



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 476 of 2005

ADELA RWABUDARIKO

CLAVER RWABUDARIKO.....APPELLANTS

VERSUS

FARMERS CHOICE LIMITED..... RESPONDENT

RULING

The applicants in this Chamber Summons, under Order 41 Rule 9(1) and (2) and Rule 32 of the Civil Procedure Rules, seeks the following orders:

1. That the appellant/Respondents do deposit in court K.Shs.50,000/- as security for costs of the appeal or such other sum as the **court deems appropriate.**
2. **Costs of this application to abide the cause.**

Dated 11/12/06, and supported by an Affidavit by S.A. Wakiaga, the application is on the grounds that:-

- (a) The appellant/Respondents are Rwandese Nationals.**
- (b) Appellants do not have sufficient property in Kenya;**
- (c) If the appeal does not succeed, the Respondents are unlikely to trace the appellants and recover the costs from the appellants.**
- (d) Appellants will suffer no prejudice if this application is granted.**
- (e) The issue of recovering costs has already been an issue between the parties previously.**

In their Replying Affidavit, the appellants aver, **inter alia**, that: although they are Rwandese, they have been in Kenya for 38 years and they have no intention of leaving the country; with regard to settling costs in previous matter between the parties, the reason in the issuance of conflicting certificates and decrees by the Executive Officer, Milimani Commercial Courts. The Respondents aver that they are able and willing to reimburse the applicant.

After perusal of the pleadings and the submissions by learned counsel for both sides, I have reached the following findings and conclusions.

Order 41 rule 9(1) and (2) of the Civil Procedure Rules under which the application is brought, provides that:

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.”

9(2) If the appellant is not ordinarily resident in Kenya and has no sufficient property in Kenya (other than property to which the appeal relates) the court shall order the giving of security for the whole or part of the costs of the appeal within a time to be limited in the order.”

It is common ground that the appellants are Rwandese nationals. However, notwithstanding that, they have been residents in Kenya for 38 years and they have deponed that they have no intention of leaving the country.

The main reason for the application for the security is that the appellants do not have sufficient property in Kenya, in the event the appeal does not succeed and the Respondents have to trace the appellants. This statement, by the applicants, is not sufficiently controverted by the appellants. To aver that the appellants are willing and able to pay, in the absence of evidence for the source of that ability, is not sufficient.

In the result, I find and hold that the applicants have established a case for this court to exercise its discretion and order for security for costs.

Accordingly, the application succeeds and I order that the appellants do deposit in court K.Shs.25,000/- as security for costs; within 30 days from today’s order.

I further order that the costs of this application abide the cause.

Further, I order that failure to deposit the said security within the prescribed period of 30 days; the appeal herein will stand dismissed with costs to the Respondent/applicants and against the appellants.

DATED and delivered in Nairobi, this 6th Day of May, 2007.

O.K. MUTUNGI

JUDGE