



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA A
AT NAIROBI MILIMANI COMMERCIAL COURTS
CIVIL APPEAL 774 OF 2001

FRANCIS NDUNGU GACHUNGWEIAPPELLANT

V E R S U S

KAKUZI LIMITEDRESPONDENT

(Appeal from decree dated 8th October 2001 in Thika CMCC No. 1236 of 1999)

R U L I N G

This is an application (by chamber summons dated 25th October, 2004) by the Respondent in this appeal for an order that the Appellant do provide security for costs in a reasonable sum as the court may direct; in lieu of cash the Appellant may provide a surety, such surety to offer security either in cash or by way of a charge or mortgage on immovable property. There is a further prayer that in default of providing security as the court may order the appeal be dismissed.

The application is brought under Order 41, rule 9 of the Civil Procedure Rules (the Rules). It is supported by an affidavit sworn by one JEREMY HUME, the managing director of the Respondent. The grounds of the application appearing on the face thereof are:-

1. That there is at the moment no assurance or guarantee that the Appellant will pay the Respondent's costs of the appeal in the event that the appeal fails.
2. That the Respondent will be prejudiced unless security for costs is provided.
3. That the appeal has little or no chance of success.

The Appellant has opposed the application as set out in his replying affidavit filed on 29th November, 2004. The grounds emerging therefrom are:-

1. That the application is made in bad faith.
2. That there are no grounds to seek security for costs.
3. That the application is frivolous and an abuse of the process of the court.

I have considered the submissions of the learned counsel for the Defendant. There was no appearance for the Plaintiff at the hearing of the application notwithstanding service of hearing notice. But I have considered the objections raised in the replying affidavit.

The Appellant is exercising his undoubted right of appeal. It has not been stated in the supporting affidavit upon what grounds the Respondent is apprehensive that the Appellant may not be able to pay its costs of the appeal. A bare allegation in that regard is not sufficient. And even then, it is doubtful in my view if the mere possibility of an appellant being unable to meet the respondent's costs will be allowed to stand in the way of the exercise of the appellant's undoubted right of appeal. There must be more, and the merits or lack thereof of the Appellant's appeal should ordinarily not be one of them.

In the present case I find no reason why the Appellant should be burdened with an order for security for costs as a price for exercise of his undoubted right of appeal. There is no merit in the application. It is hereby dismissed. Costs thereof shall be in the appeal. It is so ordered.

DATED AT NAIROBI THIS 15TH DAY OF MAY, 2008

H. P. G. WAWERU

J U D G E

DELIVERED AT NAIROBI THIS 16TH DAY OF MAY, 2008