REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 108 of 2006

1. NATION MEDIA GROUP LIMITED

2. MUTEGI NJAU

3. BOB KIOKO …….....…….....APPLICANTS

AND

1. JOHN JOSEPH KAMOTHO

2. CHARLES GITHII KAMOTHO

3. JAMES KAMOTHO

4. DAVID KAMOTHO …….....RESPONDENTS

(Application for stay pending the determination of the appeal from the judgment and decree of the High Court of Kenya (Ojwang J) dated 1st day of July, 2005

in

H.C.C.C. NO. 368 OF 2001)

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RULING OF THE COURT

This is an application under ***Rule 5 (2) (b)*** of the Rules of this Court for an order that the execution of the judgment and the decree of the superior court (Ojwang J) delivered on 1st July, 2005 be stayed pending the determination of the appeal against that decree and the judgment.

The first applicant is the proprietor of both the Nation Radio and Nation T.V. The second and third applicants are the employees of the first applicant.

The 1st respondent is a member of Parliament for Mathioya constituency in Murang'a District. He was at the material time a Minister for Local Government in the government of Kenya and also the Secretary General of KANU, the ruling political party at the time. The 2nd, 3rd and 4th respondents are the sons of the first respondent. The 2nd applicant was at the material time a Senior Medical Officer in

charge of Thika District Hospital. He was also running a private clinic at Thika Town and a consultant at Nairobi Heart Clinic at Nairobi Hospital now situated at Karen Hospital. The 3rd respondent is a business man and a proprietor of two companies while the 4th respondent is a student in Australia.

On 1st July, 2005, the superior court found the three applicants in the application liable for three publication of libellous material against the four respondents on 18th January, 2001 and awarded damages to the respondents. The three publications which gave rise to the liability for libel were published in the Nation Radio and Nation T.V. on the early morning on 18th January, 2001.

On 18th January, 2001 the Nation Radio in its *changamka* programme hosted by the third applicant broadcasted, among other things, that:

"… ***a white Peugeot 405 bursts into the parking lot at a speed of about 80 to 90 kph …… the car has three young men and at that speed they are unable to control the car and the car slams into a stationary Nissan ..... The young boys reversed the car and moved from the accident scene, got out of the car and bounced off towards the parking office and guess what!!! The three spoilt brats are sons of a cabinet minister!!! …… Right now I can see them on cellular phones …… I think they are just trying to call their father to try and get them out of this ……".***

The third applicant further reported that the three sons of a Minister seemed to have been drunk on something; that they were driving off but the security officers had not allowed them to leave the compound of the parking lot. This publication was followed by Nation Radio News Bulletin at 9 a.m. which reported, *inter alia*, that a son of a Local Government Minister, Joseph Kamotho was involved in a scuffle after his friends hit another car at Westlands.

The incident was also broadcast in the Nation T.V. news at 11 a.m. as the first news item and the video tape of the incident shown.

The trial judge after analyzing the evidence made findings of fact, among others, that the three phases of publication were built on a continuous transaction; that the contents of the three phases of publication taken together did identify the first respondent as the Cabinet Minister whose sons were ill-behaved and had committed acts of a criminal nature following which they had resorted to the prominent public standing of their father to go scot-free; that the applicant failed to show by evidence that the 2nd, 3rd and 4th respondents were at the scene of the accident or were involved in the drunken brawl and that, on the contrary, the 2nd, 3rd and 4th respondents had shown that they were not involved in the accident and were not at the scene or involved in a drunken brawl.

The trial judge awarded damages as follows: 1st respondent Shs.6,000,000/= as general damages plus Shs.1,000,000/= as aggravated damages; 2nd respondent, Shs.2,500,000/= as general damages and Shs.500,000/= as aggravated damages; 3rd respondent, Shs.2,000,000/= as general damages and Shs.500,000/= as aggravated damages and the 4th respondent; Shs.1,000,000/= general damages and Shs.500,000/= as aggravated damages.

The applicants were also adjudged liable to pay the costs of the suit and interest on costs of the suit and interest on damages.

Being aggrieved by the judgment, the applicants promptly lodged *Civil Appeal No. 284 of 2005* in this Court on 11th November, 2005 against both the liability and the quantum of damages.

This Court has said on many occasions that the original jurisdiction conferred by ***Rule 5 (2) (b)*** to grant a stay of execution; stay of proceeding or an order of injunction pending appeal is discretionary and that the discretion is exercised on settled principles, amongst them, that the applicant should satisfy the court that the appeal or intended appeal is not frivolous and in addition that unless the execution of the decree is stayed, the intended appeal or appeal, if it ultimately succeeds would be rendered nugatory. The

jurisdiction of the court even extends to the cases where the appeal is against a monetary decree. (See ***Industrial & Commercial Development Corporation v. Daber Enterprises*** **[1999] 2 EA 112)**.

Regarding the merits of the appeal, the applicants have attached to this application a copy of the memorandum of appeal in Civil Appeal No. 284 of 2005 which contains 15 grounds of appeal. Mr. Gitonga for the applicants submitted, without elaboration, that the appeal raises arguable grounds which are not frivolous. Mr. Kahonge for the respondents, on the other hand, submitted that the applicants have failed to show that the appeal is arguable and that it is not sufficient to merely refer to the grounds of appeal.

The appeal raises issues of fact and law. For instances, the applicants take issue with the findings that the words complained of are defamatory and that they refer to any of the respondents, when according to them, no witnesses were called to say that they heard the words or that they understood the words as defamatory and as referring to the respondents. The applicants also complain that the judge erred in awarding aggravated damages without any justification and that the awards of damages were manifestly excessive.

The appeal has already been filed and it is inappropriate to refer its merit in some detail. That is the task of the appellate judges who will ultimately hear the appeal. There are arguable grounds concerning the liability of the applicants for libel. Secondly, the award of damages particularly to the 1st and 2nd respondents is *prima facie* relatively high and it is arguable whether the awards are reasonable on the higher side. Lastly, the applicants complain that there was no justification for an award of aggravated damages. The aggregate of the aggravated damages awarded to the four respondents is Shs.2,500,000/=. It is arguable whether or not the awards for aggravated damages were appropriate.

We are satisfied that the applicants have shown that the appeal is not frivolous.

Mr. Sekoy Owino deposes in the affidavit in support of the application that the judgment sums awarded to the respondents are colossal in excess of Shs.14,000,000/=; that the first applicant does not know the means and assets of the respondents; that there is great apprehension that the applicants, if they succeed on appeal, will not be able to recover any money paid in satisfaction of the decree at all or without considerable difficulty and that the first applicant is a large company with substantial assets and is ready and willing to give security on its behalf and on behalf of the 2nd and 3rd applicants. According to Mr. Gitonga for the applicants, the applicants would be happy if the decretal sum in invested is a bank account in the joint names of the advocates for the parties.

The 1st, 2nd and 3rd respondents filed replying affidavits annexing documents to show their respective incomes and the properties including motor vehicles, lands and buildings which each owns and the properties jointly owned through a family company. The first applicant in particular states that he is ready, willing and able to repay the decretal amount awarded to him and to the 4th respondent should the appeal be decided in favour of the applicants.

We do not respectfully agree with the counsel for the applicants that the 1st, 2nd and 3rd respondents are men of straw. Even without examining their respective assets in great detail, we are satisfied that each of the first three respondents is possessed of assets which, if sold would be sufficient to repay the respective decretal amounts.

However, 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. As this Court said in ***Reliance Bank ltd v. Norlake Investments Ltd*** [2002] 1 EA 227 at page 232 paragraphs b, c, 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".

The applicants have asked the appellate court to interfere with the awards of damages and there is possibility that the appellate court may reduce the awards considerably. There might be long delay in recovering from the respondents the taxed off sums as there are so many imponderables in the sale of land which forms the bulk of their assets. In such a likely eventuality, the applicants might be greatly inconvenienced. The balance of convenience is in favour of the applicants.

The applicants have, as a sign of good faith offered to deposit the decretal sum in a bank account. An order for the deposit of deposit of judgment sum will manifestly serve the justice of the case.

Accordingly, we allow the application and grant an order staying the execution of the decree pending the determination of *Civil Appeal No. 284 of 2005* on condition that the applicants do deposit Shs.13,000,000/= being the total judgment sum in an interest bearing bank account in the joint names of the respective advocates for the parties within 14 days from date hereof. The name of the bank to be agreed by such advocates. Those are our orders.

Dated and delivered at Nairobi this 9th day of June, 2006.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

W. S. DEVERELL

……

JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR