



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO 562 OF 2012

1. ISABELA ATSIENO OMONDI

**2. GETRUDE AGOLA OMONDI (Administrators of the estate of
ALFUNZI OMONDI ODUORI, Deceased).....APPELLANTS**

VERSUS

1. PETER MACHARIA KARANJA

2. BUS TRACT COMPANY LTD.....RESPONDENTS

R U L I N G

- 1.** The main order sought by the Respondents herein in their application by **notice of motion dated 13th March 2014** is for the Appellants to provide security for the Respondents' costs herein in the sum of KShs 70,000/00, the same to be deposited in a joint account in the names of the advocates on record within 30 days of the date of the order. Pending such deposit the Respondents want the appeal stayed. In the event of default of an order for such deposit they want the appeal dismissed with costs.
- 2.** The appeal is against an order of the lower court by which the Appellants' suit for damages in respect of a fatal accident was dismissed for being filed out of time.
- 3.** The grounds for the application are that the Appellants testified before the lower court that they were unemployed and were fully dependent upon the Deceased; that they have no known assets; and that the Respondents are apprehensive that if the appeal is dismissed they will be unable to recover their costs herein. There is a supporting affidavit sworn by their advocate, **Caroline Wanjiru Githae**.
- 4.** The Appellants have opposed the application by **grounds of opposition dated 22nd and filed on 24th July 2014**. There is no replying affidavit. The main points raised are that no cause has been shown for the deposit of security sought; and that in any event the Appellants' presumed low economic status is not a good ground to demand such security.
- 5.** I have considered the submissions of the learned counsels appearing. It was submitted for the Respondents that their costs for the suit dismissed by the lower court have not been paid; but the learned counsel quickly conceded that there has not been any attempt at execution for those costs. It was also

submitted for the Respondents that the Appellants have not taken any steps towards prosecution of the appeal since filing the same; in this regard it can be quickly pointed out that the application before the court is not one for dismissal of the appeal for want of prosecution.

6. I do not understand the Respondents' case in the present application to be that the Appellants' appeal is hopeless or an abuse of the process of the court. By filing the appeal the Appellants exercised their undoubted right of appeal against dismissal of their suit by the lower court. That right cannot be lightly fettered by a demand for security for costs.

7. The court will not permit a citizen's right to approach the court by way of appeal to be fettered by an order for security for costs unless such an order can be justified in the circumstances of the case. Instances where such an order would be justified would include where it has been demonstrated that the appellant is abusing the process of the court, or where inability to pay previously incurred costs in the same dispute has been demonstrated. Such is not the case here.

8. That being my view of the matter I must refuse the application. It is hereby dismissed with no orders as to costs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF OCTOBER 2014

H P G WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2014