



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 423 OF 2015

MULI MUEMA MUNYOLI

JOSEPHINE MUNYIVA NDAMBUKI

**(SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE
ESTATE OF THE LATE JOSEPH MUTHIANI MULE)..... APPELLANTS**

- V E R S U S -

MACHARIA NGURU.....1ST RESPONDENT

WAKI CLEARING & FORWARDING LIMITED..... 2ND RESPONDENT

RULING

1. Macharia Nguru and Waki Clearing & Forwarding Ltd, the 1st and 2nd respondents respectively took out the motion dated 16.02.2016 in which they sought for *inter alia* that the appellants be ordered to provide security for costs within 15 days and in default this appeal be struck out. The motion is supported by the affidavit of Hannah Wanjiku Mbatia. When served with the motion, Mwema Munyoli and Josphine Munyiva Ndambuki the 1st and 2nd appellants respectively filed grounds of opposition to resist the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

2. I have considered the grounds stated on the face of the motion and the facts deponed in the supporting affidavit. I have further considered the grounds of opposition plus the rival written submissions. It is the submission of the respondent that the net estate of the late Joseph Muthiani Mule is principally made up of the judgement sum and costs paid to the appellants in the suit giving rise to this appeal. It is averred that the appellants have received the aforesaid sum and are in the process of distributing the estate. The respondents further argued that that unless the appellants made the deposit out of the judgment sum the respondents will not be able to recover costs awarded if the appeal is unsuccessful. The respondents pointed out that the appellants intentionally withheld service of the memorandum of appeal for over 35 days and only caused it to be served after they have been paid the judgment sum plus costs. According to the respondents the appellants have not acted in good faith in the circumstances hence an order for security is reasonable and appropriate.

3. The appellants on the other hand have strenuously opposed the motion on the basis that the respondents have not tendered evidence indicating that the estate of the deceased would be wound up and that the appellants would be unable to pay costs of the appeal if the appeal is unsuccessful. The appellants argued that the estate is capable of meeting the costs of the appeal. The appellants further attacked the

submission that there is lack of good faith on their part arguing that the assertion is unfounded.

4. Having considered the material placed before me plus the rival arguments three issues appear to be undisputed. First, it is not in dispute that the judgment sum arising from Nairobi C.M.C.C no. 5865 of 2011 has been paid to the appellants' advocate. Secondly, it is also not disputed that the judgment sum is the only asset of the estate of Joseph Muthiani Mule, deceased. Thirdly, that the judgment sum is the only asset of the estate which is available for distribution. The issue which has been left to this court is whether or not the order for provision for security for costs should be made. There is no doubt the court retains the unfettered discretion to make the order for the provision of security for costs. The main ground relied upon by the respondents in seeking for the order is that the estate may be wound up by the time the appeal is concluded and that there will be nothing to attach to pay costs to the respondents if the appeal is lost. The appellants have merely stated that the estate will be able to pay costs without tendering credible evidence to prove that the estate has the means. The order for security for costs is made to ensure that a successful litigant is not left without a remedy for costs that might be awarded to him.

5. In the end, I am satisfied that the motion is well founded. It is allowed as prayed. Consequently the appellants are directed to deposit in an interest earning account in the joint names of advocates and or firm of advocates a sum of ksh. 1,025,158/= as security for costs pending appeal within the next 30 days. In default the appeal shall stand dismissed.

6. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 29th day of September, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent