



**Martine Kupai (alias Maritim Kusai) & 2 others v Ngugi Ndibii Wamutua
(Sued as the Legal Representative of Kimgori Lolakupai) (Environment and
Land Appeal 09 of 2018) [2022] KEELC 3856 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3856 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL 09 OF 2018**

**CG MBOGO, J
JUNE 23, 2022**

BETWEEN

**JOSEPH NKURUMWA 1ST APPELLANT
MARTINE KUPAI (ALIAS MARITIM KUSAI) 2ND APPELLANT
TIPATIT KOROS 3RD APPELLANT**

AND

**NGUGI NDIBII WAMUTUA (SUED AS THE LEGAL REPRESENTATIVE OF
KIMGORI LOLAKUPAI) RESPONDENT**

RULING

1. What is before me for determination is a notice of motion application dated January 20, 2022 filed by the applicant/ respondent and expressed to be brought under order 42 rule 7 of the [Civil Procedure Rules](#) and section 3A of the [Civil Procedure Act](#) seeking the following orders: -
 1. That the respondents/ appellants herein do deposit security for costs, within a period to be specified by this honourable court.
 2. That failure to comply with (1) above this appeal be dismissed.
 3. That in the alternative to (2) above, the orders of May 7, 2018 be vacated forthwith.
 4. That the costs of this application be borne by the respondents/appellants.
2. The application is premised on the grounds on the face of it and in the supporting affidavit of the applicant/respondent sworn on January 19, 2022. The applicant deposed that he is the plaintiff in CMCC ELC No 87 of 2017 and the respondents are the defendants therein and that on September 20, 2018, the trial court delivered a ruling where the respondents had sought orders for striking out on



grounds of *res judicata*. The respondents appealed against the said ruling in this court which orders were granted *ex-parte*.

3. The applicant further deposed that by the said ruling, there was nothing to be heard inter-partes since the same had been granted without giving him an opportunity to challenge. Further that the next step is for the court to give directions but it is not clear who will pay costs in case the appellant loses the appeal, which issue is now disturbing as the appellants are individuals who are not members of the same family hence the need for security for costs. The applicant believes that security for costs is necessary more so that this court is seized of the fact that one of the appellants is deceased. The applicant is also apprehensive that the appellants no longer have an interest in prosecuting their appeal which has prompted him to file this application.
4. The application is opposed by the 3rd respondent sworn on March 9, 2022. The 3rd respondent deposed that order 42 rule 7 of the Civil Procedure Rules is not applicable for the reason that the trial court did not order for execution of any decree because the suit against the appellants at the trial court has not been determined with finality as there is no judgment and decree that has been delivered in favour of the respondent and, therefore, this court should aim to dispense substantive justice as enunciated in articles 50 and 159 of the Constitution.
5. The applicant filed written submissions dated May 17, 2022. The applicant submitted that the purpose of depositing security for costs is to ensure that the appellant is not being fanciful with filing an appeal that will never see the light of day and is simply instituted to put the other party into unnecessary expenses and anxiety and hence the appellants must prove to this honourable court that they are capable of paying costs should they lose the appeal. The applicant further submitted that the necessity for depositing security is fortified by the fact that one of the appellants is deceased.
6. The respondents did not file written submissions. I have considered the application, replying affidavit and the written submissions filed by the applicant and the issue for determination is whether the application dated January 20, 2022 is merited.
7. Before I delve into the application any further, I note that the application is dated January 20, 2022 and the supporting affidavit was sworn on January 19, 2022. The supporting affidavit is supporting an application that is filed a day later which brings to doubt the seriousness of the applicant in filing this instant application. Be that as it may, I have perused the documents relied on by the applicant and I find that in CMCC ELC 87 of 2018 a ruling was delivered on September 20, 2018 with respect to an application dated July 10, 2018 seeking to strike out the suit on grounds of *res judicata*. The trial has, therefore, not determined the suit with finality. I have also perused this file and I note that the respondents have filed a memorandum of appeal dated May 3, 2019 and a record of appeal dated June 10, 2020. I cannot really agree with the applicant that the respondents are not keen on prosecuting the appeal.
8. Order 42, rule 7 of the Civil Procedure Rules provides as follows:- “(1) Where an order is made for the execution of a decree from which an appeal is pending, the court which passed the decree or the court to which an appeal is pending in terms of rule 6 shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the court from whose decree or order such appeal shall have been brought. (2) Where an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the court which made the order, or to any court to which such appeal or second appeal shall have been



made, be stayed on such terms as to giving security or otherwise as the court thinks fit until the appeal is disposed of”.

9. My understanding of the above provision of the law is that it is applicable where security is required to be deposited where an order for execution of decree appealed from exists. In this case there is none.

10. The applicable law in an application for security for costs is order 26 rule 1 of the Civil Procedure Rules which provides as follows;

“(1)

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”.

11. The test in an application for security for costs is not whether the applicant in this case has established a *prima facie* case but whether the respondents has shown a *bonafide* defence as was espoused in the case of Jayesh Hasmukh Shab Vs Narin Haira & another (2015) eKLR in which the court held;

“It is now settled law the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors as absence of known assets in the country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the *bonafides* of the plaintiff’s claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account”.

12. In an application for security for costs, the applicant ought to establish that the respondents, if unsuccessful in the proceedings, would be unable to pay costs due to poverty or are men of straw. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful or in this case, that one of the respondents is deceased and the remaining respondents are individual members who do not come from the same family. I mean, when filing the suit the applicant must have known or knew that the surviving respondents were not from the same family.

13. This court is also mindful of the letter and spirit of our Constitution as stipulated under articles 48 which provides that:

“The state shall ensure access to justice for all persons and, if any fee is required it shall be reasonable and shall not impede access to justice”.

14. Also article 50 (1) provides that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

15. This court is not persuaded by the reasons advanced by the applicant that one of the respondents is deceased and the surviving respondents are individuals who do not come from the same family.

16. Arising from the above, I find that the notice of motion dated January 20, 2022 without merit and the same is hereby dismissed. Costs shall abide the outcome of the appeal. It is so ordered.

DATED, SIGNED and DELIVERED VIA EMAIL ON 23RD JUNE, 2022.

MBOGO C.G



JUDGE

23/6/2022

In the presence of: -

CA: Timothy Chuma

