



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 97 OF 2017**

**SEAH NETWORKS LIMITED .....APPELLANT**

**VERSUS**

**DAVID OSANO BULIA .....1ST RESPONDENT/APPLICANT**

**MELLECH ENGINEERING &**

**CONSTRUCTION COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> Respondent herein has filed a Notice of Motion dated 18/10/2017 seeking for the following reliefs namely:-

- (i) That the security be and is hereby issued by the Appellant in full satisfaction of the balance of the decretal amount in the lower court **Case Number 891 of 2013 Mavoko** which is Kshs.1,310,592.17 to be deposited in court.
- (ii) That the Appellant be compelled to furnish security for costs of the 1<sup>st</sup> Respondent for the sum of Kshs.200,000/= within 21 days to be deposited in court.
- (iii) That the present proceedings in this court be stayed until the Appellant deposits the said amounts of money.
- (iv) That in the alternative to order (i), (ii) and (iii) the appeal be struck out with costs.
- (v) That the costs of the application be provided for.

2. The application is supported by the annexed affidavit of the 1<sup>st</sup> Respondent/Applicant sworn on even date as well as grounds on the face of the Application the gist of which *inter alia* is that the Appellant herein is a foreign company which should be compelled to furnish security for costs as well as the outstanding balance of the decretal amount in the lower court; that the Appellant's present address is not known to the 1<sup>st</sup> Respondent or to this court; that the Appellant has no assets whatsoever within the jurisdiction of the court for purposes of recovering costs and the decretal sums from the Appellant in the end; that the 1<sup>st</sup> Respondent will be unable to recover its outstanding decretal balance and costs if the appeal is dismissed; that the orders sought will not prejudice the Appellant.

3. The 2<sup>nd</sup> Respondent supported the 1<sup>st</sup> Respondent's application and intimated that it shall too be seeking for security for costs from the Appellant pending the determination of the appeal.

4. The application was strenuously opposed by the Appellant. A replying affidavit was filed by Mbatia Ndome who is the local representative of the Appellant and who raised several grounds of opposition *inter alia*; that the application is mischievous, baseless and highly speculative; that the Appellant has deposited sufficient security in the lower court capable of satisfying the Respondent's costs if the same are awarded; that the application is intended to delay the fast resolution of the appeal; that the courts should uphold the right to access to justice under Article 48 of the Constitution by the Appellant.

5. Parties agreed to canvass the application by way of written submissions. However, it is only the Respondents who filed submissions.

It was submitted for the 1<sup>st</sup> Respondent/Applicant that the Appellant being a foreign company whose physical address is unknown should be compelled to deposit the balance of the decretal sums of Kshs.1,310,592.17 as well as security for costs in the sum of Kshs.200,000/= pending the hearing of the appeal. It was finally submitted for the Applicant that this court has power under Order 42 Rule 14 of the Civil Procedure Rules to order the Appellant to give security for the whole or any part of the costs of such appeal. Learned Counsel sought reliance in the case of **Lydia Mathia =Vs= Naisula Lesuuda & IEBC [2013] eKLR**.

It was submitted for the 2<sup>nd</sup> Respondent that the 1<sup>st</sup> Respondents application should be allowed as prayed since the 2<sup>nd</sup> Respondent's circumstances are similar to those of the 1<sup>st</sup> Respondent.

### **Determination**

6. I have considered the 1<sup>st</sup> Respondent's application dated 18/10/2017 together with the rival affidavits. It is not in dispute that a substantial amount of the decretal sums vide Mavoko **PMCC No. 891 of 2013** have since been received by the 1<sup>st</sup> Respondent/Applicant herein leaving a balance of Kshs.1,310,592.17.

It is also not in dispute that the Appellants application for stay of execution dated 17/8/2017 has since been withdrawn as same had been overtaken by events following the receipt of part of the decretal sums by the 1<sup>st</sup> Respondent/Applicant herein. The issue for determination is whether the 1<sup>st</sup> Respondent/Applicant has presented sufficient reasons to warrant the orders sought.

7. The 1<sup>st</sup> Respondent's main ground is that the Appellant is a foreign company whose physical address is unknown and hence it would be difficult to trace it in the event the Appellant's appeal fails to succeed. Indeed the 1<sup>st</sup> Respondent's concerns might not be far fetched and it was now the responsibility of the Appellant to dispel any such fears and reassure the Respondents. The Appellant's local representative Mbatha Ndome of P.O. Box 42-00204 Nairobi has filed a replying affidavit in which he has categorically stated that the Appellant has already deposited sufficient security in the lower court capable of satisfying the Respondent's costs if the same are awarded. The lower court had entered judgement against the Appellant for a sum of over Kshs. 3 million out of which the Appellant has already made a deposit of over Kshs. 2 million as ordered by the lower court. The said sums have already been received by the 1<sup>st</sup> Respondent. That amount of money is quite a tidy sum by any standards and is in my view sufficient security and capable of satisfying the Respondents costs if the same are awarded by this court at the time of conclusion of the appeal herein.

8. It is noted that the parties herein had litigated before the lower court and no issue of the Appellant's likelihood of disappearing into thin air arose. The 1<sup>st</sup> Respondent while instituting suit before the lower court was well aware that the Appellant was a foreign company and nevertheless proceeded to effect service of summons to enter appearance and litigated with it until judgement was entered in his favour. At no time did the 1<sup>st</sup> Respondent indicate before the lower court that he was dealing with an unknown entity. Indeed the 1<sup>st</sup> Respondent has already received a substantial part of the decretal sums from the Appellant. I find the said sums are sufficient enough to act as security pending the determination of the appeal. The Appellant has a local representative in Kenya and who has filed a replying affidavit. I find the said local representative is qualified enough to engage the 1<sup>st</sup> Respondent in this appeal just like they did before the lower court. The 1<sup>st</sup> Respondent's application and his demands appear to me to curtail the Appellant's constitutional rights of access to justice under Article 48 of the Constitution. The Respondents should not deny the Appellant a right to exercise its quest to ventilate their appeal. The 1<sup>st</sup> Respondent has not even indicated whether he will be ready to refund the sums already received from the Appellant in the event the appeal succeeds. The 1<sup>st</sup> Respondent's conduct wants to have its cake and eat it and while at it wishes to prevent the Appellant from exercising its right to ventilate the appeal. This is quite unfair and is unconsoanable.

9. The authority relied upon by the 1<sup>st</sup> Respondent is easily distinguishable in that the same was to do with an election petition dispute whereby security for costs were mandatory unlike in the present case. The Appellant herein has already complied with the lower courts order to deposit a substantial amount of the decretal sum which have been confirmed to have been received by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent should now be content with the said sums since I find the same to be sufficient security for costs in the event the same are awarded at the conclusion of the appeal herein. In any event even if the Appellant is a foreign company, there will be no difficulty visited upon the 1<sup>st</sup> Respondent in pursuing the Appellant through the enforcement of foreign judgements provided for under the Civil Procedure Act and Rules.

10. In the result, it is the finding of this court that the 1<sup>st</sup> Respondent's application dated 18/10/2017 lacks merit. The same is ordered dismissed with costs to the Appellant. The parties herein are directed to proceed and set down the appeal for hearing as a matter of priority.

Orders accordingly.

Dated and delivered at Machakos this **23<sup>rd</sup>** day of **January 2019**.

**D. K. KEMEI**

**JUDGE**