



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & MUSINGA, J.J.A.)

CIVIL APPLICATION NO. E392 OF 2020

BETWEEN

**KENYA AVIATION WORKERS UNION.....APPLICANT**

AND

**MICHAEL JOSEPH.....RESPONDENT**

*(Being an Application for stay of proceedings, Ruling and orders of the High Court of Kenya at Nairobi (L. Njuguna, J.) dated and delivered on 22nd October, 2020 and issued on 10th November 2020*

in

**HCCC No. 41 of 2019)**

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**RULING OF THE COURT**

1. **Michael Joseph (the respondent)**, filed a suit before the High Court at Milimani claiming, *inter alia*, damages against the **Kenya Aviation Workers Union (KAWU)** (the applicant) for defamation. He also filed within the said suit an application dated 8th March, 2019 seeking restraining orders against the applicant from further writing, printing and publishing, circulating, disseminating or causing to be written, printed, published, circulated, disseminated in any manner whatsoever words and statements concerning and in respect of the respondent in the publication dubbed '**Kawu's press statement on challenges facing aviation sector**' or causing to be written, printed, published, circulated or disseminated any words in any manner defamatory of the respondent whatsoever pending the hearing and determination of the suit.
2. It was the respondent's position that the applicant published defamatory words against him under the title: "**Kawu's Press Statement On Challenges Facing Aviation Sector**" and which defamatory words were further published on an online site traced at [www.kahawatungu.com](http://www.kahawatungu.com) under the headline: "**How CEO Sebastian Mikosz and Chairman Michael Joseph have led the looting of Kshs. 1.8 billion from KQ**" and the headline: "**Kenya Aviation Workers Union accuse KQ bosses of wastage**".
3. The respondent contended that the defamatory words could be taken to mean that the respondent was, *inter alia*, incompetent, corrupt and unprofessional yet the impugned publications were false and actuated by malice, and it was his position that unless the applicant was restrained from making further publications, it would continue to publish defamatory material of a similar nature concerning the respondent.
4. The applicant herein opposed the application and filed a replying affidavit stating that no defamatory words were ever published against the applicant and that the applicant has never received any demand for an apology or a retraction from the respondent.5. The Judge allowed the application and granted the injunctive orders as sought on the basis that the aforementioned publications would very well cause any reasonable person to develop a negative perception of the respondent. She held that the respondent had reasonably demonstrated the likelihood of irreparable damage for which an award of costs would not constitute adequate compensation, the basis being her appreciation of the fact that the reputation of a person was invaluable and once tainted, it would be very difficult to redeem and any injury suffered could not adequately be compensated by way of damages.
6. On the issue concerning whether the application and suit disclosed a reasonable cause of action, she found that the issue had previously been raised by the applicant vide a notice of preliminary objection and the court had aptly analyzed and made a determination on the issue thus the applicant could not be heard to raise the issue afresh.

7. The applicant was aggrieved by this decision and preferred an appeal to this Court and in the meantime filed the instant application seeking stay of execution of the said orders pending appeal. The application is supported by an affidavit sworn by Moss Ndiema, the applicant's Secretary General on behalf of the Union on 30th November, 2020 in which he deposes that if the orders sought are not granted, their statutory obligations and rights under **Article 41** of the Constitution would be infringed upon as the Court proceeds with the full hearing hence rendering the appeal an academic exercise.
8. The applicant averred that the orders issued were gag orders prohibiting and suppressing the freedom of expression and would encourage unfair labour practices and policy making by the respondent against unionisable members. Additionally, that if the orders sought are not granted, then the appeal would be rendered nugatory.
9. The applicant submitted that from the wording of the order, there was an implication that the applicant who has over 15,000 members was constrained from commenting or challenging unfair labour practices which could be exhibited by the respondent. Also, that this case had special circumstances which were that the applicant had produced in court evidence of forensic documents from the DCI indicating that they did not issue a press statement and that the signatures on the alleged press statement filed in court were different from its Secretary general's.
10. It was also the applicant's position that if the proceedings in the High Court were allowed to continue, then any decision reached by this Court might be rendered nugatory, academic and/or deemed to be overtaken by events. To buttress this proposition, the applicant relied on the case of **Butt vs Rent restriction Tribunal [1982] KLR 417 and Consolidated Marine vs Nampija & Another, Civil App. No. 93 of 1989 (Nairobi)**.
11. The respondent did not file a replying affidavit but filed submissions in response to those filed by the applicant. According to the respondent's advocates, under **Rule 50(1)** of the Court of Appeal Rules, they did not see the need to file a replying affidavit since the factual position had been captured with clarity and sufficient detail in the respondent's supporting affidavit filed in the High Court and the instant application did not set out new facts that required rebuttal.
12. It was submitted further that the general principle was that orders of stay of proceedings are made sparingly and only in exceptional circumstances and relied on the case of **Silvestein vs Chesoni (2002) 1KLR 876**.
13. It was also submitted that based on the assertion by the applicant that it performs statutory functions and its rights under **Article 41** would be infringed, the applicant did not explain what "*statutory function*" it performs and how its rights under **Article 41** would be infringed, and that the application essentially suggests that the applicant is unable to carry out its statutory function or enjoy its **Article 41** rights without defaming the respondent.
14. We have carefully considered the application, the rival submissions by learned counsel and the applicable law. The principles applicable in the exercise of the Court's unfettered discretion under **Rule 5(2) (b)** to grant an order of stay are now well settled. Firstly, an applicant has to satisfy that it has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. See **Multimedia University & Another vs. Professor Gitile N. Naituli (2014) eKLR**.
15. The first issue for consideration is whether the Applicants have an arguable appeal. An arguable appeal is one that is not frivolous but raises a bona fide issue deserving determination by a Court; a single bona fide issue would suffice. (See: **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA. No. Nai. 72 of 2001**).
16. On the issue of arguability, we have seen the draft memorandum of appeal. We also note that this is an interim appeal and the substantive issues raised in the main suit are yet to be canvassed and determined. For purposes of this interlocutory appeal, all the Court will be considering is whether the learned Judge exercised her discretion judicially when she granted the orders being challenged on appeal.
17. From the material before us, orders in question infringe we are not in the least persuaded that the on the applicant's unionisable members' constitutional rights under **Article 41** of the Constitution. It has not been demonstrated that the learned Judge failed to consider material that was relevant in the matter which material would have assisted the court in arriving at its decision; or that the learned Judge considered irrelevant matters and as a result arrived at the wrong conclusion. We are not told that the learned Judge acted capriciously or injudiciously in exercising her discretion to grant the orders appealed against.
18. Having failed to demonstrate the first limb, in view of the fact that the law enjoins the applicant to demonstrate both arguability and the nugatory aspect for the application to succeed, this application falls on its face. Even if the Court was to be magnanimous and assume that there is an arguable issue in the applicant's appeal, other than saying that the appeal will be rendered nugatory, the applicant has not demonstrated how that will be. Whether the appeal before this Court succeeds or not, the High Court will still hear the substantive suit and pronounce itself on the issues raised therein, and if dissatisfied the applicant can still challenge the judgment in this Court. It will not however, render the intended appeal otiose or irrelevant.
19. In the event the appeal succeeds, the applicant will be at liberty to write, print, publish, circulate, disseminate or cause to be written, printed, published, circulated, disseminated in any manner whatsoever words and statements concerning and in respect to the respondent. The substratum of the appeal will not be lost even if the orders sought are not granted. Ultimately, our view is that this application is totally devoid of merit. We dismiss it with costs to the respondent.

**Dated and delivered at Nairobi this 19th day of March, 2021.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**