



**Mwathe & another v Karanja & another (Miscellaneous Application  
29 of 2019) [2022] KEELC 13676 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13676 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
MISCELLANEOUS APPLICATION 29 OF 2019**

**JG KEMEI, J**

**OCTOBER 19, 2022**

**BETWEEN**

**LAWRENCE KARURI MWATHE ..... 1<sup>ST</sup> APPELLANT**

**SCHOLASTICA WANGARI KIRURI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DUNCAN MUKUNDI KARANJA ..... 1<sup>ST</sup> RESPONDENT**

**GITHUNGURI CONSTITUENCY RANCHING CO LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant/1<sup>st</sup> respondent filed the instant notice of motion application dated July 4, 2022 seeking orders that;
  - a. Spent.
  - b. This honorable court be pleased to order the amount of security of costs of Kshs 300,000/- deposited in court on the January 16, 2020 by the 1<sup>st</sup> and 2<sup>nd</sup> respondent herein be released to the firm of Muchoki Kangata Njenga & Co Advocates on behalf of the applicant,
  - c. That the applicant is entitled to the said amount being the costs awarded to him as general damages in Thika Civil case No 122 of 2011 Duncan Karanja Mukundi v Lawrence Kiruri Mwathe Scholastica Wangari Kiruri & Anor *vide* the ruling delivered on the Decemeber 19, 2019.
  - d. That the 1<sup>st</sup> & 2<sup>nd</sup> respondents does bear the costs of this application.
2. The application is based on the grounds on the face of it and the supporting affidavit of L N Mwangi Advocates sworn on July 4, 2022.



3. In the affidavit the applicant filed a suit in the lower court which was heard and concluded and judgment delivered on the November 28, 2018 where he was awarded general damages in the sum of Kshs 300,000/- among other reliefs. That the respondents being dissatisfied with the judgment of the lower court filed an application on the May 28, 2019 seeking stay of execution and leave to file an appeal out of time against the said judgment, which leave was granted *vide* a ruling of the court delivered on the December 19, 2019. *Inter alia* the court granted conditional stay of execution pending the hearing and determination of the appeal and also directed the 1<sup>st</sup> and 2<sup>nd</sup> respondents to deposit security in court in the sum of Kshs 300,000/- being general damages awarded to the applicant in the lower court.
4. That in compliance with the said order of the court the 1<sup>st</sup> and 2<sup>nd</sup> respondents deposited in court the sum of Kshs 300,000/- as security pending the hearing and determination of the appeal.
5. The 1<sup>st</sup> and 2<sup>nd</sup> respondents thereafter filed the appeal ELCA No 3 of 2020 – Lawrence Kiruri Mwathe & Scholastica Wangari Kiruri v Duncan Karanja Mukundi & Githunguri Constituency Ranching Co Ltd and the Court delivered judgment on the May 24, 2022 and dismissed the entire appeal for lack of merit. That the applicant is therefore entitled to the amount of security in the sum of Kshs 300,000/- deposited by the 1<sup>st</sup> and 2<sup>nd</sup> respondent. That the applicant wrote to the Deputy Registrar on the June 13, 2022 requesting for the amount but were advised to move the court and seek an appropriate order.
6. The application is opposed by the respondents *vide* the replying affidavit dated the July 25, 2022 sworn by Felix Otieno Odhiambo, counsel for the respondents. He sought orders that the amount in question be paid back to the law firm of Japheth Kenvine Felix & Smith Advocates LLP seeing that their law firm is accountable to 1<sup>st</sup> and 2<sup>nd</sup> respondents on whose behalf the amounts was deposited in court. It was their argument that the applicant ought to file their bill of costs in court and have the same taxed by the taxing master as is the norm.
7. Although the parties took directions on the July 28, 2022 and undertook to file written submissions, none of the parties filed any written submissions and the court will determine the application based on the material placed before it.
8. The single issue for determination before the court is whether the application is merited.
9. It is on record that the applicant was victorious in the suit in the lower court where the court delivered judgment on November 28, 2018 as follows;
  - a. A permanent injunction to restrain the defendants by themselves, servants and or assigns from interfering in any manner with the suit premises title number Ruiru East Block 1 (Githunguri)/xxx and/or transferring, charging offering as security and/or in any way encumbering the title thereto;
  - b. A declaration the suit premises title number Ruiru East Block 1 (Githunguri)/xxx belongs to the plaintiff and an order to cancelling the title thereto issued to the defendants and/or any other person and that the defendants do give vacant possession thereto to the plaintiff.
  - c. An order to compel the defendants to cause to be transferred the suit premises title number Ruiru East Block 1 (Githunguri)/xxx to the plaintiff including all the necessary documents.
  - d. General damages of Kshs. 300,000/-.
  - e. Costs of the suit.
10. Being aggrieved by the judgment the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed an appeal which was heard and rejected in the judgment delivered on the May 24, 2022.



11. I have perused the ruling of the court in which the 1<sup>st</sup> and 2<sup>nd</sup> respondents sought and obtained conditional leave to file the appeal out of time as well as stay of execution of the judgment in the lower court. In granting the application, the court stated that in order to balance the needs of the applicants and protect the respondents in ensuring that the interest of justice are protected, ordered the applicants being the 1<sup>st</sup> and 2<sup>nd</sup> respondents to provide security of Kshs 300,000/- within 30 days.
12. It is this order with respect to the provision of security that is that the centre of the controversy in question. According to the applicant he is entitled to the sum as security of costs which amount should be released to the firm of Muchoki Kangata Njenga & Co Associates on behalf of the applicant.
13. The respondents on the other hand contend that the amount cannot be released to the applicant before the applicant's costs are assessed or taxed so as to ascertain the amount.
14. 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.”
15. Under order 42 rule 6 (2) (b) the court has discretion to order the applicant to provide for security for the due performance of such decree or order as may be ultimately be binding on him has been given by the applicant.
16. Security for the due performance of the decree includes costs and interest flowing from the judgment, which decree will have been adjudged to be binding on the applicant or respondent whichever case it may be. This was the decision of the court in the case of [\*Mwaura Karuga T/A Limit Enterprises v Kenya Bus Services Ltd & 4 others \[ 2015\] eKLR\*](#), that:
 

“.....the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore envisage just any security. The words “ultimately be binding” are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost, that is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6(2) of the [\*Civil Procedure Rules\*](#) includes costs and interest on the judgment sum unless the latter two were not granted – which is seldom. The security to be given is measured on that yardstick.”
17. Similarly in the case of [\*Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd \(2019\) eKLR\*](#), the Court observed:
 

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6 (1) of the [\*Civil Procedure Rules\*](#), it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.”



18. The purpose of security was highlighted in the case of *Arun C. Sharma v Ashana Raukundalia T/ A Rairundalia & Co. Advocates & 2 others [2014] eKLR*, where the Court stated:

“... The purpose of the security needed under order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

19. It is evident that part of the decree in the lower court was a money decree in the sum of Kshs 300,000/- being general damages awarded by the court in favour of the applicant. By granting security in the sum of Kshs 300,000/- the court was making provisions for security for the decretal amount that would ultimately be binding upon the respondents on the rejection of the appeal. It is trite that security should always be available for the purposes it was intended unless otherwise ordered by court as stated in the case of Mwaura (*supra*) that: -

“.... Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for the performance of the decree.”

20. The rationale for security for costs as I understand in an application for stay of execution is to provide a fall back which the payments flowing from the decree may be met from. In this case after the appeal was rejected, the applicant becomes entitled to the execution of the judgment he obtained in the lower court. I have carefully perused the orders which *inter alia* include an award of general damages in the sum of Kshs 300,000/-. I have also perused the ruling of the court delivered on the November 28, 2018 and my understanding of the said ruling was that the provision of the security was for purposes of the due performance of the decree as may ultimately bind the respondents. To the extent that the respondents have been adjudged to pay an award of general damages in the sum of Kshs 300,000/- to the applicant, it is my humble view that the decree is binding on them hence liable to pay.

21. I therefore find no difficulty in allowing the application because in my view the decree binds the respondents as the same has not been set aside, successfully appealed and or vacated. I find no prejudice if the respondents are ordered to release the amounts in satisfaction of the decree that remains valid and unexecuted. It is my view that costs accrued to the successful party shall be assessed and or taxed by the taxing master before they become payable.

22. In the end I allow the application with no orders as to costs.

23. It is so ordered.



DELIVERED, DATED AND SIGNED AT THIKA THIS 19<sup>TH</sup> DAY OF OCTOBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

**Delivered online in the presence of:**

Sang HB Odhiambo for 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Respondents

1<sup>st</sup> and 2<sup>nd</sup> Respondent/Applicant – Absent

Court Assistant – Phyllis Mwangi

