



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: GITHINJI, WAKI, J.J.A. & DEVERELL, AG. J.A.
CIVIL APPLICATION NAI 211 OF 2003 (UR.103/2003**

BETWEEN

WANGETHI MWANGI 1ST APPLICANT

NATION NEWSPAPERS LIMITED 2ND APPLICANT

AND

J.P. MACHIRA T/A

MACHIRA & CO. ADVOCATES RESPONDENT

**(An application for stay of execution pending the hearing and
determination of an appeal from a judgment of the High Court
of Kenya at Nairobi (Mr. Justice Kasanga Mulwa) dated 7**

September, 2001

in

H.C.C.C. NO. 1709 OF 1996)

RULING OF THE COURT

This is an application under **Rule 5(2)(b)** of the Court of Appeal Rules (“the Rules”) seeking a stay of execution of the decree of the superior court pending the hearing and determination of an appeal from a judgment of the superior court (Kasanga Mulwa J), delivered on 7th September, 2001 in *High Court Civil Case No. 1709 of 1996*.

The High Court case was an action for defamation brought by the respondent before us *John Patrick Machira* who is and was at all material times an advocate practising in Nairobi.

In his suit Mr. Machira claimed general and aggravated damages and the publication of a full apology from the defendants (the applicants before us)The first defendant (the applicant before us) was the Editorial Director of Nation Newspapers Limited which was second defendant (the second applicant before us). The superior court dismissed an application to strike out the defence of the first and second defendants which decision was overturned by this Court in Civil Appeal No. 179 of 1997 in its judgment delivered on 4th June 1998. This Court entered interlocutory judgment for Mr. Machira and further directed that the suit be set down for the assessment of damages by the superior court.

The superior court awarded damages in the total sum of Shs.10, 200,000 being Shs.8,000,000 compensatory damages, Shs.2,000,000 aggravated damages and Shs.200,000 in lieu of an apology.

In accordance with numerous authorities relating to applications for stay of execution pending appeal it is necessary for us, in exercising our discretion under rule 5 (2)(b) of the Rules, to consider, firstly, whether the applicant's appeal is an arguable appeal, or in other words an appeal which is not frivolous and, secondly, whether the appeal, if successful, will be rendered nugatory if no stay is granted.

On the first of these issues we have come to the conclusion that, given the size of damages and the great variation in awards of damages for defamation the appeal is not frivolous or unarguable.

We now turn to the second issue as to whether a successful appeal would be rendered nugatory if there is no stay. It is not suggested by the applicant that if the decretal amount is paid to the respondent and then reduced substantially on appeal the respondent will not be able to repay the difference between the decretal amount and that awarded by this Court.

The applicant's case on this limb of the application is that the amount decreed is so large that the payment of that amount will cause destabilization of the applicant's financial position resulting in immediate irreparable injury to it. It is argued that if and when it receives any repayment by the respondent as a result of the appeal, that will be too late to undo the destabilization which will have occurred.

Apart from frequently repeating the assertion of likely destabilization, the applicant's gave no evidence or submissions as to how and to what extent the applicant would be destabilized. No accounts were produced by the applicants to support the destabilization theory.

The only accounts produced were exhibited by the respondent. These showed the very substantial nature of the Nation Group and there was nothing in these documents to indicate that a payment of Shs.10.2 million would cause destabilization of the applicant which was part of that group.

We are therefore not satisfied that the applicant has shown that a successful appeal on quantum will be rendered nugatory if no stay is granted. The application is accordingly hereby dismissed with costs.

Dated and delivered at Nairobi this 18th day of March, 2005.

E. M. GITHINJI

JUDGE OF APPEAL

P. N. WAKI

JUDGE OF APPEAL

W. S. DEVERELL

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR