IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. 74 OF 2019

BETWEEN

ALFRED MINCHA NDUBI.....APPLICANT

AND

THE STANDARD LIMITED.....RESPONDENT

(Being an application for injunction pending the determination of an intended appeal from the judgment of the High Court of Kenya at Nyamira **(Maina, J.)** dated 23rd May, 2019 In H. C. C. A. No. 5 of 2017)

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RULING OF J. MOHAMMED, JA

BACKGROUND

1. Before me is a Notice of Motion dated 9th July 2019 filed by **Alfred Mincha Ndubi** (the applicant), under Rule 5 (2) (b) of the Court of Appeal Rules (the Court Rules), against the decision of the High Court at Nyamira (E. N. Maina, J.) delivered on 23rd May, 2019.

2. The genesis of the application as can be gleaned from the plaint dated 19th March, 2014 is that the applicant sought judgment against **The Standard Limited** (the respondent) for defamatory words published against him by the respondent and in particular, general damages, special damages, costs of the suit and interest at court rates.

3. In the said plaint, the applicant alleged that he was defamed by two articles published by the respondent in its newspapers dated 4th December, 2013 and 3rd December, 2013. The applicant averred that the impugned words interpreted in their natural and ordinary meaning referred to him as a criminal, a dangerous person and as a person who did not respect the law and that the same had lowered his standing and reputation in the eyes of right-thinking members of the society. It was the applicant's contention that as a result of the two articles he had been exposed to hatred, scandal, odium and rejection, and that he had suffered special damages.

4. The trial Magistrate found the respondent liable for the tort of libel against the applicant and awarded Kshs 4 million as damages; costs of the suit and interest. Aggrieved by that decision, the respondent filed an appeal to the High Court urging the court to set aside the judgment of the Magistrate's court and award the costs of the first appeal to the respondent or in the alternative to set aside the award of the trial magistrate and substitute it with a nominal award.

5. The learned Judge found that the impugned words were neither false nor defamatory, and concluded as follows:

> **"As was held by the Court of Appeal, a publication can only be defamatory if it is false. The two articles did not in any way impute guilt to the respondent (the applicant herein). To the contrary, they were an accurate reporting of what had happened… There was therefore no evidence that the (sic) was defamed. Accordingly, I find merit in the appeal."**

6. Consequently, the learned Judge allowed the appeal, set aside the judgment and orders of the trial Magistrate, and substituted it with an order dismissing the applicant's suit with costs. The respondent was also awarded costs of the first appeal.

7. Undeterred, the applicant preferred an appeal to this Court. The applicant has also filed the instant notice of motion seeking *inter alia:*

> **a. An injunction to restrain the respondent from commencing recovery proceedings of the decretal amount of Kshs 4,000,000**

that had already been paid out to the appellant pending the hearing and determination of the instant application inter-partes;

b. An injunction to restrain the respondent from commencing recovery proceedings of the decretal amount of Kshs 4,000,000/- that had already been paid out to the appellant pending the hearing and determination of the intended appeal.

c. Costs of the application.

8. The Notice of Motion is supported by the applicant's affidavit sworn on 8th July 2019 in which he avers that the respondent filed an appeal after the entire decretal sum of Kshs 4,000,000/-had been paid to him; that the High Court allowed the respondent's appeal; that he has filed a Notice of Appeal against that judgment; that the appeal raises arguable issues of law and has overwhelming chances of success; that unless an injunction is issued to restrain the respondents from commencing and prosecuting recovery proceedings, the respondent will commence the said proceedings; that the applicant will be greatly prejudiced if such proceedings are commenced; and that he is ready to furnish such form of security as will be adequate to cover the decretal sum and as may be justly ordered by the court in granting the orders sought herein. Counsel urged us to allow the application.

9. The respondent opposed the application through a replying affidavit sworn by Ms. Millicent Ngetich, the respondent's Company Secretary and Head of Legal Department. Ms. Ngetich averred that there is no judgment in favour of the applicant the basis of which the applicant can seek an injunction; that the applicant's motion is misconceived as there is no basis for the grant of the orders sought in the absence of a decree capable of being executed by the respondent; that the recovery of monies paid to the applicant is consequential upon dismissal of the suit filed by the applicant in the Magistrate's court (Nyamira PMCC No. 76 of 2014) by the High Court in the first appeal (HCCA No. 5 of 2017); that the applicant is insincere in that the respondent did in fact pay him a judgment sum of Kshs 4,582,491/- and further fees to M/s. Hegeons Auctioneers who were retained to undertake execution proceedings against the respondent; that the recovery is for monies paid in execution of the decree issued at the Magistrate's court, which decree has since been set aside by the High Court; and that the applicant's plea to be allowed to offer security is misguided as there is nothing in the impugned judgment to be secured.

10. It was the respondent's further submission that the instant application is misconceived as the respondent is legally and equitably entitled to monies it paid in satisfaction of a decree which has since ceased to exist; that the applicant has not demonstrated the prejudice he will suffer in the event that he is directed to refund what he ought not to have received in the first instance; that allowing the application would be dealing the respondent an injustice as the respondent will be deprived of funds which it ought to invest for a return; that the applicant is engaging in inequitable conduct as whereas he has had the benefit of funds he ought not to have received in the first place, he seeks to keep the respondent from benefit of its own monies; and that the applicant seeks to avoid paying Kshs 4,000,000/-notwithstanding that he received Kshs 4,582,491/- from the respondent.

11. It was the respondent's further claim that ordering the monies due and owing to the respondent by way of refund (inclusive of interest at court rates) to be otherwise dealt with will not advance the course of justice; that the applicant's appeal will not be rendered nugatory should recovery of all monies be made before hearing and determination of the appeal; and that the applicant has not demonstrated how his appeal will be affected adversely if the orders sought are not granted and his intended appeal succeeds.

Submissions by counsel

12. When the application came up for hearing, learned counsel, **Mr. E. N. Nyamwea** represented the applicant while learned counsel, **Mr. Nyamurongi** represented the respondent.

13. Mr Nyamwea submitted that the intended appeal raises serious issues of law and has high chances of success. Counsel further submitted that they would prove that the statements that were published were malicious and of a defamatory nature. Counsel referred to the draft memorandum of appeal filed on 30th July, 2019 which urged the following grounds of appeal:-

"1. The learned appellate Judge erred in law in finding that the appellant herein did not prove all the elements of defamation when the contrary suffices.

2. The learned appellate judge erred in law in making an injudicious assessment of the evidence in criminal case no. 901/2013 where the appellant was charged and acquitted thereby misdirecting her mind and arriving at a legally erroneous conclusion."

14. On the nugatory aspect, counsel submitted that the applicant is likely to lose properties and his liberty as he may be subjected to civil jail which is not reversible; that the applicant may lose his ancestral land and being from the Kisii tribe, this loss is akin to death; that the applicant is ready to proffer security to cover the decretal sum as may be justly ordered by the Court in granting the orders sought.

15. **Mr. Nyamurongi** relied on his written submissions which he briefly orally highlighted. Counsel submitted that the applicant does not have an arguable appeal and has not included a draft Memorandum of Appeal in the instant application.

16. On the nugatory aspect, counsel submitted that there is no evidence that the respondent who paid Kshs 4,582,491/= on the same day its motor vehicle was attached cannot pay the amounts that may be ordered to be due and payable to the applicant; that the respondent's conduct in the past of paying decreed sums without difficulty clearly shows that it has the ability to pay any sums to the applicant that may be ordered to be due and payable.

17. Counsel further submitted that it will not be just in the circumstances to grant the orders sought as: whereas the applicant was paid Kshs

4,582,491/- he now seeks to be allowed to furnish security for Kshs 4,000,000/=; that the respondent would suffer prejudice to the extent of the difference of Kshs 582,491/= together with interest on the principal sum; that the respondent is an entity which exists for profit making and should the orders sought be granted, the respondent will be deprived of a colossal amount of money which it would have otherwise invested as it deems expedient for much higher profits; that the applicant has not demonstrated the prejudice he will suffer if the orders sought are not granted; that the applicant has not shown how the cause of justice shall be advanced nor how his appeal will be secured if the orders sought are granted; and that the filing of the instant application is itself an express indication that the applicant does not readily have the means to refund monies paid to it.

18. It was counsel's further submission that the instant application is misconceived and untenable as the applicant has sought a blanket order of injunction without addressing the costs awarded to the respondent and the fact that there can be no order of stay in respect of costs; that there is no decree capable of being executed upon which the order of stay can be predicated. Relying on the case of **Stanbic Bank Kenya Ltd vs. Kenya Revenue Authority (Civil Appeal No. 294 of 2007)** in support of his proposition, counsel urged us to dismiss the application with costs.

Determination

19. I have considered the application, the affidavits, the submissions by counsel, the authorities cited and the law. The jurisdiction of this Court in applications such as the one before us is donated by ***Rule 5 (2) (b)*** of this Court's Rules. The jurisdiction is original and discretionary. In **Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR** this Court stated *inter alia*:

> **"That in dealing with Rule 5(2)(b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court." The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable."**

20. In **Teachers Service Commission vs Kenya National Union of Teachers, Sup. Ct. Appl. No. 16 of 2015,** the Supreme Court considered the nature and scope of the jurisdiction under this provision, and stated as follows:

> **"It is clear to us that Rule 5 (2)(b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years…**
>
> **Rule 5 (2) (b) of the Court of Appeal Rules of 2010 is derived from Article 164 (3) of the Constitution. It illuminates the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal."**

In **Dennis Mogambi Mang'are V. Attorney General & 3 Others Civil Application No Nai 265 of 2011**, this Court stated as follows:

> **"An arguable appeal is not one that must necessarily succeed; it is simply one that is deserving of the court's consideration."**

As stated by this Court in **Ishmael Kangunyi Thande v Housing Finance Company of Kenya Limited Civil Application No. Nai 157 of 2006** (unreported), in order to succeed in an application under **Rule 5(2)(b)** of the Court Rules, the applicant has to establish that the appeal is arguable, and also that it is likely to be rendered nugatory if an injunction is not granted and the appeal succeeds.

21. On the first limb, I have perused the draft memorandum of appeal and find that the applicant's appeal is not frivolous as it raises arguable points, *inter alia,* whether the tort of defamation against the applicant was proved to the required standard. The Court cannot go into the merits of the appeal at this stage but what emerges is that the appeal is not frivolous. As stated in **Wasike V Swala [1984] 591,** an arguable appeal is not one that must necessarily succeed but one which merits consideration by the Court. I am satisfied that the applicant has satisfied the requirement of arguability of the appeal.

22. On the nugatory aspect, as this Court held in **Reliance Bank Limited v Norlake Investments Ltd [2002]1 EA 227**, the factors which render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the Court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the Court stated as follows:-

> **"To refuse to grant an order of stay to the applicant would be out of proportion to any suffering the respondent might undergo while waiting for the applicant's appeal to be heard and determined."**

23. In the instant application, counsel for the applicant submitted that the decretal amount was paid more than two (2) years ago and the applicant is therefore likely to lose properties and civil liberty if the orders sought are not granted and the applicant is ordered to refund the amount due and payable to the respondent. In **African Safari Club Limited V Safe Rentals Limited, Nairobi Civil Appeal (Application) No 53 of 2010** (Unreported), this Court stated:

> **"…with the above scenario of almost equal hardship by the parties it is incumbent upon the Court, pursuant to the overriding objective to act justly and fairly. The first role we have undertaken in this regard is to consider the hardships of the two parties before us. The second role is to put hardship on scales…We think that the balancing act as described in the analysis of the parties before us, is in keeping with one of the principle aims of the oxygen principle of treating both parties with equality or in other words placing them on equal footing in so far as is practicable…We believe that the rules of procedure including Rule 5(2)(b) have considerable value in terms of administration of justice but new challenges brought**

about by the enactment of the oxygen principle brings into focus the fundamental purpose of civil procedure which is to enable the court to deal with cases justly and fairly."

24. I note that in the event that the applicant is ordered to refund the monies paid and his appeal eventually succeeds, he will be refunded any monies due to him. There is no assertion that the respondent is incapable of making such refund. In the circumstances, the applicant's appeal will not be rendered nugatory if he refunds the amounts paid by the respondent and his appeal succeeds.

25. From the circumstances of the application, the applicant has demonstrated that the appeal is arguable but has failed to demonstrate that the appeal will be rendered nugatory if the instant application is dismissed and the appeal succeeds. The applicant has, therefore, failed to demonstrate the existence of both limbs as required by **Rule 5(2)(b)** of this Court's Rules.

26. The upshot is that I would decline to grant an injunction pending the hearing and determination of the intended appeal, to restrain the respondent from commencing recovery proceedings of the decretal amount of Kshs 4 million that had already been paid out to the applicant. As Hon. Okwengu JA is in agreement, the notice of motion dated 8th July, 2019 is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 3rd day of April, 2020.

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

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RULING OF H. OKWENGU, JA

I have read in draft the ruling of J. Mohammed JA. I concur that the applicant has failed to meet the threshold for granting an order of injunction pending the hearing of his appeal. I have nothing useful to add, save to order that the applicant's motion dated 8th July 2019 be and is hereby dismissed with costs as proposed by J Mohammed JA.

This ruling has been delivered under Rule 32(3) of the Court Rules as Githinji JA has since retired.

Dated and delivered at Nairobi this 3rd day of April, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL