



REPUBLIC OF KENYA

High Court at Kitale

Civil Appeal 59 of 2011

SILVANCE OJWANG ODEROAPPELLANT.

VERSUS

ELDORET EXPRESS CO. LTD.

ENOCK KIPTOO.....RESPONDENTS.

R U L I N G.

The Notice of Motion dated 7th November, 2011 is made pursuant to Order 42 Rule 14 of this Civil Procedure Rules and Section 1A and 3A of the Civil Procedure Act.

The respondents seek orders that this appeal be consolidated with appeals No. 58, 54, 55, 56, 57 and 53 of 2011 all filed at the High Court in Kitale and that the said appeals be stayed pending the hearing and determination of the application (see, prayers 1 and 2 of the Notice of Motion.)

The respondents also seek an order that each of the appellants in all the aforementioned matters provides security of Ksh. 89,500/= each (i.e. a total of Ksh. 626,500/=) being the respondent's estimated costs of the appeals within a period of fourteen (14) days (see prayer (3)) and that pending provisions of the said security the appeals be stayed until the security aforementioned is furnished by being deposited in court (see, prayer (4)).

By consent of both the appellants and the respondents, prayer (1) and (2) were granted as prayed.

Prayer (3) was argued by way of oral submissions. Mr. Rotich, learned counsel for the respondents, submitted that the seven appellants should furnish security in the total sum of Ksh. 626,500/= and that the appeals should be stayed pending furnishing of such security.

The reason advanced by the respondent for the appellants to furnish security is that it emerged during the proceedings in the lower court that the appellants do not have tangible or any source of income. Further, they have failed to show in their replying affidavits evidence of their financial means.

The respondents submitted that from the contents of the replying affidavits (paragraphs 5, 6, 7 & 8), it is not clear whether the appellants are paupers so as to seek the assistance of the court or whether they are persons of means capable of paying any costs. The respondents urge this court to apply its discretionary powers under Order 42 of the Civil Procedure Rules and grant the orders sought herein.

In response to the foregoing, the appellants through learned counsel, Mr. Ingosi submitted that the respondents have not given proper reasons for this court to exercise discretion in their favour and are only

apprehensive which is not a good reason to lock out a litigant from these proceedings. The appellants also submit that they do not have an obligation to establish their financial means and in that regard, the respondents have not proved that they (appellant) are persons of straw. In any event, it has not been demonstrated that the appeals are not likely to succeed.

The appellants contend that if security is to be deposited, it should not be such like the sum of Ksh. 89,500/=. The appellants therefore urge this court to dismiss the application.

Order 42 Rule 14 of the Civil Procedure Rules provides for security for costs such that the court in its discretion may order the appellant to give security for the whole or any part of the costs as such appeal and more so, if the appellant is not ordinarily resident in Kenya and has no sufficient property in Kenya.

In this case, the appellants reside in Kenya and in the circumstances may not be asked to provide security as if they were foreigners.

It is clear from the respondent's arguments that they desire furnishing of security by the appellants simply because they (respondents) perceive them (the appellant) to be persons of straw who may be unable to pay the respondents' costs should the appeals fail.

The respondents are of the view that the appeals have no chance of success but do not attempt to establish the fact other than raising extraneous allegations that the appeals are part of fraudulent claims which are overwhelming and crippling the Public Service Motor Vehicle Insurance Industry and that the appellants are attempting to use the court as a conduit for the perpetration of fraud.

In this court's view, the allegations by the respondents pertaining to fraudulent claims ought not have found their way into this application. They merely smack of bad faith on the part of the respondents and an attempt to elicit the sympathy of this court in seeking the appropriate orders. Matters of fraud are not within the domain of this kind of suit but a criminal case which in most cases would be filed in courts by state organs such as the police. It is to the police that the respondents should complain against the alleged fraudulent claims implying the insurance industry.

With regard to whether the respondents have established sufficient and satisfactory reason to require the appellants to provide security for costs, the answer is in the negative.

The respondents have not by any shread of evidence demonstrated that the appellants would be unable to meet their (respondents) costs should the appeal fail.

In any event, lack of financial muscle should not bar a citizen of this country from accessing justice. It is the role of this court and indeed any other court to promote constitutional values that underlie an open and democratic society based on human dignity, equality, equity and freedom. In that regard, poverty and/or lack of substantial financial resources should not impede access to justice which every citizen is guaranteed under Article 48 of the Constitution.

This application is devoid of merit and must stand dismissed with costs to the appellants.

Ordered accordingly.

[Read and signed this 18th day of October, 2012.]

[In the presence of M/s. M/s. Nyakibe h/b for Mr. Kairu and Mr. Ingosi h/b for Ochieng for appellant.]

J.R. KARANJA.

JUDGE.