REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, AKIWUMI & SHAH, JJ.A.)

CIVIL APPLICATION NO. NAI. 223 OF 2000 (UR 99/2000)

BETWEEN

WACHIRA WARURU ..... 1ST APPLICANT

THE STANDARD LIMITED ..... 2ND APPLICANT

AND

FRANCIS OYATSI ..... RESPONDENT

(Application for stay of execution from a Ruling and Order of the High Court of Kenya at Nairobi (Justice V.V. Patel) dated 9th February, 2000

in

H.C.C.C. NO. 1225 OF 1999)
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RULING OF THE COURT

The first applicant, Wachira Waruru, is the Editor-in- Chief of the East African Standard (hereinafter referred to as "**the Standard**") a newspaper printed and published by the second applicant. The respondent was at all material times the Deputy General Manager (Finance) of Mumias Sugar Company Limited which company as its name suggests, is a sugar manufBaecttwuereern in2 ndK enyaan.d 17th December, 1998 the Standard published several articles in connection with an alleged scandal at Mumias Sugar Company Limited. The articles spoke of an alleged loss of nearly one billion shillings incurred by the company through uninvoiced sugar sales as a result whereof, it was stated, not only did the company suffer losses but also that the Government lost **Shs.170,000,000/=** in Value Added Tax and Sugar Development Levy. It was alleged that the respondent was sent on leave pending inquiries into the scandal; that an audit team was appointed to inquire into the scandal; that the company was asked to explain the loss.

The respondent sued the applicants claiming inter alia general and special damages as well as aggravated and/or exemplary damages for defamation and damages for malicious falsehoods. The applicants entered appearance and filed a defence to the respondent's claim all in good time. The respondent applied by a notice of motion dated 5th November, 1999 stated to be brought under **Order**

XII rule 6, Order L. rule 10 and **Order VI rule 13 (1)(b)** of the Civil Procedure Rules seeking orders to strike out the defence of the applicants and for entry of judgment on liability. The main grounds on which the application was based were that the applicants had admitted the printing and publication of the offending articles and that they had admitted that the published articles were defamatory of the respondent. The apology published by the applicants was relied upon by the respondent to say that there was no defence available to the appliWchaennts tohne tshaei di ssaupep loifc atliioanb ilciatmye. up for hearing, neither the applicants nor their advocates appeared in court and the learned Judge without really considering the merits or demerits of the defence, ruled on 2nd December, 1999 as follows:

> ***"Having considered the application dated 5th November, 1999, filed on 9th November, 1999 with care I am satisfied that the plaintiff/applicant is entitled to the order (sic) asked for herein. Indeed it be noted that the application is not opposed. I make th e order as prayed for in prayers Nos. 1, 2 & 3 of the application."***

Although the learned Judge says that he had considered the application with care, nowhere does he set out the points in issue or say why he thought the defence should be struck out. A defence which raises several issues, in this case the defences of fair comment, justification etc, should not be struck out just because the defendant has not appeared to oppose the application by the plaintiff to strike it out. The learned Judge should have considered the points raised in the defence and determine whether or not they constituted a reasonable defence to the plaintiff's claim. In the course of argument counsel for the respondent submitted that by publishing an apology the applicants had admitted the respondent's claim and hence there could be no defence at all; but that is too simplistic a view to take having regard to the grounds of defence put forward by the applicants. It was, we understand, a matter of great concern to the public, when it was announced that the company was involved in the scandal.

The applicants applied to set aside the said ruling of 2nd December, 1999 on the grounds that the recipient of the copy of the application did not inform counsel in the chambers of the advocates for the applicants of the fact of such service as a result whereof, it was not entered in the relevant diary and so the application was heard ex-parte. Counsel who was conducting the defence of the applicants stated that his failure to attend the court on 2nd December, 1999 was neither deliberate nor intended to delay the course of justice. He invoked the exercise of the court's discretion to set aside the ex-parte order so that the application could be heard on merits. The learned Judge refused to exercise his undoubted discretion to set aside the order of 2nd December, 1999. This refusal has led to the filing of an appeal being **Civil Appeal No. 111 of 2000**, as well as this application now before us, brought under **rule 5(2)(b)** of the Rules of this Court.

It is at least arguable that the learned Judge ought to have considered the reason advanced by the applicants for the non-appearance of counsel in court on 2nd December, 1999. It is also arguable that the factor of delay in lodging an application to set aside the said ruling was not properly considered by the learned Judge. The delay between 13th December, 1999 and 11th January, 2000 was considered as too long a delay by the learned Judge. We bear in mind the fact that the court was on vacation from 21st December, 1999 to 13th January, 2000 during which period time remains "suspended" and courts are not open for normal business. At least it is arguable that the delay may not have been that inordinate. It is also arguable that it was not open to the learned judge to dismiss the application only on the basis that there was no bona fide defence, without saying what was not bona fide about the same. We are satisfied that the applicant has an arguable appeal, at least it is not a frivolous one.

The applicants seek a stay of further proceedings, namely, assessment of damages scheduled for 28th September, 2000 pending the hearing and determination of **Civil Appeal No. 111 of 2000.** It cannot be gainsaid that unless a stay is granted the already lodged appeal will be rendered nugatory. If the process of assessing damages goes on and if the appeal in question is allowed that process would be an exercise in futility.

We allow this application and order a stay of any further proceedings in **H.C.C.C. NO. 1225 OF 1999** until the hearing and determination of **Civil Appeal No. 111 of 2000**. The costs of this application will abide by the result of **Civil Appeal No. 111 of 2000.**

Dated and delivered at Nairobi this 18th day of August, 2000.

R.O. KWACH

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR