

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL 5 OF 2014

PATRICK KIVUTI KITHAKA.....APPELLANT

VERSUS

JOHN MWANGI.....RESPONDENT

***(Being an appeal from the judgement in CC No 35/13 at Runyenjes Principal Magistrate's Court by
Hon M.O. Obiero Ag PM on 20th February, 2014)***

RULING

1. This is an application seeking an order that the respondent be ordered to give security for costs in the aggregate sum of Kshs 149,300/-. It also seeks stay of the appeal pending the deposit of the said security. Additionally, it seeks that in default of provision of the said security within the prescribed period, the appeal should be struck out with costs. And finally, the applicant seeks that costs be provided for in respect of this application.
2. The application is supported by four grounds in support of the notice of motion that is brought under section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya and under Order 26 Rule 1 of the 2010 Civil Procedure Rules. The applicant has stated that he believes the appellant will not be able to pay the respondent's costs in the event that the appellant is unsuccessful in the appeal. He has also stated that the appellant is a person of unknown means and may not be able to settle the costs in the event that his appeal does not succeed. He has also stated that the respondent has already settled the subordinate court decree and that he is exposed to loss and prejudice if costs are not given. And it is for that reason that he prays the court to order the appellant to provide security for costs.
3. In addition to his grounds in support of the application, the respondent has deponed to a six paragraph affidavit. The major factual matters in the affidavit are as follows. Firstly, he deponed that the appellant led evidence that he no longer works and depends on other people for his livelihood. He has also deponed that it is the insurance company which settled the damages awarded in favour of the appellant in the sum of Kshs 711,900/- and that the agreed costs in the sum of Kshs 67,863 were also settled.
4. Furthermore, the respondent has deponed that the assessment of damages involves the exercise of judicial discretion, which requires a very high standard of proof to overturn it. He has also deponed that the appellant is a person of unknown means and therefore is not in a position to pay the costs of the respondent in the event that he loses his appeal. Finally, he has deponed that the appellant should provide security for costs in the sum of Kshs 149,300/- and that in the interim period, the appeal should be stayed and that if he fails to deposit the security his appeal should be struck out and dismissed.
5. The appellant has opposed the application by filing five grounds of opposition. According to the appellant, the motion is an abuse of the court process and an affront to justice. He has also stated that the application is meant to deny or block the appellant's constitutional right to an appeal. He has further stated that the application is premised on a premonition that the appeal is hopeless and will fail *suo motu*. Furthermore, he has stated that the proposed costs in the sum of Kshs 149,300/- has no basis in law, because the appeal has not been heard and determined. And it is for this reason that he prays that the appeal should be heard and disposed of in accordance with the law.
6. The law applicable in this application is ***Order 26 of the 2010 Civil Procedure Rules***. The provisions of that Order confer on a court discretionary power to require provision of security for costs for the whole

or any part of the costs that may be incurred by any other party. Those provisions further require that in the event a party fails to provide security as ordered within the specified time in terms of **Order 26 Rule 5**, the court shall upon application dismiss the suit.

7. I have considered the affidavit evidence and the law applicable. I find that the court is vested with discretionary power to order for the provision of security for costs. I also find that that discretion must be exercised judicially. I also find that the right of appeal is guaranteed by statute namely **section 65 of the Civil Procedure Act**. The discretion conferred on the court should not be exercised to deny the appellant his right to appeal. I find that the appellant had stated that he was not a person of means in terms of the affidavit evidence.

8. In the light of foregoing matters, I find that to require the appellant to deposit security in the sum of Kshs 149,300/- is not fair. Costs in this appeal have not been assessed and will only be so assessed at the end of the appeal. I further find that the requirement that the appellant deposits a security will unfairly interfere with his right to exercise his right of appeal. As a result, I exercise the discretionary powers vested in this court to reject this application, which I hereby do.

RULING DELIVERED, DATED and SIGNED in open court at **EMBU** this **25th** day of **OCTOBER 2016**.

In the presence of Mr Anyoka holding brief for Mr Ogweno for the applicant and Mr Morara for the respondent.

Court clerk Njue

J.M. BWONWONGA

JUDGE

25.10.16