



Dorcas Ndugi Njoroge (Sued as the Executor of the will of John Njoroge Keige (Deceased) & 2 others v Thanawalla & 2 others (Civil Appeal E377 of 2021 & Miscellaneous Case E408 of 2021 (Consolidated)) [2022] KEHC 12928 (KLR) (Commercial and Tax) (31 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12928 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E377 OF 2021 & MISCELLANEOUS CASE E408 OF 2021 (CONSOLIDATED)

A MABEYA, J
AUGUST 31, 2022

BETWEEN

DORCAS NDUGI NJOROGE (SUED AS THE EXECUTOR OF THE WILL OF JOHN NJOROGE KEIGE (DECEASED)) 1ST APPELLANT
MICHAEL ROBERT KARANJA 2ND APPELLANT
SHAZ TWO LIMITED 3RD APPELLANT

AND

TAJDIN THANAWALLA 1ST RESPONDENT
JANE MULII KAMENE 2ND RESPONDENT
VERONICA KAMENE MUSYIMI 3RD RESPONDENT

(Being an appeal under section 39(1) of the Arbitration Act from a domestic award dated 19/04/2021 by Prof. Paul Musili Wambua pursuant to the agreement to appeal on a point of law)

RULING

1. Upon the issuance of the arbitral award published by Prof Paul Musili Wambua on April 19, 2021, the respondents filed an application dated May 27, 2021 in Misc E408 of 2021 now consolidated with this suit, seeking orders that the award be adopted as an order of the court.
2. The parties had agreed to an appeal on a point of law and the respondent filed the memorandum of appeal dated May 17, 2021 seeking to set aside the arbitral award.
3. The respondents then filed the present application which is dated 6/07/2021. It was brought under article 159 of the Constitution, sections 1A, 1B & 3A of the Civil Procedure Act, section 37(2) of the



Arbitration Act and under order 2 rule 15(1) (c) and (d), order 11 rule 3, and order 51 rule 1 of the Civil Procedure Rules.

4. The respondents prayed that the appellants be ordered to deposit in a joint interest earning account in the names of the advocates on record a sum of Kshs 13,435,167.81 being security for the damages and assessed arbitral costs. In the alternative, an order do issue attaching three apartments from 'The Shaza', a development situated on LR MN/1/19797 Mombasa to secure the decretal amount.
5. The grounds thereof were set out on the face of the application and on the supporting and further affidavit of Tajdin Thanawalla sworn on 6/07/2021 and 4/10/2021, respectively.
6. It was contended that the respondents had good reason that the appellants would be unable to pay their costs if they did not succeed in setting aside the arbitral award. That the appellants had in the past shown unwillingness or inability to discharge their financial obligations.
7. That the respondents were not aware of any other attachable assets belonging to the appellants and that the succession process for the now deceased 1st appellant would take a long time thus subjecting the respondents to succession proceedings in order to recover in the event they won the appeal.
8. The respondents also relied on annexure TT2 at pages 1-6 being a letter dated 6/08/2021 by the 3rd appellant admitting that it had received Kshs 6,000,000.00 and Kshs 6,599,998.00 from the respondents. It was therefore contended that the letter was an admission by the appellants that they owed the respondents the sums awarded in the subject award.
9. By the time this court retired to write this ruling, the appellants had not filed any response despite being given time to do so. The respondents filed submissions dated November 22, 2021 which the court has considered.
10. Order 42 rule 14 of the Civil Procedure Rules provides:-

“(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.

...

(3) If security for costs is not given within the time ordered the court may dismiss the appeal.”
11. The granting of the orders sought herein is a matter of judicial discretion. See Shah and others Vs Manurama Limited and others (2003) E.A 294 cited with approval in the case of Abmed Kulimye Bin & 2 others Vs Kenya Revenue authority & another (2012) eKLR.
12. In Jayesh Hasmukh Shah Vs Narin Haira & another (2015) eKLR, it was held: -

“It is now settled law the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors as absence of known assets in the country, absence of an office within the jurisdiction of the court, 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 circumstances or conduct of the plaintiff or defendant may be taken into account”.
13. 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 the costs. 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 *Kenya Education Trust Vs Katherine S.M. Whitton Civil Appeal No 310 of 2009*.

14. The special circumstances of this case are that the appellants did not oppose the application and establish that they have a *bona fide* appeal. The respondents on the other hand produced evidence including several letters from the appellants to the effect that they were working on a repayment plan which never materialized.
15. Without the appellant's response, it is difficult to ascertain whether or not they are in a position to pay in the event that they are unsuccessful in their appeal.
16. This court will therefore exercise its discretion and make orders which will prevent a situation whereby the appellants drag the respondents through a long appeal and in the end, are unable to pay the award and costs of the appeal should they be unsuccessful in their appeal.
17. The application is therefore found to be merited and is allowed as prayed. The amounts are to be deposited within 14 days of the date hereof.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF AUGUST, 2022.

A. MABEYA, FCIArb

JUDGE

