Court at Siaya (Aburili, J.) dated 28th July, 2021 in HC. CA. NO. E1 OF 2020)*

**RULING**

1. The notice of motion dated August 25, 2021; brought under rule 5(2) (b) of the *Court of Appeal Rules* and articles 22 and 23 of the *Constitution*, supported by grounds on its body and a supporting affidavit sworn on August 27, 2021; together with annexures thereto, substantively seeks orders to stay execution of the judgment delivered by (Aburili (J) on July 28, 2021; pending the hearing and determination of the appeal; and that the costs of this application be provided for.
2. The application has been opposed by a replying affidavit dated September 8, 2021 and was canvassed through written submissions of both parties which were not orally highlighted.
3. The background to the application is that the respondent, a member of parliament for Gem Constituency, instituted a suit against the applicant, a known owner, holder and administrator of facebook page, seeking the following orders: -
  - a) A permanent injunction restraining the applicant, his agents and or servants from publishing and circulating any articles or letters defamatory to the respondent in reference to the NG-CDF project at Masinde Primary School. An order that the applicant do make a full and unqualified apology.



- b) General damages.
  - c) Exemplary and aggravated damages.
  - d) Costs of the suit.
  - e) Interest on (c), (d) and (e) above.
4. The respondent claimed that on September 2, 2020; the applicant falsely and maliciously published and posted or caused to be published and posted on various social media platforms a letter dated August 23, 2020; which the applicant wrote to the respondent stating, materially inter alia:
- “...To stop all the flagrant theft under your watch and stop the primitive accumulation of wealth...”
5. The respondent considered these words as defamatory; that he heard the applicant on Radio Ramogi FM giving an interview where he repeated the same defamatory words concerning him. According to the respondent, the applicant knew and ought to have known that the constituency had a fund manager, and each project has a project management committee formed that addressed any complaints pertaining to the project; that the respondent did not handle any funds or manage projects of the Constituency Development Fund. (CDF)
6. The respondent alleged that: the afore-stated words (which he described as false and malicious), and interview were intended to incite members of the society against him; his character, credibility and social standing as a member of parliament had been seriously injured; and his reputation and integrity had been put to public question, he thus suffered considerable mental anguish, humiliation and embarrassment as he received several calls from his constituents and friends seeking clarifications over the allegations made in the said letter and the radio interview at Ramogi FM.
7. The applicant denied liability saying that he had complained to the respondent as a Member of Parliament, regarding the misinterpreted use of NG-CDF funds. While admitting the contents of the letter he wrote to the respondent, he maintained that it was strictly between himself and the respondent, but denied publishing the letter and added that he first saw it on social media after the respondent sued him and circulated the letter with the pleadings alongside the restraining order in this case to the Siaya WhatsApp groups.
8. Upon consideration of the evidence, the learned judge held that there was sufficient evidence to show that the contents of the letter was published by the applicant in his facebook page and to Wagai/Yala Division WhatsApp group; there was sufficient evidence that the applicant was interviewed by Ramogi FM and he repeated contents of the said letter, and although the audio recording of the interview was not produced in evidence, the same was heard by the respondent and his witnesses; that the words complained of by the applicant, taken as a whole implied that the respondent was a corrupt person who colluded with the head teacher of the school; stole funds from the NG-CDF; and piggybacked on the already constructed administration block in justifying his theft of the funds thus covering up his theft.
9. The learned judge found no evidence to show that the respondent received and misapplied any funds from NG-CDF; and pointed out that the conduct of the applicant in continuing to make the same unverified allegations, and even organizing for demonstrations in Gem Constituency to flash out thieves of public funds, thus forcing the respondent to seek the intervention of the court to restrain the applicant further publishing defamatory statements concerning the respondent pending the conclusion of this suit, further, there was implied malice on the part of the appellant; and there was no justification or fair comment in the public interest to warrant such conduct.



10. The court in finding the applicant 100% liable for defamation, awarded general damages of Kshs 5,000,000/- and aggravated damages in the sum of Kshs 1,000,000/-, pointing out that even after restraining orders had issued against the applicant in an interlocutory application, the applicant had an opportunity to correct or delete the obviously untrue and misleading information published of and concerning the respondent, but he did not. Also issued was a permanent injunction restraining the applicant his agents and or servants from publishing and or circulating any articles or letters or material defamatory to and of the respondent in reference to the NG-CDF project at Masinde Primary School.
11. Aggrieved by the said judgment, the applicant filed an appeal whose grounds are set in the memorandum of appeal; and also sought orders of stay of execution of the judgment, decree/order pending the lodging and determination of an intended appeal from the High Court judgment on grounds that: the appeal has high chances of success and will be rendered nugatory unless this court grants the orders sought; the applicant stands to suffer substantial and irreparable loss and damages, since in the event that the appeal succeeds, he may never recover the decretal sum; and the respondent shall suffer no prejudice if this application is allowed.
12. In supporting the instant application, the applicant contends: - that on delivery of the contested judgment, a 30 days stay of execution was granted and as at the time of filing this application, it was yet to lapse; that the loss of reputation said to have been suffered by the respondent was not proven, thus the quantum of damages that was awarded was excessive; that the probable and expected execution shall cause substantial loss as the respondent has not demonstrated his financial capabilities to refund the decretal sum if the applicant's appeal succeeds; and that the applicant is ready and willing to offer such security, including depositing such amounts of the decretal sum in a joint interest earning account pending the outcome of the appeal, and this will secure the interests of both parties without any bias.
13. The respondent by a replying affidavit opposes the application, saying it is not merited and does not meet the threshold required for stay of execution pending appeal, namely that the intended appeal is arguable and shall be rendered nugatory if the orders sought are not granted.
14. The respondent submits that: the judgment clearly addressed the manner in which the applicant had acted, leaving no room for a successful appeal; paragraphs 5, 6 and 7 of the memorandum of appeal are singled out as contradictory; the evidence on the face of the record is overwhelming and in any event the applicant admitted authoring the offensive messages and letters which led to the filing of the suit at the High Court; that the applicant is just out to frustrate the respondent since even after being restrained by the High Court, he has never stopped spreading false information about the respondent and is a party who has no respect for court orders and undeserving of its protection.
15. The respondent contends that there is no justification in denying him the fruits of the judgment he should be enjoying, particularly because the applicant's only defence to the defamatory remarks was that he had a duty to make known matters affecting the public in general, yet the applicant admitted in his evidence that he had no proof of the allegations he made against the respondent; that the applicant has not shown readiness to pay the decretal sum should the appeal fail; and in any case, the respondent has stated in his affidavit that he is a man of means capable of compensating the applicant should his appeal succeed.
16. We have considered the record in light of the rival pleadings and submissions.  
  
This being an application for stay of execution, the applicant needs to satisfy the twin requirements of rule 5(2)(b) of the *Court of Appeal Rules* as restated in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR. The requirements are that the intended appeal is arguable and secondly, that it will be rendered nugatory if the order of stay sought is not granted.



17. Indeed, 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. See the case of [Joseph Gitabi Gachau & another v Pioneer Holdings \(A\) Ltd. & 2 others](#), Civil Application No 124 of 2008. A single bona fide arguable ground of appeal is sufficient to satisfy this prerequisite. See the case of [Damji Pragji Mandavia v Sara Lee Household & Body Care \(K\) Ltd](#), Civil Application No Nai 345 of 2004.

Applying the above threshold in satisfaction of the first requirement, we note that the applicant has not pointed out to any single arguable ground of appeal other than stating that his memorandum of appeal raises substantive issues which he believes shall persuade the court to alter the decision; there is no response to the impugned paragraphs in the memorandum of appeal; and the contention is simply that the intended appeal is arguable and not frivolous. We have perused the memorandum of appeal and we are unable to pick out any arguable issue.

18. On the nugatory aspect, this 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. See the case of Reliance [Bank Ltd v Norlake Investments Ltd](#) [2002] 1 EA 227.
19. In satisfaction of this requirement, the applicant argues that the respondent has not demonstrated his means to allow this court to assess his financial capabilities thus, he may not be in a position to refund the said decretal sum if the applicant's appeal succeeds; and that he is ready and willing to offer such security as the court may deem fit in a joint interest earning account, to secure the interest of both parties. In the same breath, the respondent contends that he is a man of means capable of compensating the applicant should his appeal succeed.
20. Applying the above threshold, we take note that this is a case where damages may reasonably compensate the respondent, and he would be cushioned by the offer to deposit the decretal amount in court or in a joint interest earning account. However, given that the applicant has not satisfied one of the twin principles required for grant of stay, the application must fail and is dismissed. The costs shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.**

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**ASIKE - MAKHANDIA**

**JUDGE OF APPEAL**

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**J. MOHAMMED**

**JUDGE OF APPEAL**

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**H. A. OMONDI**

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

