



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 353 OF 2009**

**BETWEEN**

**NATION MEDIA GROUP LTD**

**WANGETHI MWANGI.....APPLICANTS**

**AND**

**HON. AMB. CHIRAU ALI MWAKWERE.....RESPONDENT**

**(Application for stay of execution pending the hearing and determination of the intended appeal against the judgment and decree of the High Court of Kenya at Nairobi ( Khamoni, J) dated 8<sup>th</sup> May, 2009**

**in**

**H.C.C.C. NO. 1329 OF 2003)**

**\*\*\*\*\***

**RULING OF THE COURT**

By this motion expressed to be brought under **rule 5(2) (b)** of the Rules of this Court the applicants seek an order of stay of execution of the judgment and the decree of the High Court at Nairobi (Khamoni, J) delivered on 8<sup>th</sup> May 2009 pending the hearing and determination of an intended appeal.

The 1<sup>st</sup> applicant is the publisher and the proprietor of the popular newspapers, the Daily Nation and the Sunday Nation, both published in Nairobi. The 2<sup>nd</sup> applicant was at the material time the editorial director of the two papers and an employee of the 1<sup>st</sup> applicant.

The respondent was at the material time a member of Parliament for Matuga constituency and a Minister in the Government of Kenya. By a judgment dated 8<sup>th</sup> May 2009 the superior court found the

applicants in the motion liable for the publication of defamatory material against the respondent on 15<sup>th</sup> December 2003 and awarded him damages of Shs. 10,000,000 plus costs and interest.

Being aggrieved by the said decision the applicants on 15<sup>th</sup> May 2009 timeously filed a notice of appeal; and subsequently, on 16<sup>th</sup> December 2009 lodged this application.

The grounds in support of the application have been set out in detail in the affidavit of Mr. Owino, a Legal Officer with the 1<sup>st</sup> applicant. He depones in the main that the respondent had obtained warrants of attachment and sale of the applicants' assets and yet the bill of costs had not been taxed which is an indication that the respondent appears bent on executing the decree at any time unless restrained as soon as taxation is completed; that the decretal sum is substantial and immediate payment thereof will adversely affect the applicants' operations; and that the respondent's assets had not been disclosed and that it is not guaranteed that he would readily be able to repay whatever sums of money paid to him in the event that the appeal may be successful.

Mr. Munyu, the learned counsel of the applicants, submitted that the appeal is arguable in that the learned Judge had erred in finding that the respondent was the person referred to in the alleged defamatory article in the absence of evidence of identification and that there was no proof of the alleged innuendo. He further averred that the general damages awarded were manifestly excessive in the circumstances and not based on comparative authorities. He contended that untold suffering and inconvenience would result to the applicants' business having regard to the prevailing economic conditions generally and, thus, their appeal would be rendered nugatory.

The respondent, who was represented by Mr. Sagana, his learned counsel, has vigorously opposed the application. His grounds of opposition have been set out in *extenso* in the replying affidavit sworn by the respondent on 22<sup>nd</sup> February 2010. First, Mr. Sagana submitted that the applicants have been dilatory in filing this application and that they had not offered any financial status to support the claim that payment of the decretal sum would cripple their operations. Secondly, the respondent averred that the appeal would not be rendered nugatory since he could comfortably meet any order for refund of the decretal sum, if ever ordered since he had assets in excess of Shs. 50,000,000. Mr Sagana further argued that the intended appeal would not be arguable at all nor be rendered nugatory and there was therefore no reason to deny the respondent the enjoyment of the decretal sum.

On our part, we have carefully considered the conflicting claims of both parties; and especially, the history of the dispute and of the litigation. We have further considered the grounds of the intended appeal which are set out in the draft memorandum of appeal. We are, however, satisfied without deciding, that the intended appeal is certainly arguable and not frivolous.

The next aspect of such an application like this is, however, difficult to resolve. This is whether or not the appeal, if successful would be rendered nugatory. In our view, the sum of Shs. 10,000,000 with costs and interest is relatively substantial, but, taking into account the respondent's station in life and his assets whose titles have been filed, we are satisfied that the respondent is possessed of assets which, if sold would be sufficient to repay the decretal amount.

But, as was said by this Court in **Reliance Bank Ltd. v Norlake Investment Ltd. [2002] 1 EA 227**, the fact that a respondent in an application of this kind has the financial means to refund the decretal sum should the appeal succeed is not invariably decisive. What may render the success of an appeal nugatory must be considered within the circumstances of each particular case. In the same case, the Court had earlier said at page 231 paragraph 3 thus:-

**“We do not understand the position to be that in a decree for the payment of money, for example, the only thing that would render success of an appeal nugatory is the inability of the other side to refund the decretal sum if it has been paid over to it.”**

It is plain from the grounds set forth in the draft memorandum of appeal that the applicants have

asked the appellate court to interfere with the awards of damages and there is possibility that the appellate court may either decline or reduce the awards considerably. In the event of the former there might be a long delay in recovering from the respondent the decretal sum as there are so many imponderables in the sale of the respondent's land which forms the bulk of his assets. It is obvious therefore that in such a likely eventuality, the applicant might be greatly inconvenienced. The balance of convenience is definitely in favour of the applicants, we would think so.

Also, we have been informed from the bar that the applicants have, as a sign of good faith offered to provide security in the form of a Bank Guarantee. In our view, having regard to the principle of proportionality and the need to create a level playing ground for the parties we would think that the applicants should be made to provide a Bank Guarantee to secure the decretal sum.

Accordingly, we allow the application and grant an order staying the execution of the decree pending the determination of the intended appeal on condition that the applicants do provide a Bank Guarantee for Shs. 10,000,000 being the total judgment sum. The applicants may accordingly extend the Bank Guarantee which is currently in force to accord with this order. This shall be made within 14 days from the date hereof. The costs of this application shall be in the intended appeal.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of April, 2010.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original

**DEPUTY REGISTRAR**