



**Gulf Energy Transporters v Ismail & another (Civil Appeal
E101 of 2021) [2023] KEHC 274 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E101 OF 2021
OA SEWE, J
JANUARY 20, 2023**

BETWEEN

GULF ENERGY TRANSPORTERS APPELLANT

AND

KHALID IBRAHIM ISMAIL 1ST RESPONDENT

AHMED NOOR MOHAMED 2ND RESPONDENT

RULING

1. The Notice of Motion dated October 7, 2021 was filed by the 2nd respondent, Ahmed Noor Mohamed, pursuant to sections 1A, 1B and 3A of the *Civil Procedure Act*, chapter 21 of the Laws of Kenya, as well as order 42 rule 14 of the *Civil Procedure Rules, 2010*. The 2nd respondent thereby prayed for orders that:
 - (a) The court be pleased to make an order that pending the hearing or any further proceedings in this appeal the appellant does deposit in court or into a bank account in the joint names of the advocates for the appellant and 2nd respondent herein as security for the 2nd respondent's costs of kshs. 500,000/= in this matter.
 - (b) In the event the appellant fails to furnish security within the period ordered by the Court, the appeal be dismissed with costs to the 2nd respondent.
 - (c) The costs of the application be provided for.
2. The application was premised on the grounds that the appeal has no chances of success; and that the appellant will be unable to pay the 2nd respondent's costs in the event his appeal fails, granted that the appellant is yet to pay the respondent's assessed costs of kshs 163,666.66 in the lower court suit. The application was premised on the Supporting Affidavit sworn by the 2nd respondent, Mr Ahmed Noor Mohamed in which he explained that whereas the appellant complied with the order to deposit



- security for the payment of the decretal sum, it failed to deposit his assessed costs for the lower court suit in the sum of kshs 163,166.66.
3. Hence, the 2nd respondent was apprehensive that the appellant will be unable to pay his costs in the event the appeal fails. In the premises, the 2nd respondent averred that it is only prudent that the appellant be ordered to provide security for costs in the subordinate court and in this appeal in the sum of kshs 500,000/=. In support of its assertions, the 2nd respondent annexed copies of the lower court decree as well as the certificate of costs.
 4. The application was resisted by the appellant vide the Grounds of Opposition dated February 2, 2022. The appellant thereby contended that:
 - (a) the application does not meet the threshold of the legal requirements of the order and provisions of the law under which it is purportedly brought.
 - (b) the appellant is a company incorporated by Kenyan citizens and having a registered office within the Republic of Kenya.
 - (c) the applicant has not demonstrated that the appellant has no attachable assets capable of satisfying the contemplated costs.
 - (d) the applicant has not placed before the court any evidence/material for purposes of invoking the discretionary power of the court to grant the prayers sought.
 - (e) the applicant has not offered to pay damages for these proceedings in the event of any inconveniences being suffered.
 - (f) the application is based on mere allegations and conjectures without foundation and ought to be dismissed.
 - (g) the applicant's stake in the proceedings is merely as an interested party, the suit having been dismissed against them by the trial court.
 5. The application was canvassed by way of written submissions, pursuant to the directions given herein on March 14, 2022. In support of the application, Mr Jengo relied on his written submissions filed on March 7, 2022. He reiterated the 2nd respondent's averments and urged the court to find that the same are unrebutted in so far as no Replying Affidavit was filed by the appellant. Accordingly, Mr Jengo posited that there is credible evidence to show that the appellant has refused to deposit the costs for the lower court matter, which was a condition for stay; that the appellants have closed down their offices; and that attempts at tracing the appellant's assets have been in vain. Mr Jengo further submitted that no prejudice will be suffered if the appellant were to deposit costs of kshs 500,000/=.
 6. For the applicable principles, counsel made reference to *Mustano Rocco v Aniello Stereli* [2019] eKLR; *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR and *Messina & Another v Stallion Insurance Co Ltd* [2005] 1 EA 264, among other authorities. He submitted that, taking into account that the appellant has no known registered office and/or place of business in Kenya or at all, nor known assets, sufficient cause has been made for the grant of the orders sought by the 2nd respondent.
 7. On behalf of the appellant, written submissions were filed on March 25, 2022 by Mr Muma Nyagaka, advocate. In his submission, the 2nd respondent has not demonstrated by way of evidence that he has tried to execute for the purported costs and failed to trace the appellant's office or assets. He urged the court to note that no demand notice or application for execution was exhibited by the 2nd respondent to back up his allegations. Counsel further pointed out that, on a careful perusal of the trial court's judgment, it is notable that no finding was made condemning the appellant to pay costs; and therefore



that the 2nd respondent unilaterally awarded himself costs and purported to target the appellant for payment without an order being made to that effect.

8. In response to the assertion that the appellant's office cannot be traced, Mr Muma urged the court to dismiss the same, being assertions from the bar with no evidence attached to the application from the registrar of companies to support the same. Counsel relied on *Abdinasir Yasin Ahmed & 2 Others v Ahmed Ibrahim Abass & 2 Others*, Civil Appeal No. 294 of 2013, for the proposition that such allegations of impecuniosity must be proved by concrete evidence. Mr Muma also thought that it would be oppressive for the court to dismiss the appeal just because security for costs has not been provided. He relied on article 50(1) which entrenches the right to fair hearing. He accordingly prayed for the dismissal of the application with costs.
9. I have given due consideration to the application, the averments set out in its Supporting Affidavit, the Grounds of Opposition relied on by the appellant as well as the written submissions filed by learned counsel. The main issue that arises is whether this court ought to order the appellant to deposit Kshs 500,000.00/= as security for the 2nd respondent's costs pending hearing and determination of the appeal herein.
10. Order 42 rule 14 of the Civil Procedure Rules, 2010 provides as follow: -
 - (1) At any time after the memorandum of appeal has been served the court, in its discretion, may order the appellant to give security for the whole or any part of the costs of such appeal.
 - (2) If the appellant is not ordinarily resident in Kenya and has no sufficient property in Kenya (other than property to which the appeal relates) the court shall order the giving of security for the whole or part of the costs of the appeal within a time to be limited in the order.
 - (3) If security for costs is not given within the time ordered the court may dismiss the appeal.
11. Needless to say therefore that the above provision provides a shield to the respondents in an appeal where there is reasonable and credible apprehension that the appellant may not be able to pay the costs in the event the appeal is unsuccessful. The provision is aimed at ensuring frivolous, vexatious and/or unsuccessful proceedings do not prejudice respondents. Hence, in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others* [2014] eKLR the court stated that:

“The rationale for security for costs is to ensure first, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty and secondly, that a litigant who by reason of his financial ability is unable to pay costs of litigation if he loses is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party.”

12. In the premises, the onus was on the 2nd respondent, having sought the exercise of discretion, to provide a basis for the exercise of such discretion. Indeed, in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others* (*supra*) it was held that:

“In an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven. See *Hall vs Snowdon Hubbard & Co (I)*, (1899) 1 Q B 593, the learned Judge at page 594 stated:-

“The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be



unable through poverty to pay the costs of the appeal, an order for security for costs is made.” In *Marco Tool & Explosives Ltd vs Mamujee Brothers Ltd* (*supra*), this court expressed itself thus:- “The onus is on the applicant to prove such inability or lack of good faith that would make an order for security reasonable.”

13. Similarly, in *Johnstone Muchemi Gichema v Moses Wekesa* [2017] eKLR the applicable principles were summarized thus: -

Our case law has established the contours and principles the courts used to determine when the courts will use their discretion to order payment of security for costs. The following are germane:

- a. First, the rule gives the court discretion to order security for costs but the discretion must be used judiciously not whimsically. In particular, the court must be careful to balance between the need for access to justice for the appellant and the need to ensure that a successful respondent is not unduly disadvantaged..
- b. Second, some of the factors that the courts consider include “absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs; the general financial standing or wellness of the plaintiff; the bona fides of the plaintiff’s claim; or any other relevant circumstance or conduct of the plaintiff or the defendant. And the list is not, and I do not pretend to make it exhaustive. In the latter category, conduct by the plaintiff will include activities which may diminish the chances of or makes recovery of costs very difficult, for instance recent close or transfer of bank accounts, close or minimizing of operations, and disposal of assets. And the conduct of the defendant includes, filing of application for security for costs as a way of oppressing or obstructing the plaintiff’s claim, for instance, where the defence is mere sham, or there is an admission by the defendant of money owing except there is deliberate refusal or delay to pay money owing or refusal to perform its part of the bargain” per Gikonyo J in *Saudi Arabian Airlines Corporation v Sean Express Services Ltd* [2014] eKLR.
- c. Third, in the exercise of its wide discretion, a court might still refuse to order lodgement of security even where an individual litigant is impecunious or company insolvent. See *Saudi Arabian Airlines Corporation Case* (*supra*.)
- d. Fourth, in an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful.

14. In this case the 2nd respondent’s claim is that he has been unable to trace the appellant as it has closed down its offices hence unable to trace the appellant’s assets for purposes of execution. Further, that appellant has not paid costs awarded by subordinate court and thus is unable to pay costs. However, as has been correctly pointed out by Mr Muma, these assertions were not backed by any evidence. The 2nd respondent did not attach any document to prove that a search has been done at the companies registry or that the appellant’s file cannot be traced as alleged.

15. Additionally, the 2nd respondent alleged that he wrote a demand letter through his Advocates to the appellant for costs of kshs 163,166.66 awarded by the trial court. There is, however, no proof attached in proof thereof. In my considered view, without demonstration of demand and inability to pay, it



would be unfair to impose an order for security to pay. Moreover, there being no dispute that the appellant is a company domiciled in Kenya, the court would be slow in requiring security. In *Shah v Shah* [1982] KLR 95, the Court of Appeal held that:

“The general rule is that security is normally required from plaintiffs residing outside the jurisdiction, but as was agreed in the court below, a court has discretion, to be exercised reasonably and judicially, to refuse to order that security be given.”

16. It is noteworthy too that, while the appellant was sued as Gulf Energy Transporters, Annexure ANM-2 is in respect of Gulf Energy Transport Limited; such that, it is possible that the 2nd respondent’s searches may have been misdirected.
17. In the circumstances, I find no merit in the application dated October 7, 2021. It is hereby dismissed with costs.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF JANUARY 2023.

OLGA SEWE

JUDGE

