

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E206 OF 2021

JOSEPH MWANGI.....1ST APPELLANT/APPLICANT

DAVID KIURU MAINA.....2ND APPELLANT/APPLICANT

VERSUS

STEPHEN WAMBUA MULINGE.....RESPONDENT

RULING

The Applicants filed an application dated 19th April, 2021 seeking for reinstatement of the orders granted on 20th April, 2021 in their application dated 19th April, 2021 as the temporary orders initially issued had lapsed. That the delay in complying with the court orders requiring them to deposit Kshs. 200,000 in court was due to technical hitches with the judiciary account which they finally managed to deposit on 10th May, 2021.

The Application is supported by the affidavit of **JANEROSE M. NANJIRA** sworn on 10th May, 2021. On 15th July, 2021 when the application came before this court for mention parties through their counsel, Miss Nanjira and Miss Oseko for the Applicants and Respondent respectively, informed the court that the application was not opposed save for the issue of security. Whereas the Applicants were willing to give a bank guarantee of the balance of Kshs. 400,000 the Respondent sought to have the balance paid to them.

The purpose of the security under Order 42 of the Civil Procedure Rules is not to punish the Applicant but to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. The Court of Appeal in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**, stated;

The exercise of the Court's power under Rule 107 is discretionary. In Marco Tool & Explosives Ltd – vs- Mamujee Brothers Ltd. (1988) KLR 730, this Court at page 733 held:-

“As the cases show the Court has unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance from Noormohamed's case is that the final result must be reasonable and modest.”

The respondents have not faulted the suitability of the bank that will issue the guarantee. Once the guarantee is issued by a bank, the respondent will be able to activate it upon completion of guarantee is a suitable security in the circumstances of this case.

The upshot is that the application dated 19th April 2021 is merited and is hereby granted as prayed. The applicant to provide a bank guarantee of Kshs.400,000 within forty five (45) days hereof. In default the orders staying execution shall stand vacated and the respondent shall be at liberty to execute. Costs of the application shall follow the outcome of the appeal.

Dated and delivered at Nairobi this 29th day of July, 2021

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S. J. CHITEMBWE

JUDGE