



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 708 OF 2019**

**DANIEL MURIUNGI KABERIA.....APPELLANT/RESPONDENT**

**-VERSUS-**

**SOLOMON MWANGI WANJAU.....RESPONDENT/APPLICANT**

**RULING**

1. This ruling is precipitated by the Notice of Motion dated 25<sup>th</sup> August, 2020 brought by the respondent/applicant (“the applicant”) herein. The Motion is supported by the grounds set out on its face and the facts stated in the affidavit of advocate Penina Oloo. The applicant sought an order for security for costs from the appellant/respondent (“the respondent”) to be given within seven (7) days from the date of this ruling. The applicant also sought costs of the Motion.
2. To oppose the Motion, the respondent put in a replying affidavit.
3. At the *inter partes* hearing of the Motion, the parties were directed to file written submissions, which they did.
4. I have considered both the grounds set out on the face of the Motion and the facts deponed in the affidavits supporting and opposing the Motion. I have also considered the rival submissions plus authorities cited.
5. A brief background of the matter according to the record is that, the respondent filed a suit before the lower court and sought compensation for injuries sustained in a road traffic accident, against the applicant. The applicant filed a statement of defence in the suit.
6. Going by the record, the respondent’s suit was dismissed with costs for non-attendance on 8<sup>th</sup> August, 2019, which led to the filing of an application by the respondent before the trial court, seeking to set aside of the dismissal order and reinstatement of the suit.
7. Upon considering the application, the trial court dismissed it with costs vide the ruling delivered on 28<sup>th</sup> November, 2019. That ruling is the subject of the present appeal.
8. The applicant is now before this court seeking security of costs in respect to the suit.
9. Advocate Penina Oloo states on behalf of the applicant that, following dismissal of the suit, the applicant’s advocates closed their file and yet the respondent did not pay costs to the applicant as ordered by the trial court. That the applicant is apprehensive that the respondent will not be able to pay his costs in the event that the appeal is dismissed.
10. The applicant also submits that there has been no inordinate delay in bringing the Motion and that he has clearly demonstrated the inability of the respondent to pay the costs of the appeal should the circumstances require.
11. In reply, the respondent states that the instant Motion has been brought too late in the day as the appeal is in its final stages. The respondent further states that, the Motion is unfounded since he is a civil servant residing within the jurisdiction of this court and hence capable of meeting the costs of the appeal should it be dismissed.
12. It is the averment of the respondent that the applicant has failed to show that the costs of the suit were ever sought and hence he is not entitled to the orders sought in the Motion.
13. The respondent echoed the above sentiments in his submissions save to add that to require him to provide security for costs would be punitive and unjust.
14. On whether there has been unreasonable delay in bringing the Motion, the record discloses that the memorandum of appeal was filed on

4<sup>th</sup> December, 2019 whereas the Motion was brought about nine (9) months later. Upon considering the explanation by the applicant that he was not aware of the existence of the appeal until the same was served upon him much later, I find this explanation to be reasonable.

15. Furthermore, upon considering that the appeal was marked as ready for hearing on 28<sup>th</sup> July, 2020 as per the record, I am satisfied that the length of delay is not unreasonable in the circumstances.

16. On the merits thereof, **Order 26 Rule 1** of the **Civil Procedure Rules** stipulates as follows in respect to security for costs:

***“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.”***

17. It is clear from the foregoing provision that an order for security for costs is purely discretionary. Moreover, security for costs can be ordered in the following circumstances, espoused in the case of **Jayesh Hasmukh Shah v Narin Haira & another (2015) eKLR** cited with approval in the case of **Aggrey Shivona v Standard Group PLC [2020] eKLR**:

***“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 bonafides of the plaintiff’s claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account.”***

18. It is clear that in order for an applicant to succeed in his/her application, he/she must demonstrate that the respondent will be unable to pay the costs as a result of poverty. This position was reaffirmed by the Court of Appeal in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** cited in the applicant’s submissions, when it held that the onus is on the applicant to prove that the respondent will be unable to pay the costs due to poverty, should the proceedings terminate against such respondent.

19. In the present case, I note that the applicant did not furnish this court with any evidence or material to show the inability of the respondent to pay the costs of the appeal, should the appeal be dismissed.

20. The upshot therefore is that the Motion is unmerited and the same is dismissed. Costs of the Motion to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF APRIL, 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

In the presence of:

Mr. Mwiti for the Appellant/Respondent

Mrs. Oloo for the Respondent/Applicant