



REPUBLIC OF KENYA

HIGH COURT AT KIAMBU

CIVIL APPEAL NO. 180 OF 2016

JOHNSTONE MUCHEMI GICHEMA.....APPELLANT

VERSUS

MOSES WEKESA.....1ST RESPONDENT

RULING

1. The Appellant herein, Johnstone Muchemi Gichema, was the original Plaintiff in Thika CMCC No. 267 of 2006. It was a claim based in negligence arising from a road traffic accident involving the Appellant's motor vehicle which was damaged beyond repair as a result of the accident. The Appellant sought special damages, costs of the suit and interests. The suit was prosecuted by the Appellant's insurer under the doctrine of subrogation.

2. At the conclusion of the case, the Trial Court dismissed the suit in its entirety having established that the Appellant had not established to the required degree that the Respondent was the owner of the vehicle that caused the accident.

3. The Appellant was dissatisfied with the decision of the Trial Court and has timeously preferred an appeal to this Court.

4. On 13/06/2017, the Respondent in the Appeal ("Applicant") filed a Notice of Motion under Order 26 Rules 1, 5 and 6, Order 42 Rule 14 and Order 51 Rule 1 as well as the inherent jurisdiction of the Court seeking for orders that:

- a. The Appellant do provide security for costs in the sum of Kshs. 120,000/= or such amount as the Court may order within fourteen (14) days of the order;
- b. The security be deposited in an interest earning account in the joint names of the respective advocates of the parties;
- c. In default of the security being provided the Appellant's appeal stand dismissed.

5. The grounds upon which the prayers are sought are expressed thus on the face of the Application:

- a. The Appellant has not settled the Respondent's costs ordered by the Trial Court on 24/08/2010;
- b. The Respondents will be prejudiced unless security for costs for the Appeal and lower court proceedings is granted;
- c. The appellant is apparently impecunious.

6. The Application is supported by an affidavit by Jared Omari Mituga, an advocate representing the Respondents in the appeal. His brief affidavit basically restates that the Appellant has not paid costs to which he was condemned in the Trial Court and that the Respondents inform him that they believe that the Appellant is impecunious and they will not be in a position to recover costs of the lower Court and this Court "in the likely event the appeal is unsuccessful."

7. In his oral submissions, counsel for the Respondent repeated these assertions and cited to me the decision by Onyancha J. in *Nairobi HCCC No. 317 of 2005 Amos Muthoka v Athi River Mining Co. Ltd.*

8. On his part, the Appellant filed a Replying affidavit by Jared Muga, an Assistant Claims Manager at Geminia Insurance Company Ltd, the insurer of the Appellant.

9. The Replying Affidavit depones that the insurer is the one that instructed counsel on record for the Appellant to file the present appeal as well as the suit in the Trial Court and that they did so under the doctrine of subrogation.

10. Further, the Replying Affidavit asserts that Geminia Insurance Company Limited is a big commercial underwriter and as such it is in a position to pay up the Trial Court's costs once the appeal is heard and determined. It further states that it is in the interests of justice that this Application be dismissed.

11. Counsel for the Appellant repeated these assertions in her oral submissions before me.

12. Neither party denies that this Court can order for security for costs in appropriate cases. Both parties also agree that this is a discretion which the Court has but which must be used judiciously. The parties disagree, however, on the application of this general principle to the facts of this case.

13. Order 42, Rule 14 provides for the taking of security for costs of an appeal. It provides as follows:

(1) 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.

(2) If the appellant is not ordinarily resident in Kenya and has no sufficient property in Kenya (other than property to which the appeal relates) the court shall order the giving of security for the whole or part of the costs of the appeal within a time to be limited in the order.

(3) If security for costs is not given within the time ordered the court may dismiss the appeal.

14. The purpose of this Rule is to provide protection of the Respondent in cases where there may be reasonable and credible apprehension that the Appellant may not be able to pay the costs in the event the Appeal is unsuccessful. Its counterpart in the case of trial is Order 26 Rule 6. The main objective of the Rule is to ensure that frivolous, vexatious and/or unsuccessful proceedings do not prejudice Respondents.

15. The purpose of an order for security for costs is to ensure justice between the parties, and in particular to ensure that unsuccessful proceedings do not disadvantage defendants.

16. Our case law has established the contours and principles the Courts used to determine when the Courts will use their discretion to order payment of security for costs. The following are germane:

a. *First*, the Rule gives the Court discretion to order security for costs but the discretion must be used judiciously not whimsically. In particular, the Court must be careful to balance between the need for access to justice for the Appellant and the need to ensure that a successful Respondent is not unduly disadvantaged.

b. *Second*, some of the factors that the Courts consider include "absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs; the general financial standing or wellness of the Plaintiff; the bona fides of the Plaintiff's claim; or any other relevant circumstance or conduct of the Plaintiff or the Defendant. And the list is not, and I do not pretend to make it exhaustive. In the latter category, conduct by the Plaintiff will include activities which may diminish the chances of or makes recovery of costs very difficult, for instance recent close or transfer of bank accounts, close or minimizing of operations, and disposal of assets. And the conduct of the Defendant includes, filing of application for security for costs as a way of oppressing or obstructing the Plaintiff's claim, for instance, where the defence is mere sham, or there is an admission by the Defendant of money owing except there is deliberate refusal or delay to pay money owing or refusal to perform its part of the bargain" per Gikonyo J. in **Saudi Arabian Airlines Corporation v Sean Express Services Ltd [2014] eKLR**.

c. *Third*, in the exercise of its wide discretion, a Court might still refuse to order lodgment of security even where an individual litigant is impecunious or company insolvent. See **Saudi Arabian Airlines Corporation Case (supra)**

d. *Fourth*, 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. See **Hall -vs- Snowdon Hubbard & Co. (I), (1899) 1 Q.B 593**, the learned Judge at page 594 stated:-

"The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made."

In **Marco Tool & Explosives Ltd – vs- Mamujee Brothers Ltd. (supra)**, Court of Appeal expressed itself thus:-

"The onus is on the applicant to prove such inability or lack of good faith that would make an order for security reasonable."

17. Applying these general principles to the present case, the Applicants's claim, as I understand it, is based on two grounds:

a. That they believe that the Appellant is impecunious; and

b. That the fact that the Appellant has not paid costs in the lower Court after losing the case means he is unable to pay costs.

18. In my view, neither grounds justify the exceptional step of ordering the payment of security for costs in the specific circumstances of this case. I say so for three reasons.

a. *First*, as **Marco Tool & Explosives Ltd Case** held, it is not enough for an Applicant to allege that the Appellant is impecunious. The onus is on the Applicant to prove the impecunious of the Applicant. Here, there is nothing more than the allegation contained in the affidavit of the Applicant's lawyer that he has been told by the Applicants that they believe that the Appellant is impecunious. No basis whatsoever is given for this belief and no evidence thereof is given.

b. *Second*, the Applicants have not shown that they ever demanded for their costs in their lower Court or attempted execution of an extracted decree or certificate of costs and that it remained unpaid. All they claim is that the Appellant lost the case with costs and did not pay the costs. Without demonstration of demand and inability to pay, it would be unfair to impose an order for security to pay.

c. *Third*, this is a claim brought by the Insurer on behalf of its insured under the doctrine of subrogation. This is a fact well known to the Applicants. Indeed, the first sentence in the judgment which is appealed from reads:

“The Plaintiff claims on behalf of his Insurer, Geminia Insurance Company, the sum of Kshs. 246,579/= being the used (sic) to repair his motor vehicle 731R (sic) after it was involved in an accident with defendant's motor vehicle KAP 349/ZA/470 (sic).”

It is readily obvious that, therefore, the functional litigant in this case is not, strictly, the Appellant himself but his Insurance Company. In applying the test for impecuniousness, therefore, the subject should be Geminia Insurance Company and not the Appellant himself. It has not been alleged at all that Geminia Insurance Company is insolvent or is at the risk of becoming so.

19. The upshot, therefore, is that there is no good reason to take the unusual step to impose an order to pay security for costs in this case. Consequently, the Application dated 09/06/2017 and filed in Court on 13/06/2017 is devoid of merit. It is hereby dismissed with costs.

20. Orders accordingly.

Dated and delivered at Kiambu this 27th day of July, 2017.

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JOEL NGUGI

JUDGE