



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT ELDORET  
CIVIL APPEAL NO.87 OF 2003**

**REUBEN CHERUIYOT ..... 1ST APPELLANT**

**JOHN PERI WERUNGA ..... 2ND APPELLANT**

**HENRY KIPKOECH MASACHA .....  
.....3RDAPPELLANT**

**PETER JUMA SHILARO ..... 4TH  
APPELLANT**

**-VERSUS**

**JULIUSKIPLIMO KETER ..... 1ST  
RESPONDENT**

**SAMUEL KIVUITU(Chairman Electoral Commission of Kenya .....  
2ND RESPONDENT**

**RULING**

This is an application dated 12th March 2004 made by way of Chamber Summons. It is brought under Order 41 Rule 9 and 32 of the Civil Procedure Rules. It seeks for an order that the appellants (hereinafter referred to as the respondents) in the Civil Appeal No.87 of 2003 provides for security for costs of the appeal to 1st respondent Julius Kiplimo Keter (hereinafter referred to as the applicant). There was a similar application dated 20th November 2003 for security for costs, filed by second respondent Samuel Kivuitu. However, at the hearing on 26th April 2004 advocate for the second respondent withdrew the application.

Mr. Kuloba for the respondents raised preliminary objections to the application dated 12th March 2004. He submitted that under section 79B of the Civil Procedure Act, such an application cannot be filed before the appeal is admitted to hearing under the said section. Until the appeal is admitted to hearing, the applicant has no audience. He also submitted that under Order 41 rule 8 (A), it is only after the appeal is admitted to hearing that the appeal will be served. The application is therefore pre-mature and irregular. Such an application can only be filed after directions have been given. He relied on the authority of the ruling of Justice Omondi Tunya, given in **Eldoret High court Civil Appeal No.120 of 2001 – Stanley Kamau Mboce Vs. Eldoret Municipal Council** – where the court declined to grant orders for security for costs on the grounds that the appeal had not been admitted.

Mr. Murei for the applicant submitted that the appeal had been served on the applicant on 4th July 2003. The record of appeal was also served on 7th April 2004. He submitted that under Order 41 rule 9(1) the operating words are “service”. He argued that the respondents cannot use their own mistake to justify a defeat of this application. He submitted that under Order 41 rule 9(1) there is no requirement that directions should be given before such an application can be made. He submitted further that the case authority quoted was for stay pending appeal, and not security for costs. He was seeking for discretionary orders and therefore the court can grant the order for security for costs.

I have considered the application and the submissions of both Counsel. From the record, the appeal has neither been admitted under Order 41 rule 8A nor have directions been given under Order 41 rule 8B of the Civil Procedure Rules. However, the respondents do not deny that they served the appeal on the

applicant. Counsel for the respondents contends that that mistake should not give ground for this application, as the law is very clear that the appeal should be admitted first.

On my part, I find that the law requires that the appeal be admitted first before service can be effected – Order 41 rule 8A. The case cited by the Counsel for the respondents i.e. **Eldoret HC. Civil Appeal No.120 of 2001 – Stanley Kamau Mboce –vs- Eldoret Municipal Council** is applicable to this application before me. I agree with the decision of Tunya .J. that before the appeal is admitted, the applicant has no legal basis for making an application for security for costs. In our particular case, though the applicant was served with the appeal, that does not change the legal position.

I therefore consider that this application cannot succeed. Such an application can only be filed after the appeal has been admitted. However, as the applicant did serve the respondent, thus prompting this application, I will award costs of this application to the applicant.

In the result therefore, I dismiss this application. I however, award costs of the application to the applicant.

**Dated and Delivered at Eldoret this ..... Day of ..... 2004**

**George Dulu**

**Judge**