



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 150 OF 2015**

**BETWEEN**

**MWADHAHABU RAJABU TAYARI .....APPELLANT/RESPONDENT**  
**KENYA POWER & LIGHTING**  
**COMPANY LTD.....RESPONDENT/APPLICANT**

**RULING**

1. Through an application dated 23<sup>rd</sup> May, 2016 brought under sections 1A and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 26 rule 1 and Order 51 rule 1 of the Civil Procedure Rules and all other enabling provisions of law, the Respondent/Applicant seeks the following orders:-

i) Spent;

ii) That the appellant/respondent be ordered to furnish security for costs of the Appeal herein before the appeal can be set down for hearing; and

iii) That the Costs of the application be in the cause.

2. The application is supported by the affidavit of Michael O. Oloo Advocate dated 23<sup>rd</sup> May, 2016 and the grounds on the face of the application.

3. The respondent, Mwachhabu Rajabu Tayari filed a replying affidavit on 16<sup>th</sup> June, 2016 in opposition to the application. Both Counsel filed their written submissions which they highlighted to advance their arguments.

**APPLICANT'S SUBMISSIONS**

4. Mrs. Mwasaru, Learned Counsel for the applicant informed the court that the respondent received the decretal sum following a Judgment delivered on 2<sup>nd</sup> September, 2015. It was her submissions that the respondent who is a carpenter has no means to pay the applicant if the appeal is unsuccessful, as he has not disclosed any assets that may be attached if the appeals fails. Counsel further submitted that the respondent has received Kshs. 700,000/= general damages and Kshs. 240,000/= as special damages plus costs and interest. The same was subjected to 70:30 % contribution in favour of the respondent. In her view, it was only fair and in the interest of justice for the respondent to furnish security for costs in the sum of Kshs. 90,000/=. The court was referred to the case of **Bulk Medical Ltd. vs Paramount**

**Universal Bank Ltd & Others**, HCC 249 of 2006. In that case, the issue was on deposit of security for costs. The Judge stated that it was clear that the plaintiff did not have any disclosed assets that may be attached to satisfy the costs that may be awarded to the defendants in the event that they were successful. It was Mrs. Mwasaru's contention that it was only fair and just that the respondent herein deposits security for costs before the appeal was listed for hearing. She also prayed for costs.

## RESPONDENT'S SUBMISSIONS

5. Mr. Muganda, Learned Counsel for the respondent urged the court to consider their replying affidavit and written submissions. He argued that the applicant has not established the need for the respondent to furnish security. He submitted that the test for deposit of security is not one about the poverty status of the respondent. The court ought to rely on three factors, namely, if the respondent is being put under undue pressure by defending a frivolous suit, if the appellant is likely to succeed and if he has a good defence. Counsel contended that the appeal was filed due to the failure of the Magistrate to make an award for loss of earnings and amenities. He added that the lower court Judgment did not comply with the provisions of order 21 rule 4 of the Civil Procedure Rules; thus the appeal was not frivolous. Mr. Muganda cited the case of **Ali Mohamed Mwanzia vs National Bank of Kenya** [2015] eKLR, where the court of Appeal allowed a case to proceed without security for costs. He also referred to the case of **Invesco Assurance Company vs City Hopper Ltd & 2 Others** where the court declined to order security for costs. He further submitted that the claim herein is unliquidated hence difficult to ascertain the costs. He denied that payment had been made. He prayed for the application to be dismissed.

## APPLICANT'S REJOINDER

6. Mrs Mwasaru submitted that the payment was made through cheque No. 116813 dated 24<sup>th</sup> September, 2015 and if the respondent was not satisfied with the Judgment, he should not have pocketed the sum of Kshs. 658,000/=.

## ANALYSIS AND DETERMINATION

The issue for determination is if the respondent should deposit security for costs pending the hearing of the appeal.

7. The court notes from the pleadings on record that Judgment was delivered on 2<sup>nd</sup> September, 2015. The applicant settled the decretal amount through cheque No. 116813 marked as M002 to the applicant's supporting affidavit. The said cheque for the sum of Kshs. 658,000/= was drawn on 24<sup>th</sup> September, 2015. Annexure MRI 1B attached to the respondent's replying affidavit shows that the cheque was forwarded to the respondent's Advocates vide a letter dated 30<sup>th</sup> September, 2015. The rubber stamp on the said annexure shows that the letter and the cheque were received on 5<sup>th</sup> October, 2015. The respondent's Counsel cannot therefore deny that the respondent's Counsel received the cheque. The memorandum of appeal indicates that it was filed on 30<sup>th</sup> September, 2015. This court is therefore inclined to believe the veracity of paragraph 3 of the respondent's affidavit that his Advocate received the cheque 6 days after the memorandum of Appeal was filed.

8. Order 26 rule 1 of the Civil procedure Rules provides as follows:-

***"In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party".***

The exercise of the court's power under order 26 rule 1 of the Civil Procedure Rules is discretionary. 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 will not be enough to allege that the respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven. In **Marco Tool & Explosives Ltd vs Mamujee Brothers Ltd.** (1988) KLR 730, the 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.”***

9. The applicant’s Counsel submitted that the respondent is a carpenter. This is well stated in his evidence in the lower court proceedings, secondly he pocketed the sum of Kshs. 658,000/= being the decretal sum. The thinking behind the issuance of orders for security for costs is well laid out in the case of **Noor Mohammed Abdul vs Ranchodbhal J. Patel & Another** (1962) EA 448 where the court held :-

***“The order for security for costs in such a case is not directed towards enforcing payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties.”***

10. Judge Majanja in **Patrick Ngetakimanzi vs Marcus Mutuamuluvi & 2 Others**, High Court Election Petition No. 8 of 2013 held:-

***“Security for costs ensures that the respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access to justice vis-a-vis the respondent’s right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.”***

11. Counsel for the respondent has submitted that the claim being made through the appeal is an unliquidated claim and that the applicant is using this application to oppress the respondent who is being alleged to be a poor man who cannot raise Ksh. 90,000/=. It is also contended that the prayer for security is aimed at deterring the respondent from pursuing his appeal. The provisions of order 26 rule 1 of the Civil Procedure Rules do not make distinction that an order for security for costs must only be made in a liquidated claim. The court considers all the circumstances of a particular case and if the amount being sought as security for costs is reasonable.

12. My understanding of the arguments of Counsel for the applicant is that they want a measure of assurance that their costs will be catered for in the event that the respondent will not be successful in his appeal. In the instant application, it is clear that the respondent is a man of limited means, he produced in the lower court copies of deposit slips for his post bank account as evidence of his earnings as a carpenter. It is my finding that the prayer being sought by the applicant is reasonable and I am persuaded that the respondent if unsuccessful in his appeal may not be in a position to pay costs that will be incurred by the applicant.

13. I therefore order that the appellant/respondent deposits the sum of Kshs. 90,000/= as security for costs within 30 days from the date of this ruling. The said amount will be held in a joint interest earning bank account to be opened in the names of both law firms on record.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 14<sup>th</sup> day of October, 2016.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mrs. Mwasaru for the respondent/applicant

Mr. Muganda for the appellant/respondent

Mr. Oliver Musundi Court Assistant