



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 61 of 2009

UMAR CHIBACHI OMURUNGA.....PLAINTIFF
VERSUS
WILDFIRE FLOWERS LIMITED.....DEFENDANT

RULING

The court below, N. N. Njagi, Principal Magistrate, awarded to the appellant against the respondent Kshs.50,000/= subject to 80% contribution in general damages and Kshs.3,000/= being special damages.

The respondent has drawn a cheque in the sum of Kshs.25,000/= in favour of the appellant in settlement of the judgment. The appellant has not signed a consent letter marking the matter as settled. Instead he has filed the instant appeal challenging the lower court's decision. The respondent on the other hand has brought the instant application that the appellant provides security for costs for the appeal to be deposited in an interest earning account, failing which the appeal to be struck out.

The respondent has averred that it is reasonably apprehensive that the appellant shall not be able to pay the respondent's costs should the appeal be dismissed as the appellant is unemployed and has no meaningful source of income or known assets. The respondent has proposed a sum of Kshs.50,000/= as security.

Learned counsel for the respondent has cited Joel K. Kibiwott and 4 others Vs. The Registered Trustees of Monastery of Our Lady of Victory, Nakuru HCCC No.146 of 2004.

The appellant has filed grounds of opposition arguing that the appellant has a right of appeal and the application is intended to frustrate and lock him out. That the apprehension expressed by the respondent is without basis. That the appeal is arguable with high chances of success.

I have considered these arguments and the only authority cited. Order 41 rule 9(1) of the Civil Procedure Rules provides:

“9.(1) At any time after the memorandum of appeal has been served, the court, in its discretion, may order the appellant to give security for the whole or any part of the costs of such appeal.”

Unlike sub-rule 2 where such order may be issued if the appellant is not ordinarily resident in Kenya and has no sufficient property in Kenya, the above sub-rule (1) under which this application is premised, the power to require security for costs is discretionary.

The court in considering such application must weigh two opposing positions not to unnecessarily prevent poor persons who may not raise security but who may indeed be aggrieved and have appeal with reasonable chances of success from exercising that right. Yet at the same time the court must secure the respondent in an appeal from the risk of having to incur further costs which he might never recover from the appellant if the appeal were to fail. The respondent having expressed fear on the appellants' ability to meet its costs of the appeal, the burden shifted to the appellant to indicate if indeed he is capable. The appellant filed grounds of opposition and did not explain his position.

The application of a similar rule as our rule 9(1) was given in the code of Civil Procedure (India) by Sir Dinshah Fardunji Mulla, KT Ninth Edition, Order 41 rule 11 at page 996 as follows:

“The mere fact that the appellant is poor or insolvent is no ground for demanding security for costs. Similarly mere non-payment of the costs of the original suit is no ground for calling upon the appellant

to furnish security under this rule unless his conduct be shown to be vexatious, that is, such as indicates a wilful determination on his part not to obey the order of the court in respect of costs. But the court will, as a general rule, demand security for costs for a poor or insolvent appellant if it is proved to the satisfaction of the court that the appellant is not the real litigant, but a mere puppet in the hands of others who are well able to furnish security or if the merits of the case are plainly in favour of the respondent”
(Emphasis supplied).

The appellant as I have observed is genuinely and personally aggrieved by the award and has filed this appeal. It is only just and fair that no attempts are made to deny him his right of appeal. After all he has had an advocate representing him from the lower court upto this stage.

I exercise my discretion in favour of the appellant and decline to grant the orders sought in this application.

The application is dismissed. Costs in the cause.

Dated, Signed and Delivered at Nakuru this 11th day of June, 2010.

W. OUKO
JUDGE