



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA**

AT NAIROBI

Civil Appli 1 of 2007

NATION NEWSPAPERS LIMITED APPLICANT

AND

PETER BARAZA RABANDO RESPONDENT

(Application for stay of execution pending the filing, hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nakuru (Kimaru J) dated 15th November, 2006 in H.C.C.C. 505 OF 1998)

RULING OF THE COURT

It is now well settled that for an applicant to succeed in an application under **rule 5 (2) (b)** of the Court of Appeal Rules, whether for an injunction or a stay of execution of decree or proceedings pending before the superior court, he must show firstly, that his appeal or intended appeal is arguable. Secondly, that unless he is granted the orders sought, the success of that appeal will be rendered nugatory.

The applicant before us, is Nation Newspapers Limited. It was the defendant in Civil Suit No. *Nakuru High Court Civil Case No. 505 of 1998*, in which Peter Baraza Rapando, the respondent, had sued for damages for libel. The alleged libel was contained in a front page story carried by the applicant in its daily, the Daily Nation, of 30th October, 1998 and 4th November, 1998 respectively. The story as carried on 30th October, 1998, edition read as follows:

“MAN IS INJURED MILKING JUMBO

A young farm hand suffered two broken ribs, and a dislocated shoulder after trying to milk an elephant. The elephant, which had been browsing peacefully with her calf, suddenly realized that she was being handled and indignantly tossed 21 year old Peter Baraza into the air together with his half filled can of milk. Badly wounded, he struggled to escape by climbing a nearby tree, but she seized the tree with her trunk, uprooted it with one violent tug and waved it in the air with Peter clinging desperately to a branch Witnesses said he tried to milk the elephant when he came across her near Kenya Agricultural Research Institute in Ol’joro Orok Division, last Saturday. The Kenya Wildlife Service area partnership officer Mrs. Mary Thigera visited him in hospital to offer her condolences Baraza, she (Mrs. Thigera) said, had obtained almost one pint of milk from the elephant before he was attacked”.

The applicant repeated the story in its 4th November, 1998, edition but this time the story was flavoured. It went like this:

“THE MAN WHO MILKED A JUMBO

The story of the young man’s escapade spread through the country like a bush fire. Twenty two year old Peter Baraza is a daring man. He did what nobody ever attempted to do – he milked a rogue elephant. Baraza concedes that he had never seen a jumbo before but his encounter with the mammal will ever be imprinted in his memory for the rest of his life”.

With this account, the applicant carried a photograph of the respondent depicting him as holding a milking can allegedly full of elephant’s milk. This was a manipulated portrayal of the respondent to give the story flavour and full effect. At no time was the respondent seen holding a milking can and attempting to milk a rogue or any elephant. The superior court after examining witnesses found as fact that the story about the respondent milking an elephant was not true, was malevolent, malicious and defamatory of the respondent. In the court’s view, a right thinking member of society reading the story will think that the respondent was a very daring but stupid man – an idiot. The superior court awarded the respondent Shs.2,000,000/= as general damages.

Before us, Mr. Saende for the applicant submitted that there is nothing defamatory in the words the applicant published of the respondent, and the trial court erred in concluding that they were defamatory. In his view, because of the lapse of over one year between the date the judgment against which an appeal is intended was reserved and the date it was delivered, the trial judge could not possibly have remembered the demeanor of the witnesses and the detailed issues which had been raised at the trial. For that reason, he said, the judgment cannot be said to be without error.

On the nugatory aspect, Mr. Saende expressed the view that the respondent being a casual labourer, is unlikely to refund the decretal sum should it be paid over to him, and eventually the intended appeal were to succeed.

Mr. Mburu for the respondent, in reply, conceded that the respondent was unlikely to refund the decretal sum, which is in excess of Kshs.2 million, should it be paid over to him and the intended appeal were eventually to succeed. His further submission, was, however, that the intended appeal has no chances of success, more so, because the applicant was unable to produce witnesses who saw the respondent attempting to milk an elephant. He did not think the sum awarded by the superior court was inordinately high as to amount to an unreasonable estimate.

The applicant’s witness admitted at the trial, that it would be foolhardy for any person to attempt to milk a rogue elephant. That was one of the innuendoes the respondent relied upon in his action for defamation. He averred that he was portrayed as a daringly foolish or stupid person. The story, according to him, was untrue and exposed him to ridicule.

The damages awarded appear high, but quantum of damages is a matter for exercise of judicial discretion. What one may consider high may not necessarily be high to another person. What is important is whether all relevant factors were taken into account in coming to the figure being challenged and irrelevant factors excluded.

The respondent’s is a money decree. In ***Kenya Shell Ltd vs. Kibiru & Another*** [1986] KLR 410, this Court held that normally a stay of execution would not issue in money decrees. However, recent decisions of the Court are to the effect that in certain cases, an appeal against a money decree, if successful, may be rendered nugatory, and the court granted a stay in those cases. In such cases, however, the court balances two parallel positions. First, that a litigant if successful should not be deprived of the fruits of a judgment in his favour without just cause. The second factor is that, if the execution of the decree will render the proposed appeal nugatory, the court will be inclined to grant a stay, may be on terms.

In the matter before us, counsel for the respondent commendably conceded that if the decretal sum were to be paid over to his client, he would most likely be unable to refund it if he spends it and the intended appeal by the applicant were eventually to succeed. The damages awarded were in the nature of

general damages, which are normally in the discretion of the trial court. Once the intended appeal is heard this Court might either affirm the award, set it aside altogether or vary the sum awarded. The appeal against the quantum of damages does not prima facie appear frivolous.

In the circumstances, we need to consider and balance the interests of the parties, and their respective positions, and safeguard the same. The applicant intends to exercise its undoubted right of appeal, and in the event it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent has a decree in his favour, and he should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree.

In those circumstances, we are minded to grant a conditional stay. We grant a stay conditional on the applicant depositing in an interest bearing account in the joint names of counsel on record for the parties, the whole of the decretal sum. The deposit shall be made within 15 days of the date hereof, in a reputable commercial bank to be agreed upon between counsel. Upon satisfaction of that condition, execution of the decree in *Nakuru High Court Civil Case No. 505 of 1998* shall be stayed pending the determination of the intended appeal or further order of this Court. Costs of this motion shall be in the appeal.

Dated and delivered at Nairobi this 16th day of March, 2007.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR