



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPLI 19 OF 2008 (UR/13/2008)

THE NATIONAL NEWSPAPERS LIMITED1ST APPLICANT

J. RODRIGUES2ND APPLICANT

AND

FIBI MUNENE.....RESPONDENT

(An application for stay pending the hearing and determination of an appeal from a judgment of the High Court of Kenya at Nairobi (Osiero, J.) delivered on 28th June, 2007

in

H.C.C.C. NO. 2636 OF 1979)

RULING OF THE COURT

Fibi Munene (Fibi) is a well known journalist and at one time, a weekly columnist with the Daily Nation Newspaper, called “The last word”. About thirty years ago in 1979, she sued the **Nation Newspapers Limited** (“the Nation”) who are the proprietors and publishers of the Daily Nation, together with the Editor, Joel Rodrigues and the author of a letter published in that daily paper on 21st August, 1978, which Fibi alleged was defamatory of her character as a journalist. She claimed damages. The editor and publisher admitted publication of the letter but denied that it was defamatory of Fibi or at all. The author of the letter did not file any defence. That was **HCCC 2636/79**.

It would appear that as a result of the suit, the services of Fibi as an employee of the newspaper group were suspended, and she was sent on unpaid leave until such time as the suit would be heard and determined. As a result of that suspension Fibi filed another suit against the Nation Newspapers Ltd seeking payment of her monthly salary. That was **HCCC 1170 of 1980**. In that suit, the Nation denied any breach of contractual terms of employment and sought dismissal of the claim. We are told by both parties that the suit was dismissed by consent, but the date of dismissal was not given.

For some reason which we are unable to establish from the record, **HCCC No. 2636/79** was not heard for a period of 29 years! It was finally heard before Osiero, J but by then the Editor, Joe Rodrigues, had died and the suit against him had abated. Fibi also applied and was granted leave to withdraw the case

against the author of the offending letter. That left the Nation who did not offer any oral evidence at the hearing. After hearing Fibi and her two witnesses, the learned Judge concluded that the offending article was indeed defamatory of Fibi and he proceeded to award her Shs.7 million in general damages with costs thereon. In addition to that award the learned Judge proceeded to consider the lengthy unpaid leave Fibi was consigned to and made the following order: -

“The plaintiff has been on unpaid leave for the last 29 years. This is really a sad case. Since she had sought under Prayer (c) of the plaint orders for any further or other relief deemed fit by this honourable Court under this heading, I make the following order:

If the Defendant is not inclined to accept the Plaintiff to resume duty after 29 years of leave, it can pay her salary for the 29 years and thereafter she can be retired in accordance with the terms and conditions of her employment as desirable. The figures to be calculated but each party be at liberty to apply”.

Those orders were made on 28th June, 2007.

The Nation was aggrieved by the entire judgment and filed a notice of appeal to challenge it before this Court. Fibi also decided to pursue the order relating to payment of her salary for 29 years and filed a notice of motion before the superior court on 24th January, 2008 claiming a further sum of Kshs. 14,355,000. The motion was due for hearing on 12th March, 2008. Alarmed by the huge claim and the slow process of awaiting the proceedings and judgment to mount the appeal, the Nation came before this Court on 25th February, 2008 and filed an application under **rule 5(2) (b)** of the Court’s rules. The orders sought under certificate of urgency issued on 7th March, 2008 were for stay of proceedings in the superior court pending the hearing of the intended appeal and also stay of execution of the decree ensuing from the judgment. That was the matter argued before us and the subject matter of this ruling.

Those orders will issue if the applicant satisfies the usual twin principles that must govern the application, that is to say; that the intended appeal is arguable or, put differently, that it is not frivolous, and secondly, that the intended appeal, if successful, would be rendered nugatory unless the stay is granted. Each case must nevertheless be considered on its own peculiar facts and circumstances in the exercise of the court’s unfettered discretion.

We are persuaded by arguments advanced by Ms. Jan Mohammed, learned counsel for the Nation that the intended appeal is not frivolous. She submitted that loss of service for a period of 29 years, for which compensation was awarded by the learned Judge, was a special damage claim and it ought to have been specifically pleaded, particularized and proved. As there was no pleading in the plaint, or in the submissions of counsel, and no proof was tendered, the claim would neither be considered nor granted under the rubric “*any further or other relief*” as the learned Judge purported to do. It was also arguable, she submitted, that the award of Shs.7 million in general damages for defamation was excessive. Finally, it was her contention that the defence on record was not considered in the judgment of the superior court, hence the lopsided view of the litigation between the parties.

That those issues were at least arguable was not seriously challenged by learned counsel for Fibi, Mr. Wanjohi. He seriously contended, however, that the intended appeal would not be rendered nugatory, even if it was successful, by the failure to grant the orders sought. In his view, the judgment rendered by the superior court was incomplete and the purpose of making the application pending before the superior court for ascertainment of the salary arrears due to the respondent, was to complete the judgment, after which the applicants will be at liberty to appeal if they are dissatisfied. At all events, Mr. Wanjohi submitted, there was no intention to execute the decree before the final judgment of the court and there is in place a consent order for interim stay before the superior court pending determination of the notice of motion. Finally, Mr. Wanjohi submitted that the decree being challenged is a monetary one and normally, this Court would be slow to prevent the execution of such decree, thus delaying the just enjoyment of the fruits of the judgment by the successful party. The respondent is in a position to refund the decretal sum even if the appeal was successful, he concluded.

For her part, Ms. Jan Mohammed was certain that the intended appeal would be rendered nugatory if the two orders sought were not granted. As it is, she pointed out, the respondent somehow irregularly obtained a preliminary decree and purported to execute and attach the applicants' goods before the process was reversed by the superior court suo motu. There was no evidence, save for bald statements made by the respondent, that she was in a position to repay the hefty decretal sum. Her advanced age and age-related complications coupled with her confession that she has not earned any income for 29 years, militate against the assertion that the decretal sum is recoverable from her.

Finally Ms. Jan Mohammed pointed out that the notice of appeal was intended to challenge the whole of the judgment of the superior court including the orders made for "*each party to be at liberty to apply*". It rendered the judgment incomplete, uncertain and incapable of execution and the very act of proceeding to file and argue the notice of motion now before the superior court would deprive the applicants of their right of appeal. That would be tantamount to piecemeal litigation as there cannot be two notices of appeal in the same judgment.

We have considered the rival submissions of counsel on this aspect of the matter. It is evident that the judgment of the superior court is unorthodox as it does not finally determine the dispute between the parties. There is nevertheless a notice of appeal filed to challenge the whole judgment and we leave it to the appellate court to express itself on the matter. The only issue before us is whether the appeal, if it succeeds, will be rendered nugatory if we do not, firstly, stay further proceedings before the superior court, and secondly, stay any intended execution of the ensuing decree. In our view, the continuing prosecution of the application before the superior court would not necessarily render the intended appeal nugatory. If the appeal is successful, those proceedings will be rendered vacuous and an appropriate order for costs would follow. There is authority for this view in Kenya Commercial Bank Ltd. v. Benjoh Amalgamated Ltd. & Another Civil Application No. NAI. 50 of 2001 and Silverstein vs. Chesoni [2002] 1 KLR 867, both Cited with approval in Johnsons Wax (E.A.) Ltd v. Mburu & 2 others [2005] 2 KLR 301 at page 305, thus:-

"The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless."

These remarks aptly apply to the application before us. What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this court would not have been rendered nugatory."

We decline to grant the order sought for stay of further proceedings.

In the application before the superior court, the respondent, Fibi, seeks a further payment of a sum in excess of Shs. 15 million. That application may well be determined before the intended appeal is heard. In aggregate therefore, if she obtains judgment in her favour, Fibi will seek to recover in excess of Shs. 22 million from the applicant. Her intention to execute the decree cannot be doubted, and is not surprising. Anyone waiting for more than thirty years for their litigation to end would feel equally frustrated and anxious. But the applicants too have a right of appeal and may suffer considerable prejudice if the appeal ultimately succeeds and the decretal sum is irrecoverable from Fibi. From the affidavits filed by her, it is not apparent that she is capable of refunding such sum. The authority of Kenya Shell Ltd. vs. Kibiru & Another (1988) KLR 410 was cited to dissuade us from issuing an order for stay of a money decree. But in Surjit Singh & Another v Caltex Oil (Kenya) Ltd Civil Application NAI. 136/07 (ur) this Court stated as follows:-

"Mr. Odunga, referred us to the case of Kenya Shell Ltd. vs. Kibiru and another (supra) in which Platt AG. JA (as he then was), dealing with a case involving money decree stated:-

“It is not normal in money decree for the appeal to be rendered nugatory if payment is made.”

That was before this Court revisited the same issue in the cases of Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Ltd – Civil Application No. Nai. 358 of 1999 and Clarkson (Insurance Brokers) Ltd. vs. South Coast Fitness – Civil Application No. Nai. 204 of 1995 (unreported) and Trust Bank Ltd. 7 Another vs. Investech Bank Ltd. & 3 Others. – Civil Application No. Nai. 258 & 315 of 1999 (unreported). In all these cases, this Court was of the view that in cases where a judgment debtor is adjudged to settle a substantial money decree, it becomes necessary for the court to qualify the usual principle that success of a money decree so long as it is certain that the respondent was capable of repaying the decretal sum, would not render any intended appeal nugatory. The court has to consider the interests of justice where undue hardship would be caused to the applicant if stay is refused purely on grounds that he can be monetarily compensated.”

In the circumstances of this case, the amount of money involved is fairly substantial.

In sum, we are of the view that some limited protection ought to be extended to the applicants pending the hearing and determination of the intended appeal. The applicant, through counsel, offered security for the stay order. In all the circumstances we grant an order for stay of execution as sought in prayer (2) of the notice of motion on the following terms:

- (i) that the applicant deposits a sum of Shs.7 million in an interest-earning bank account to be opened in the joint names of the advocates representing both parties.*
- (ii) The said deposit shall be made within 30 days of this ruling, that is to say, on or before 22nd March, 2009.*
- (iii) In default of compliance with (i) & (ii) above, this application shall stand dismissed with costs without further application.*
- (iv) If there is compliance with (i) and (ii) above, the costs of the application shall be in the intended appeal.*

Those shall be our orders.

Dated and delivered at Nairobi this 20th day of February, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR