



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: MUSINGA, J. MOHAMMED & KANTAL, J.J.A.)**

**CIVIL APPLICATION NO. 42 OF 2020**

**BETWEEN**

**NATIONAL HOSPITAL INSURANCE FUND.....APPLICANT**

**AND**

**JOEL MUTUMA KIRIMI.....1ST RESPONDENT**

**SHARON CHEPKORIR KOSKEL.....2ND RESPONDENT**

**CONSOLIDATED WITH**

**CIVIL APPEAL NO. 45 OF 2020**

**NATIONAL HOSPITAL INSURANCE FUND.....APPLICANT**

**AND**

**JOEL MUTUMA KIRIMI.....1ST RESPONDENT**

**SHARON CHEPKORIR KOSKEL.....2ND RESPONDENT**

*(An application for stay of execution of the Ruling of the High Court of Kenya at Meru (A. Ong'injo, J.) dated 27th April, 2020*

**in**

**H.C.C.C. No. 7 of 2019)**

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**RULING OF THE COURT**

The applicant, **National Hospital Insurance Fund**, was the defendant in **HCCC No. 7 of 2019** at Meru while the respondents, **Joel Mutuma Kirimi** and **Sharon Chepkorir Koskei**, were the plaintiffs. In a Judgment delivered by that Court on 6th February, 2020 (**Ong'injo, J.**), it was found that the applicant's act of publishing the respondents' image for purposes of

commercial advertisements without their consent was a violation of their fundamental rights to privacy and human dignity; the applicant was ordered to pull down the advertisement; an order of permanent injunction was granted against the applicant and an award of **Kshs.5,000,000** for each of the respondents being general damages was given.

The applicant filed in that court an application for stay of execution pending appeal and the Judge gave a conditional stay of execution ordering that the applicant deposit Ksh.5,000,000 in a joint interest earning account in the name of the lawyers for both parties within 30 days of the date of the ruling, and further that the applicant pay to each of the respondents Ksh.2,500,000 within 30 days of the date of the ruling. Civil Application No. 42 of 2020 is in respect of the ruling given on 27th April, 2020 while Civil Application No. 45 of 2020 is in respect of the said Judgment delivered on 6th February, 2020. It is convenient that we consider the applications together.

Both applications are brought under **rule 5 (2) (b)** and **41** of the **Rules of this Court** and it is prayed in the main that we grant stay of execution of the said Judgment and ruling pending determination of an intended appeal. In grounds in support of the Motions and in the supporting affidavit of **Dr. Peter Kamunyo Gathege** it is stated that the applicant was dissatisfied with the said Judgment and had filed a notice of appeal; that the terms of the conditional stay are onerous and amount to denial of the application for stay; that if the decree is executed and the damages paid, the applicant may not recover the same if the appeal succeeded and that substantial loss may therefore result to the applicant. It is further stated at paragraphs (h), (i), (j) and (k) of Civil Application No. 42 of 2020:

*“(h) The terms of the conditional stay are exceedingly onerous and amount to a denial of the application for stay.*

*(i) The aforesaid Order of the High Court directing the Applicant to pay each of the Respondents a sum of Kshs.2,500,000.00 within thirty days as a condition of stay is prejudicial to the applicant as it disregards the fact that the applicant’s intended appeal is also on the issue of quantum.*

*(j) The aforesaid Order of the High Court directing the applicant to pay to the respondents the aforesaid amounts as a condition of stay has no basis in law. It is not one of the conditions for stay provided under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010.*

*(k) The High Court in ordering the applicant to pay to the respondents the aforesaid amounts as a condition of stay disregarded the fact that the respondents had not demonstrated their ability to repay the decretal sum in the event that the appeal succeeds a concern that had been raised by the applicant at the hearing of the aforesaid application for stay.”*

Joel Mutuma Kirimi (the 1st respondent) in a replying affidavit sworn at Meru on 18th June, 2020 on his own behalf and on behalf of the 2nd respondent states that he is an Advocate of the High Court; that orders should not be granted as execution had already started; that the applicant has partially paid the decretal sum and undertaken to pay the balance by 22nd June, 2020 (now past); that no appeal had been filed within 60 days as required by the rules of this Court and at paragraph 11 of the affidavit:

*“11. THAT in any case the applicant has not demonstrated that this application meets the threshold set that whether the appeal would be rendered nugatory if the stay of execution is not granted. The decree is a monetary decree and the applicant ought to demonstrate that the decree holder would not be able to refund the decretal sum in case of successful appeal. To that end I emphasize that myself and the 2nd respondent are reputable advocates of the High Court with 7 years of good standing, running a reputable law firm and as such we are capable of refunding the decretal sum in the unlikely circumstances that the appeal is successful.”*

We have considered both records of the Motions and written submissions filed by both parties and the list of authorities filed on behalf of the applicant.

The principles that apply in applications of this nature are well settled. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, is arguable, which is the same as saying that it is not frivolous. Such an applicant must, secondly, show that the appeal would be rendered nugatory absent stay – See *Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR*.

We have perused the draft Memorandum of Appeal. It is proposed to be argued on appeal that the trial Judge erred in law and fact in failing to appreciate the key elements of a claim for unlawful use of a person’s name or image. It is also proposed to be argued that the Judge erred in law and fact in failing to appreciate the fact that the applicant did not use the respondents’ images for an exploitative or commercial purposes. These, amongst others, we find to be arguable points in the intended appeal.

What about the nugatory aspect which must also be satisfied for an applicant to succeed"

The record shows that the respondents, both lawyers, were each awarded a sum of Ksh.5,000,000 after a trial. The applicant applied for stay of execution pending appeal and the High Court granted conditional stay of execution where the applicant was ordered to deposit part of the sum in an interest earning account of the lawyers of the parties. It was also ordered that the applicant pay to each of the respondents a sum of Ksh.2,500,000. The applicant says that this conditional stay was onerous and amounted to a denial of the application for stay. We do not think so. The respondents had succeeded in their suit and were awarded damages. The applicant was given a conditional stay. The respondents say, firstly, that they are able to pay back the money if the appeal succeeds. Secondly, that part of the decree had been satisfied; that the applicant undertook to pay the balance in June, 2020. We do not, in these circumstances, think that the appeal would be rendered nugatory.

The two Motions fail and are dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 18th day of December, 2020.**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**



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