



REPUBLIC OF KENYA



KENYA LAW
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**Mwale v Ali Cars Limited (Civil Appeal 3 of 2021)
[2022] KEHC 11202 (KLR) (Civ) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL 3 OF 2021**

SJ CHITEMBWE, J

MAY 31, 2022

BETWEEN

JOSIAH MWALE APPLICANT

AND

ALI CARS LIMITED RESPONDENT

RULING

1. The appellant filed summons dated 18th January 2022 seeking the following orders;
 1. Spent
 2. That the respondent be ordered to give security for costs for Kshs. 17,451,260 or any other sum the court deemed fit in a joint interest earning account to be opened by the advocates herein as security for the costs of the defendants within 30 days of the order
 3. That honorable court be pleased to struck out the suit at the lower court with costs in default of the provision of the said security within the prescribed period.
 4. That the respondent to pay for the costs of application.
2. The application was supported by the affidavit of Josiah Mwale. The appellant claimed that it is only fair that he is allowed to have insurance for the huge amount of money that is to be spent in the prosecution and defence of the matter and its incidentals and since the appeal is admitted under pauper appeal, the court should grant costs for this application. The appellant indicated that the respondent is a foreign owned company hence without filing security they may evade the jurisdiction of this court and it would be hard to trace them.



3. The application was opposed by the respondent through grounds of opposition dated 10th February 2022 where they indicated that there is no judgement against them to warrant deposit of security. That the chamber summons dated 18th January 2022 as drawn and filed is totally defective for want of compliance with the law. That the application is grossly misconceived bad in law and an extreme abuse of court process. That there is no appeal in this matter and directions in this matter have been issued severally by various courts concerning the subject matter in this suit which the applicant has not complied with and thus he is a vexatious litigant.

Analysis and determination

4. The applicable law in an application for security for costs is order 26 Rule 1 of the [Civil Procedure Rules](#) which provides as follows;

“(1) 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”.

5. The principles on which a court exercises its discretion in an application for security for costs were considered in the case of *Keary Development v. Tarmac Construction* (1995) 3 ALL ER 534. F. Tuiyot., J in [Ocean View Beach Hotel Ltd v. Salim Sultan Mollo & 5 Others](#) (2012) e KLR as follows:-

- “1. The court has a complete discretion, whether to order security, and accordingly it will act in the light of all the relevant circumstances.
 2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.
 3. The court must carry out a balancing exercise. On one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant If no security is ordered and at the trial the plaintiff’s claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.
 4. In considering all the circumstances, the court will have regard to the plaintiff’s prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.
 5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount, it is not bound to make an order of a substantial amount.
 6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled.
 7. The lateness of the application for security is a circumstance which can properly be taken into account.”
6. The law is settled that an order for security for costs is a discretionary one under Order 26 of the [Civil Procedure Rules](#). The discretion is, however, to be exercised reasonably and judicially by making reference to the circumstances of each case.
 7. The appellant was the plaintiff in the lower court and on 8th august 2019 judgement was entered in default in favour of the appellant where the respondent was asked to pay 14,700,000 plus costs and



interest. The respondents thereafter filed an application dated 5th December 2019 seeking that the said judgement be set aside. On 28th February 2020 the lower court allowed the application and the judgement dated 8th August 2019 was set aside with costs. The appellant has now filed this appeal against the said judgement and the application herein seeks security for costs.

8. In the case of *Rayat Trading Co. Limited -v- Bank of Baroda & Tetezi House Ltd* [2018] eKLR the Court held that:

“If the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant’s costs thrown away. In addition, the Court may consider imposing a condition that the defendant must pay a specified sum of money into court to await the final disposal of the claim.”

9. On examination of the record this court finds that there was no delay in applying to set aside judgement and that the appellant has not provided anything to challenge the strength of the defence on merit or on the conduct of the respondent indicating a risk of dissipation of assets. In light of this the court cannot therefore grant orders for security of costs.
10. There is difference between security for costs and judgment before trial. The appellant was awarded Kshs.14,700,000 by the trial court plus costs and interest. This sum cannot be tantamount to security for costs. It is the decretal sum. The judgment was set aside by the trial court. In essence therefore there is no judgment in favour of the appellant. The appellant cannot claim the same amount as security for costs in his own appeal. Further, since the judgment was set aside, any other advocate can represent the respondent. Representation of the respondent cannot be an issue in these proceedings.
11. On orders for striking out of the lower court suit, the appellant did not provide any ground to support the same and therefore this court cannot grant the orders sought.
12. In the end I find that the application dated 18th January 2022 to be without merit and is subsequently dismissed. Costs shall abide the outcome of the appeal.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY 2022

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S. CHITEMBWE

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2022

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J.K. SERGON

JUDGE

