



**Githae & another (Suing as the administrators of the Estate of Francis Muigai Mbugua (Deceased))
v Munoru (Civil Appeal E089 of 2021) [2023] KEHC 19570 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19570 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E089 OF 2021**

**PM MULWA, J
JUNE 27, 2023**

BETWEEN

BETH NYAGUTHIE GITHAE 1ST APPELLANT

MICHAEL MBUGUA BUNJO 2ND APPELLANT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF FRANCIS MUIGAI
MBUGUA (DECEASED)**

AND

WILSON W MUNORU RESPONDENT

RULING

1. The Notion of Motion of determination brought by Wilson Munoru the Respondent in the Appeal is dated September 4, 2022, it seeks to have the Appellants deposit Kshs 164,350/= being the security of costs of the appeal into a joint interest-earning account in the names of both advocates.
2. The gist of the application is that the applicant stands to lose the costs of the appeal as the financial position of the appellant is unknown.
3. The application is supported by the annexed affidavit of Eric Kirimi the respondent/applicant’s counsel, wherein he depones that the appellant’s suit in the lower court was dismissed, the appellants failed to prove their case against the applicant on a balance of probability. The estimated costs of the appeal is Kshs 200,000/= which sum may not be recovered from the appellants as their financial position is unknown.
4. The appellants oppose the application through a joint Replying Affidavit sworn on September 7, 2022, in which they depone that the application is bad in law, an abuse of the court process and made in bad faith. That the applicant did not tax his bill of costs and thus the amount of Kshs 164,350/= is a random figure deficient of any basis. The applicant is not entitled to demand security of costs as the intention



for access to justice is not deny the poor and vulnerable their rights. They contend that the appeal raises strong points with the probability of success and it is only fair and just if allowed to proceed. The appeal has been admitted and directions taken to have the same canvassed by way of written submissions.

5. The application was canvassed by way of written submissions and only the applicant filed the same. The respondent/appellant has filed submissions in respect to the appeal.
6. The applicant's submissions mirror the grounds of the application, and he states that he is cushioning himself on costs if, at the end of the appeal, it will be dismissed.
7. I have considered the application, the replying affidavit and the submissions by the applicants. The issue for determination is whether this court should call for the security for costs from the respondents.
8. This court should exercise its discretionary powers judiciously in deciding whether to grant or decline an order for payment of security for costs, and each case should be considered on its own facts.
9. The applicant must prove that in case the appeal is unsuccessful the appellant/respondent will not be in a position to pay costs. In the cited case of *Hall -vs- Snowdon Hubbard & Co (I)*, (1899) 1 Q.B 593, the learned Judge at page 594 stated that: - "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."
10. The courts are vested with the discretion to call for the security of costs as provided for under Order 26 Rule 1 of the *Civil Procedure Rules*, thus;

"In any suit, the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party."
11. The Court of Appeal in *Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others* (2014) eKLR stated that: "The rationale for security for costs is to ensure firstly, that a party is not left out 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; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party."
12. In the instant application, the applicant submits that the respondents are not persons of means and thus will not be able to pay costs in the event the appeal is unsuccessful. The applicant has not attached any financial limitations in respect of the respondents. The respondents were the plaintiffs in the lower court and the trial court dismissed the suit as the appellants failed to prove their case on a balance of probability, aggrieved by the lower court judgment, the appellant filed an appeal.
13. The respondents submit that the costs as pleaded are in bad faith and the amounts of Kshs 164, 350/= is a rough estimate as no bill of costs was taxed.
14. It is not enough to state that the respondents are persons of no means, the applicant must prove that the respondents are not in the financial capability to pay costs if condemned by the court. An application for costs should not be used to deter litigants from accessing justice.
15. In the circumstances, I have not been persuaded the applicant has adduced sufficient reasons to warrant this court to exercise its discretion and call for the security of costs from the appellants.
16. I find that the application dated September 4, 2022 lacks merit and is dismissed. Costs will abide the outcome of the appeal.



17 It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 27TH DAY OF JUNE, 2023.

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P.M. MULWA

JUDGE

In the Presence of:

Kinyua – court assistant

Mr. Kerera Muriuki -for the appellant/respondent

N/A - for the respondent/applicant

