IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KWACH, OMOLO, & BOSIRE, JJ.A.

CIVIL APPLICATION NO. NAI 369 OF 2001 (196/01 UR)

BETWEEN

THE STANDARD LIMITED

WACHIRA WARURU

PATRICK WACHIRA ..... APPLICANTS

AND

WILSON KALYA

SIMON KALYA T/A

KALYA & COMPANY ADVOCATES ..... RESPONDENTS

RULING OF THE COURT

This being an application under ***rule 5 (2) (b) of the Court's rules*** for the stay of certain proceedings in the superior court at Eldoret, the three applicants, The **Standard Limited, Wachira Waruru and Patrick Wachira,** were bound to satisfy us, before they can succeed, on two points, namely:

> *(1)That the appeal which they have filed or which they intend to file is an arguable one, that is, that such appeal is not or will not be a frivolous one;*
>
> *and*
>
> *(2)That unless we grant to them the stay of proceedings which th ey seek, their appeal or intended appeal, if it were to succeed would be rendered nugatory.*

We stress that the applicants had to satisfy us on both requirements.

On the material before us and having heard the arguments of the respective counsel for the parties, we are prepared to assume in favour of the applicants, and we do so, that the appeal or proposed appeal is an arguable one. The two respondents, Wilson Kalya and Simon Lilan are advocates in Eldoret and they carry out their legal practice under the firm name of **Kalya & Company Advocates.** The respondents sued the applicants in libel alleging the publication of a matter defamatory of the respondents. The applicants in their defence pleaded, among other things, qualified privilege under **section 7 of the Defamation Act, Cap 36 of the Laws of Kenya .** That section provides:

"Subject to the provision of this section the publication in a newspaper of any such repo rt or other matter as is mentioned in the schedule to the Act shall be privileged unless publication is proved to be made with malice."

The applicants contended in their defence that they did not have malice when they published the matters about which the respondents complained. The applicants retorted that the respondents were actuated by malice.

Whether a party is or is not actuated by malice when doing a particular act is a matter of fact to be determined by a judge on evidence adduced before him. The respondents applied to the trial Judge, **(Nambuye, J)** to strike out the defence filed by the applicants and in support of that application affidavits were sworn by the respective parties, one side alleging that there was malice while the other side alleged there was none. Was the learned Judge entitled to decide the issue of malice or no malice on affidavit evidence? In other words, is it proper for a trial judge to decide contested issue or issues of fact on affidavit evidence? That, in our view, is an arguable point, and as we have said before, one arguable issue is sufficient for the purpose of **rule 5 (2) (b)** . So, these applicants have satisfied us on the first issue already set out herein.

Will the appeal be rendered nugatory if we do not grant a stay of proceedings in the superior court? On this point, even Mr Majanja for the applicants was unable to point out to us how the appeal or the intended appeal could ever be rendered nugatory by our refusal to grant the stay. In the recent application of ***DAVID MORTON SILVERSTEIN VS ATSANGO CHESONI , (Civil Application No. NAI 189 of 2001)*** **(unreported)** , this Court, relying on its previous decision in ***KENYA COMMERCIAL BANK LIMITED VS BENJOH AMALGAMATED LIMITED & ANOTHER , (Civil Application No. NAI 50 of 2001) (unreported)*** had this to say on this same point:

"... What will happen if we do not grant the stay sought is that the appeal i n 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."

These remarks apply to the circumstances of this application as they did to the circumstances in which they were made. If the High Court proceeds to assess damages in this particular matter, that alone would not render the success of this appeal nugatory. If the appeal succeeded, the order to be made would automatically render the proceedings in the High Court unnecessary but an appropriate order for costs would remedy that. Once more, we would repeat what we said in the ***Silverstein*** Application. We said there:

"The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court's own rules . ... each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugator y if we do not grant a stay."

The upshot of all this is that the applicants have failed to satisfy us on the second requirement and as they were bound to satisfy us on both requirements, their notice of motion lodged in this Court on 26th October, 2001, fails and we order that it be and is hereby dismissed. The costs of that motion shall be costs in the appeal.

Dated and delivered at Nairobi this 26th day of April, 2002.

R. O. KWACH

JUDGE OF APPEAL

R. S. C. OMOLO

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR