



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 044 OF 2021

MOHAMED ALI OSMAN T/A HANAN PETROLEUM.....APPLICANT

VERSUS

JUANCO GROUP LIMITED.....RESPONDENT

RULING

This Ruling relates to Chamber Summons dated 15th September 2021. The Summons is brought under various provisions of the law as shown on the face of it. It seeks orders as follows:

1. Spent
2. That this honourable court be pleased to hear this Application in precedence over the Appellant's Application dated 25th August 2021.
3. That upon hearing this Application, this honourable court be pleased to order that the Applicant/Appellant do deposit the sum of Kshs 8,052,539 being the decretal sum together with the accrued rent as at the time of filing this application.
4. That default by the Applicant/Appellant to comply with prayer 3 above the application dated 25th August 2021 and the Appeal stand dismissed with costs.
5. That the Appellant do pay the cost of this Application.

The grounds in support of the application are found on the face of it and in the Supporting Affidavit of John Mburu Kamau sworn on the 15th September 2021 that the Appellant/Applicant filed the suit where the Applicant in the Summons under consideration filed a cross claim against the Appellant's suit; that the Appellant withdrew his claim but the Applicant herein successfully prosecuted his claim which was not defended; that the Appellant having voluntarily withdrawn its suit and failed to defend the counterclaim cannot bring this appeal; that the appeal does not raise any arguable points; that the appeal is an abuse of court process.

In his Supporting Affidavit, the Applicant herein deposes that the Appellant is seeking to stay a judgment which was entered upon hearing of the matter wherein the Appellant was fully represented but chose not to appear or file a defence to the Applicant's counterclaim; that the Appellant withdrew its suit against the Applicant herein and has neither tried to set aside the withdrawal order nor the proceedings culminating in the judgment; that this court is being asked to set aside a judgment of a suit that was not contested after the Appellant withdrew his suit and failed to defend the counterclaim; that the appeal is untenable and an attempt to delay the conclusion of this matter.

It is further deposed that the Appellant is in possession of the demised premises, does not pay rent nor make use of the premises and the same is going to waste; that there is no evidence to support the claim that the suit was withdrawn by his lawyer without his knowledge; that it is only fair and just to order the Appellant to deposit security of costs for the Appeal and that in default of the order to deposit the security of costs, the Appeal be dismissed with costs to the Applicant herein.

Parties have filed submissions in respect to this application to which they have annexed authorities in support of their case. I have read the submissions. The Applicant reiterated his grounds in support of this application and highlighted one issue for determination that is: "Should the Appellant deposit security for the costs of this appeal?" Counsel argued that the Appellant exercised his right to withdraw the suit in the lower court and failed to defend the counterclaim against him. He argued that under **Section 35 of the Limitation of Actions Act (Cap. 22 Laws of Kenya)** which provides that **"For purposes of this Act and any other written law relating to limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded."**

Counsel submitted that despite the Appellant being aware of the counterclaim being the only part of the suit pending he did not file a defence to it leading to judgment against him in the counterclaim and that even after this the Appellant did nothing to seek to set aside the judgement. Counsel argued that Order 42 Rule 14 provides for payment of security for costs by an appellant and cited **Scotch Whisky Association & 2 others v. Africa Spirits Limited [2020] eKLR** to support that argument. He submitted that the Appellant's financial security is undetermined and his conduct in failing to honour his financial obligations shows that he is unreliable and that failure to grant the prayer for payment of security for costs will leave the Respondent unprotected.

The Appellant on his part also identified one issue for determination, that is: Should the Appellant deposit the security for the costs of the Appeal?"

He has argued that the Respondent has brought this Application under the wrong provision of the law, to wit, Order 42 Rule 1 instead of Order 42 Rule 14 of the Civil Procedure Rules and asks this court to dismiss the application. He further argues that the issue of security for costs is discretionary and is not tied to a specific amount. He has submitted that the Respondent does not have any decree directing the Appellant to pay any money or the computed sum of Kshs 8,052,539 and that this amount would lead to denial of the statutory right to appeal but also impede access to justice. He cited several cases on the issue of courts discretion to order security for costs including **Jayesh Hasmukh Shah v. Narin Haira & another (2015) eKLR**. He argued that security for costs takes many forms including bank guarantee and payment into court and that it is right and proper that security should be given in a way which is least disadvantageous to the party giving that security (see **Mathu vs. Gachimu [2004] eKLR**).

I have considered this application, the grounds in support of it, rival submissions and the authorities cited by both parties. I agree with the reasoning that while granting an order for payment of security for costs, the court ought to use its discretionary powers judiciously. Each case is unique and this power to grant security for costs must be exercised reasonably, taking into account the circumstances of each case.

From my understanding of the submissions, the Appellant, though opposing this application, seems to agree in a way, that security for costs is merited by the Applicant save for the amount sought to be paid. Although he asks this court to dismiss this application, he knows that he is in error. I agree that security for costs takes different forms. However, in this case the applicant seeks specific amount for security for costs. In this regard, it is my considered view that a reasonable amount that can adequately protect the applicant as the process of appeal is undertaken will suffice. For that reason, and having taken into account the Appellant's conduct in regard to this matter, it is my considered view that an amount of Kshs 4,000,000 is suitable for this purpose. Consequently the application dated 15th September 2021 is granted in the following terms:

- 1. That the Appellant pays to the Applicant a sum of Kshs 4,000,000 within the next 30 days as security for costs pending the hearing and determination of this appeal.**
- 2. That the Appellant prepares, files and serves a record of Appeal within 60 days of this ruling.**
- 3. That upon service, the Applicant files response within 14 days.**
- 4. That this matter be mentioned on 17th March 2022 to confirm compliance and take further directions.**
- 5. That costs of this application shall be met by the Appellant.**

Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF NOVEMBER, 2021

S. N. MUTUKU

JUDGE