REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLICATION 340 OF 2008

METEINE OLE KILELU & 19 OTHERS.....APPLICANTS

AND

MOSES K. NAILOLE.....RESPONDENT

(An application for stay of execution pending hearing and determination of the appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mr. Justice Alnashir Visram) dated 8th November, 2005

in

H.C.C.C. NO. 2523 OF 1998)
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RULING OF THE COURT

The appellants who are in total twenty (20) in number and who have filed into this Court, Civil Appeal No. 312 of 2005, are vide this notice of motion dated 29th December, 2008 and filed on 30th December,2008, seeking two orders under Rules of this Court wrongly cited as ***rules 4, 41*** and ***42*** of this Court's Rules . We say, the rules are wrongly cited because the orders sought are:-

"(a) That there be a stay of execution of the decree from the judgment of Hon. Justice Alnashir Visram J dated 8th November, 2005 pending the hearing and determination of the appeal filed herein.

(b) An order that costs of this application abide result of the appeal herein."

The first order sought can only be sought pursuant to ***rule 5 (2) (b***) of this Court's Rules and certainly is not available under ***rule 4*** of this Court's Rules which is a rule to be invoked by a party seeking extension of time to take any step after the time prescribed in the rules has expired. Be that as it may, we will take the view that the application is premised under ***rule 5 (2) (b)*** as the substance of the application clearly demonstrates that it is brought under that rule, the wrong rule cited notwithstanding.

The principles that guide the courts in respect of an application brought such as the one before us in which the applicant is seeking stay of execution is now well settled. The applicant can only be availed the orders sought if he demonstrates first that the appeal filed or intended appeal as the case may be is arguable, that is to say the appeal or intended appeal is not frivolous and secondly, that the result of the

appeal, were it to succeed, would be rendered nugatory if the application for stay is refused. See the cases of ***Reliance Bank Ltd vs. Norlake Investments Ltd*** ***(2002) 1 EA 227 (CAK***) and Caltex Oil Company (Kenya) Ltd now renamed ***Total Marketing Kenya Ltd vs. Evanson Njiru Wanjihia***, ***Civil Application No. Nai. 190 of 2009***. These two principles must be satisfied before the Court, can grant the orders sought and it is not enough that one principle is satisfied. If the other is not satisfied then the order sought cannot be granted.

In the matter before us, the record shows that in a plaint dated 11th November 1998, the respondent Moses K. Nailole sued the appellants in the superior court at Nairobi, seeking general damages, exemplary damages, costs and interest on the three claims. The claim was made on the allegations of defamation of the respondent's character by way of a letter addressed to the Permanent Secretary, Ministry of Local Government, signed or thumb printed by all the 20 appellants and copied to the Provincial Local Government Officer at Nakuru and to several other government officers, in which they made several defamatory allegations against the appellant. The appellants, in a statement of defence dated 28th January, 1999, admitted publishing the offending words to various people but denied the same words were libelous or defamatory to the respondent as alleged. They also denied the falsity of the said words or that they were actuated by malice or that they were calculated to disparage the respondent. They also denied the respondent's allegations that the said words caused the respondent to suffer any pecuniary damage, or that the words were capable of bearing the meanings attached to them by the respondent. In the alternative, the appellants stated that the said words were fair information on a matter of public interest and were therefore true in substance and fact.

After the close of the pleadings, the suit was placed before Visram J. (as he then was) for hearing. The record shows that after the respondent and his one witness had given evidence and the respondent closed his case, the appellants did not offer any evidence in their defence and did not call any witness. The learned counsel for the respondent made his submissions but the learned counsel for the appellant referred the Court to his written submissions in file and made short submissions perhaps highlighting the written submissions. In his reserved judgment delivered on 8th November 2005, the learned Judge of the superior court entered judgment for the respondent against the appellants jointly and severally and awarded the respondent a total of Ksh.2,300,000/= of which Ksh.2,000,000/= was awarded as general damages whereas Ksh.300,000 was awarded as exemplary damages. It is against that judgment that the appellants filed Civil Appeal No. 312 of 2005 in this Court. For some reasons yet to be explained, the appellants, after filing that appeal in December, 2005, waited for over three years to file this notice of motion on 30th December, 2008.

In his submissions before us, Mr. Osoro, the learned counsel for the appellants contended that the appeal already filed is arguable and referred us to the memorandum of appeal which is in the record. Together with that he maintained that two issues, namely, the issue that the respondent said he was a Town Clerk whereas he was not, which if properly considered, would result into a different decision from the decision reached by the learned Judge of the superior court, and the issue that the respondent never demonstrated the effect of the alleged defamatory letter on him were issues that were not frivolous. On the issue of whether the results of the appeal would be rendered nugatory were it to succeed, by our refusal of the application, Mr. Osoro submitted that the appellants would suffer irreparable damages if their application is refused and the appeal eventually succeeds. Mr. Kinyanjui , the learned counsel for the respondent on the other hand, submitted, first that the application could not succeed because apart from any other aspects, the affidavit in support of it was sworn and signed by a person who had no authority to swear it on behalf of all other applicants. Further, he submitted that there was undue delay in filing the application and that the Appeal Number 312 of 2005 is not arguable as the letter, the subject of the dispute, was copied to several people and was in his view, clearly defamatory of the respondent. On nugatory aspect, Mr. Kinyanjui submitted that the appellants had not demonstrated in what way the reults of the appeal would be rendered nugatory were it to succeed after our refusal of this application as the respondent was in any way able to repay monetary proceeds of execution in case the appeal eventually succeeds.

We have considered the notice of motion, the record, the submissions, by the learned counsel and the law with the principles we have referred to hereinabove in mind. We may have our own views as to the arguability of the appeal but we are nonetheless prepared to accept that the appeal already filed is

arguable. The issue raised by Mr. Kinyanjui as to whether the deponent of the supporting affidavit was in fact and in law authorized to swear the supporting affidavit on behalf of all other applicants is a valid point even as it has also been shown in this ruling that the application was not based on the proper rule. However, because of our view of the next point which is whether even if all are ignored, the appeal would be rendered nugatory by the refusal to grant this application were it to eventually succeed, we say nothing on the two technical aspects.

On nugatory points, all that Mr. Osoro submitted is that the appellants would suffer irreparable damage. That, with respect is one of the tests in cases of applications for injunction in the superior courts and below, it is not the required test under ***rule 5 (2) (b)*** of this Court's Rules. In this Court, the applicant seeking orders under ***Rule 5 (2) (b)*** of this Court's Rules has to demonstrate arguability of the appeal as we have stated and that if the appeal eventually succeeds, our refusal to grant the application would render such success nugatory. In a matter such as is before us where the decree appealed against is a money decree, the applicant has to show either that once the execution is done after our refusal of the application, the applicant may never get back that money even if his appeal succeeds or that the decretal amount is so large *vis a vis* his status, or business that the execution would in itself ruin his business or threaten his very existence. The appellants needed to show for instance, that the respondent is a man of straw who once the execution takes place and is given the decretal amount, would not be able to refund it when the appeal succeeds. They neither stated so in their affidavit nor demonstrate so at the hearing of the application.

The effect of their failure to satisfy the second limb is that the entire application cannot succeed as both limbs must be proved to the satisfaction of the Court. In short, the notice of motion has no merits. It is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 18th day of December, 2009.

E. M. GITHINJI
.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

J. G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR