



IN THE COURT OF APPEAL

AT NAIROBI

**CORAM: G.B.M. KARIUKI, MURGOR & J. MOHAMMED, JJ.A. CIVIL APPLICATION NO.
NAI 136 OF 2011 (UR 89/2011)**

BETWEEN

ROYAL MEDIA SERVICES LIMITED 1ST APPLICANT

ANTHONY KARIGA 2ND APPLICANT

AND

MACHARIA WAIGURU RESPONDENT

(An application for stay of proceedings pending the intended appeal from the ruling of the High Court of Kenya at Nairobi (Mwera, J) dated on 23rd May, 2011

in

HCCC NO. 123 OF 2010

RULING OF THE COURT

Background

1. This is an application by **ROYAL MEDIA SERVICES LIMITED** and **ANTHONY KARIGA**, (hereinafter the applicants), dated 2nd June, 2011, expressed to be brought under **Sections 3A & 3B of the Appellate Jurisdiction Act** and **Rule 5(2)(b) of the Court of Appeal Rules**, seeking

orders that:

- i. *There be a stay of further proceedings in High Court Civil Case No. 123 of 2010 pending the lodging, hearing and determination of an intended appeal against the order of the High Court at Nairobi (Honourable Mr. Justice J.W. Mwera) dated 23rd May, 2010.*

ii. The costs of this application be provided for.

2. The application is supported by the affidavit of **SAMUEL KAMAU MACHARIA**, (SK Macharia) the Chairman of the 1st applicant Company. The

grounds upon which the application is premised are to be found on the body of

the application and more particularly that:

a) (i). The learned Judge erred in not finding and holding that judgment in default could not be legally entered in that suit which was for general and exemplary damages.

...

iii. The learned Judge erred in exercising his discretion to set aside judgment in default in failing to find that the applicants had failed to enter appearance and file defence due to an excusable mistake and did not intend to obstruct the course of justice in the matter.

iv. The learned Judge erred in failing to accept the affidavit of SK

Macharia who is the Chairman of the Company, 1st defendant and thus authorized to plead on its behalf.

v. The learned Judge erred in rejecting, as hearsay, the affidavit of SK Macharia in failing to consider that Order 19 rule 3 of the civil procedure rules allows such evidence in interlocutory proceedings so long as the sources wherefrom have been disclosed.

...

b. (iii) The applicants are being faced with other similar amounts in damages from other suits are apprehensive that if this becomes the case, they will be constrained financially.

iv. The applicants have good defence and are afraid that in the event their appeal succeeds. The applicant who is an advocate who has virtually no legal business will not be able to refund the money.

3. The respondent has opposed the application vide a Replying Affidavit dated 13th August, 2011, with 18 averments all summing up the argument that the appeal is not arguable and that if an order for stay of proceedings is not

granted, the appeal, if successful, will not be rendered nugatory.

4. The factual background giving rise to this application is that on 1st September, 2009, the applicants published statements against the respondent, an advocate of the High Court of Kenya, for having been arrested by the District Officer for Kiharu in Muranga District for allegedly being found in possession of an illicit brew, (*changaa*). The respondent thereafter sued the applicants for a claim of general and exemplary damages arising out of the alleged defamatory statements made by the applicants.

5. In his plaint, the respondent pleaded that the words used by the

applicants in their ordinary meaning were defamatory and that among other negative attributes they were intended not only to lower and cause injury to the respondent's professional capabilities, but also to bring the respondent into disrepute, hatred, contempt and ridicule in the eyes of right thinking members of the society.

6. The applicants having been served with the Plaint and the Summons to Enter Appearance failed to enter appearance and file their defence within the prescribed time. A judgment in default of appearance and defence was entered against the applicants as prayed for in the Plaint. Subsequently on 31st January, 2011, the applicant moved the Court under **Sections 1A,1B, 3A of the Civil Procedure Act** and **Order 10**

Rule 11, Order 51 Rule 1 of the Civil Procedure Rules 2010 with the main prayer being that the default judgment be set aside and leave granted to file their defence out of time. Their main ground for impugning the judgment was that the default judgment entered under **Order 10 of the Civil Procedure Rules, 2010** was irregular since the respondent was not pursuing a liquidated claim and that the applicants have a good defence. The applicants also contended that the failure of their own internal processes for receipt of court documents and onward transmission of the same to their advocates were excusable mistakes and not meant to obstruct justice.

7. The learned Judge while dismissing the application opined that it was not in dispute that the applicants were served with summons to enter appearance, but failed to do so, and that the two employees of the applicant

Company, a Mr Mutegi Njau and a Zulu Thiongo who received the summons were better suited to depone to what transpired in the matter instead of SK

Macharia, who had no personal knowledge of the facts of the matter. The court found that the failure by Mr Njau and Mr Thiongo left the court with the impression that no excusable mistake, omission or inadvertence featured to warrant the orders sought. The court declined to grant the orders sought and ordered that the suit be set down for assessment of damages.

Submissions by counsel

8. When the application came up for hearing before us, learned counsel Mr P.G. Nganga appeared for the applicants, while Mr B.K. Adira appeared for the respondent.

On the arguability of the appeal, Mr Nganga submitted that, the judgment entered was irregular because **Order 9A Rule 5 of the old Civil Procedure Rules (now Order 10 Rule 6)** was not applicable in this case. He argued that the plaint filed by the respondents prayed for (a) *General and exemplary damages*, (b) *Costs of the Suit* and (c) *Any other relief*, is one in respect of which a default judgment cannot be entered. He submitted that the inclusion of prayer (c) (**any other relief**) precluded the suit from the application of the then **Order 9A Rule 5**. In support of this argument, counsel referred to the case of **MEIR MIZRAHI V NAIROBI CITY COUNCIL & OTHERS, [2005] e-KLR. Order 9A Rule 5 of the retired Civil Procedure Rules** provided that:

"5. Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 26 of Appendix C. enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be."

9. Counsel also faulted the learned Judge for the manner in which he exercised his discretion in entering a default judgment against the applicants.

Counsel submitted that the learned Judge wrongly exercised his discretion when he rejected the affidavit sworn by the applicants' Company Chairman, Mr SK Macharia, that according to **Order 19 Rule 3 of the Civil Procedure Rules** on Affidavits, such evidence cannot be considered as hearsay in interlocutory proceedings so long as the sources were disclosed. For proper exercise of such discretion, reliance was placed on the case of **SHAH V MBOGO, [1968] EA 116** and **PATEL V E.A. CARGO HANDLING SERVICES LTD, [1974] EA 75**. Counsel further submitted that the annexed defence with the attached charge sheet is meritorious and that the applicants have a good defence and have been shut out of the proceedings and denied their right to canvass their arguments.

For this proposition, counsel referred to this Court's decisions in **SEBEI**

DISTRICT ADMINISTRATION V GASYANI, [1968] EA and **SAMMY MUTUA**

MAKOVE (COMMISSIONER OF INSURANCE) V STATUTORY MANAGER UNITED INSURANCE CO LTD & 198 OTHERS, CIVIL APPLN NO. 343 OF

2009.

10. On the grounds in support of the application, counsel submitted that unless an order for stay of proceedings is granted, the High Court may proceed to assess damages and order the payment of millions of shillings payable in damages thereby rendering the intended appeal, if successful, nugatory. The applicants urged us to apply the overriding objective principle in the interest of justice.

11. Mr Adira for the respondent opposed the application arguing that the applicants have not demonstrated an arguable appeal; that the learned Judge

was correct in invoking the provisions of **Order 10 Rule 6 of the Civil Procedure Rules, 2010** in view of the fact that the claim arose out of defamation cause and therefore the respondent cannot quantify defamation until and unless evidence is tendered on record; that the draft defence does not raise any triable issues and that the learned Judge cannot be faulted for rejecting the affidavit of the applicants' Company Chairman who did not prove by evidence that the facts deponed to, were within his personal knowledge. When probed by the Court, counsel conceded that in the circumstances of this application, the appeal will be rendered nugatory if an order for stay of proceedings is not granted and the appeal thereafter succeeds.

Determination

12. The law is settled regarding applications brought under **Rule 5 (2) (b)**, that an applicant must satisfy the court that he has an arguable appeal and that his intended appeal, if successful, will be rendered nugatory if the orders sought are not granted.

This Court in **ISHMAEL KAGUNYI THANDE V HFCK, CIVIL APPLN NAI NO. 157 OF 2006** determined:

“The jurisdiction of the court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

Further, Githinji, JA in **EQUITY BANK LIMITED V WEST LINK MBO LIMITED,**

CIVIL APPLN NO. NAI 78 OF 2011, stated:

“It is trite law that in dealing with 5 (2) (b) applications the Court exercises discretion as a court of first instance... It is clear that 5 (2) (b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”

In considering the application, we bear in mind that an arguable appeal is not one that must necessarily succeed, but one which a court should consider; that one arguable point is sufficient; that whether or not an appeal will be rendered nugatory is a question of fact which will depend on the peculiar circumstances of each case; whether or not what is sought to be stayed, if allowed to happen, is reversible or not and whether an award of damages will be sufficient compensation for the purpose of the application.

In determining whether the appeal, if successful, will be rendered nugatory if stay is not granted, the court

ought to weigh the claims of both parties in the dispute.

13. On the question whether, on the material before us, the applicant has made out an arguable appeal, the applicants have in the Notice of Motion, supporting affidavit and the annexed statement of defence stipulated the grounds on which they seek to appeal against the ruling of the High Court. The applicant raises the issue whether in the context of ***Order 10 Rule 6 of the Civil Procedure Rules*** a default judgment can be entered for a prayer termed as **any other relief**. The applicant also raises the issue whether the evidence of the 1st applicant company's Chairman should have been considered in light of ***Order 19 Rule 3 of the Civil Procedure Rules***.

We cannot go into the merits of the intended appeal at this stage, but we are of the view that the above grounds are arguable. They are not frivolous. We are, therefore, satisfied that the applicant has satisfied the first limb of the requirements in an application under ***Rule 5 (2) (b)***.

14. Turning to the question whether the appeal, if successful, will be rendered nugatory, if the orders sought are not granted, as this Court stated in ***RELIANCE BANK LTD V NORLAKE INVESTMENTS LTD, (2003) 1EA 232***, what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.

15. Whether or not the success of an appeal or intended appeal will be rendered nugatory is a question of fact not law. Each case must therefore be considered on its own peculiar facts and circumstances and there is no limit to the number of factors that may be considered in the process of exercising the Court's discretion.

16. The applicants contend in the averments in the affidavit of SK Macharia supporting the application that if the order for stay of proceedings pending the intended appeal is not granted, the High Court may order colossal sums of money payable as damages against the applicants. The said affidavit further depones that the respondent herein may not be in a position to refund the monies paid to him if an order for stay of proceedings is not granted and the intended appeal succeeds, thereby rendering the intended appeal nugatory. From the circumstances of the application before us, we are persuaded that the intended appeal will be rendered nugatory if the instant application is dismissed. The applicants, have, therefore, that both limbs have been satisfied as required by ***Rule 5 (2) (b) of this Court's Rules***.

17. We have come to the conclusion that this is a deserving case for exercise of our discretion under ***Rule 5 (2) (b) of the Rules of this Court***. Accordingly, we allow the application. Costs of the application to abide the outcome of the appeal.

Dated and delivered at Nairobi this 22nd day of May, 2015.

G. B. M. KARIUKI

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR