



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NUMBER 317 OF 2005**

**AMOS K MUTHOKA.....APPELLANT**

**VERSUS**

**ATHI RIVER MINING CO. LIMITED.....RESPONDENT**

*(From the Judgment and orders of M Kaikai (Mr.) Resident Magistrate in Milimani CMCC No. 395 of 2002)*

**R U L I N G**

The application before the court is a Chamber Summons dated 29<sup>th</sup> March 2011. It was filed by the Respondent/Defendant. The Respondent in this appeal seeks security for costs in the sum of Ksh.80,000/-.

The main ground upon which the application is based is that the Appellant is impecunious and will not be able to pay costs when the appeal is determined. The application is shown to have been brought under Order 51 rule 1 and Order 26 Rules 1, 5 and 6 of the Civil Procedure Rules.

Although I was unable to find any replying affidavit on the record from the Respondent/Appellant, his position as stated in his written submission, is that he is not impecunious and that he will be able to pay costs of this appeal and below if he eventually lost the appeal. He also argued that the application for security of costs filed by Chamber Summons, is incompetent as it should have been filed by Notice of Motion. He, therefore, sought that it should be struck out.

The court has under order 26(1) of the Civil Procedure Rules, power to: -

***“Order that security for the whole or any part of the costs of any defendant or third party be given by any other party.”***

Further Order 26, rule 5 provides that: -

***“If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit.”***

I have carefully perused the appeal record including grounds of appeal as well as the grounds upon which the trial magistrate's court made the decision appealed from. In my view and understanding, the power of court to order for security of costs is a discretionary one. It should be exercised with care especially since

such order for costs may remove or prevent the plaintiff or Appellant from accessing the seat of justice. It is a rare discretion. However, in a suitable case, particularly where it is almost obvious that the chances of success of the Plaintiff or Applicant or Appellant are not high the court will not hesitate to exercise it. In such a case the basis of such order is that a party who files a suit or an appeal oblivious of the chances of success of the suit, should give be made to think twice before heading on blindly. Such order for security of costs, particularly where the economic status of the party suing is doubtful, will make him think again whether it is worthy to continue.

In this case, the applicant alleged that the Appellant is impecunious and will not pay eventual costs if so ordered although he produced no tangible evidence to that end. He based this argument on fact that the Appellant has failed to pay lower court costs so far. Having as already stated above, properly perused the file, I am of the independent view that this is a suitable case where security for costs should be ordered. The argument that Order 26 Rule 1 does not apply to appeals is in my view a fallacy. The rule applies to all suits.

I have also considered whether this application should not be struck out for want of form. It should have been brought by Notice of Motion, as per Order 51. However, the formal defect, may be excused as a technicality so that the application may be is considered on merit, which I have herein done.

In the circumstances, this application succeeds. I make the following orders.

**ORDER**

***The Appellant/Respondent shall within 30 days deposit in court a sum of Ksh.80,000/- as security for costs, in default of which, this appeal shall stand dismissed with costs.***

Dated and delivered at Nairobi this 12th day of March 2012.

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**D A ONYANCHA**  
**JUDGE**