



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL NO. 62 OF 2009

THOMAS LUMASI PILIPILI.....APPELLANT

VERSUS

JULIUS AJAGA.....RESPONDENT

RULING

The appellant filed chamber summons application dated 18th February 2010 seeking orders that; That the appellant be ordered to give security for the whole costs of the appeal in the sum of Kshs. 80,000/-, the appeal be dismissed if the security is not furnished within a time frame given by the court.

APPLICANT'S CASE

The applicant submitted that the entire decretal sum with costs were recovered after the appellant was arrested and his relatives opted to bail him out. The applicant had lodged the current appeal and used the memorandum to obtain a temporary stay of execution which lapsed and the applicant was able to recover his money.

He submitted that the appeal was a delay tactic and the fact that the appellant was unable to pay the decretal sum on his own is evidence that the appellant will not be in a position to pay any costs awarded should he lose the appeal.

The appeal has taken 9 years to be listed for hearing. The sum of money was small and was borrowed in 2004 yet in 2018 the matter is still in court. Litigation must come to an end.

The applicant relied on Order 41 Rule 9 of the civil procedure rules, the upshot of which is that the court has the discretion to order the appellant to give security failure to which the appeal may be dismissed. The same is produced under *Order 42 of the Civil Procedure Rules 2010*.

He submitted that the amount sought is not overreaching and is as per the applicable scale which is the Advocates Remuneration Order 2006. The application was filed soon after the memorandum was filed and Hon. Lady Justice Ang'awa as she then was, was of the view that it remains pending until directions were given therefore the applicant was not guilty of laches.

The applicant relied on the case of *Attorney General vs. Africa Cooperative Society Ltd (2002) 2 EA 325 (CAU)* where it was held that it was incumbent upon the applicant to show cause why the application for security for costs should be allowed. He also relied on the case of *Noble Bankers (U) Ltd & Another vs Sandhu (2004) 2 EA 228 (SCU)* where the Supreme Court of Uganda reiterated that the burden lies on the applicant to show sufficient cause why the appellant should furnish security for costs.

RESPONDENT'S CASE

The respondents submitted that the power to make an order for deposit of security for costs is a discretionary one. He cited the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 others (2014) eKLR* where the court stated that it must be proven that the respondent will be unable to pay costs if unsuccessful.

He cited the case of *Marco Tool and Explosives Ltd. Vs Mamuyee Brothers Ltd 1988 KLR 730* the upshot of which was that the discretion to order or refuse security will depend upon circumstances of each case and that the onus is on the applicant to prove such inability or lack of good faith.

He maintained that the applicant has not proven that the respondent is poor and only alleges that it was difficult to execute against him. He has not proven bad faith as well.

He prayed that the court dismiss the application with costs.

ISSUES FOR DETERMINATION

a) Whether the Appellant should pay security for costs

Order 42 rule 7(1) of the *Civil Procedure Rules* states;

“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.”

In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others [2014] eKLR* the court held;

“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 costs due to poverty. 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.”

Despite the holding that the applicant is required to prove that the respondent will be unable to pay the costs, the court must also remember that an order for costs is discretionary. The court needs to consider other factors in granting an order for security for costs.

A perusal of the proceedings shows that the appellant had to be committed to civil jail in order for his relatives to pay the decretal sum. Further, he has taken 9 years for the appeal to be set down for hearing. The delay has not been explained. In my view the appeal is being used to deny the applicant the enjoyment of the fruits of justice. In the circumstances, I do direct that the appellant deposit full security for costs and set down the matter for hearing within 21 days, failure to which the appeal stands dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 25th day of April 2019.

In the presence of;

C.F Otieno for the Applicant

Mr. Etyang - Court assistant

And in the absence of Ms. Jeruto for the Respondent