



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC APPEAL NO. 26 OF 2019

GEORGE MUTISYA.....APPELLANT/APPLICANT

VERSUS

FAITH MWENDE PHILIP.....1ST RESPONDENT

SAMUEL MUTUA KIOKO.....2ND RESPONDENT

RULING

1. On the 29th July, 2020, the Appellant/Applicant filed the Notice of Motion application dated 28th July, 2020 seeking the following orders;

i) Spent.

ii) That the applicant be granted leave to deposit alternative security for costs in form of log book.

iii) That cost of this application be in cause.

2. The application is expressed to be brought under Article 164(3) of the Constitution of Kenya, 42 Rule 6(sic), Order 51 Rule 1, Sections 1A, 1B, 3A and 66 of the Civil Procedure Act and all enabling provisions of the law. It is predicated on the grounds on its face and is further supported by the supporting and further affidavits of George Mutisya, the Appellant/Applicant herein.

3. The application is opposed by Faith Mwendu Philip, the Respondent herein, vide her replying affidavit sworn at Makueni on 19th October, 2020 and filed in court on 19th October, 2020.

4. The application was canvassed by way of written submissions.

5. In his supporting affidavit, the Appellant/Applicant has deposed in paragraphs 3, 4, 5, 6 and 8 that he applied for stay of execution pending hearing and determination of the appeal and by a ruling of delivered on 25th June, 2020, he was ordered to deposit Kshs. 300,000/= as security for costs within 45 days pending the hearing of appeal, that he has tried all his best to raise the said sum of Kshs. 300,000/= but he has been unable due to bad condition brought about by corona pandemic, that he has a car and is willing to deposit the original log book in court as alternative security pending hearing of the appeal, that he was affected by the lockdown which was beyond his control and by the time it was lifted, time had much gone thus his explanation for the small delay in bringing the application and that no prejudice will be suffered by the Respondent if the orders sought are granted because alternative security will be posted and the Respondent will have her day in court.

6. On the other hand, the Respondent has deposed in paragraphs 3, 5, 6 and 7 of her replying affidavit that she has been advised by her advocates on record which advice she verily believes to be true that the entire Notice of Motion dated 28th July, 2020 is frivolous, misconstrued, an abuse of the court process and fatally defective and ought to be dismissed for lack of merit, that she has been advised by her advocates on record and which advise she verily believes to be true that the Applicant was granted a conditional stay by depositing Kshs. 300,000/= in court within 45 days as from 25th June, 2020, that she has been advised by her advocates on record and which advice she verily believes to be true that security for costs cannot be deposited in an alternative form of log book and that she was further advised by her advocates and which advice she verily believes to be true that a logbook cannot be a sufficient alternative for money since the ruling of the court directed that the money be deposited in an interest earning account and that the interest earned was a substantial reasoning of the court.

7. In rejoinder, the Appellant/Applicant has deposed in paragraphs 2, 3, 4, 5, 6 and 7 of his further affidavit that the Respondent's allegation that alternative form of security cannot be deposited was misinformed and had no legal underpinning, that the court has the jurisdiction and powers under sections 1A, 1B and 3A of the Civil Procedure Act as well as Order 42 of the Civil Procedure Rules, that under Article 159(2) of the Constitution, the court is enjoined to do justice without undue regard to technicalities which is against what the Respondent is asking

the court to do, that the essence of security was to ensure that the winning party is able to recover his/her costs or damages but it's not meant to be a punishment or even an impediment to a party wishing to appeal otherwise it would become difficult for parties who are financially challenged but have alternative security, that the valuation report shows the vehicle was worth Kshs. 900,000/= which was twice the security ordered by the court and that the Appellant is willing to provide security in the interest of justice and the matter to proceed for hearing and determination on merit.

8. The counsel for the Appellant/Applicant has submitted that the latter has done everything possible but he has been unable to raise Kshs. 300,000/= due to bad business condition brought about by the corona pandemic. The counsel went on to submit that the Appellant/Applicant is ready and willing to deposit alternative security being motor vehicle log book so that the appeal can proceed to hearing.

9. It was further submitted that the Respondent will not suffer prejudice if the orders sought are granted since she will have the security deposited in court. The counsel pointed out that the Appellant/Applicant has attached a valuation report which shows the value of the vehicle whose logbook he seeks to deposit in court is Kshs. 900,000/=.

10. The Appellant/Applicant further submitted that the court has inherent power to grant the orders for alternative security. The Appellant/Applicant further submitted that he has shown that he has cash flow challenge brought about by the corona pandemic.

11. It is the Appellant/Applicant's further submission that the overriding objective for costs is to ensure that a successful party is able to recover costs or damages and that it is not meant to be a punishment and impediment to parties seeking to appeal. The Appellant/Applicants counsel pointed out that the valuation report clearly shows that the vehicle is more than the security awarded by the court and that it is registered in the Appellant's/Applicant's name.

12. In support of his submissions, the counsel for the Appellant/Applicant cited the case of **John Mbaya Mucheke -Vs- Kaberia E. Limukii [2020] eKLR** where the court while allowing an application for alternative security held;

“12 in the present case, the property is registered in the Applicant's name. He positively deponed that he had cash flow challenges. Security under Order 42 Rule 6 is meant to ensure that an unsuccessful applicant is able to pay the decreed amount if and when the appeal fails. The court had made an order for Kshs. 2 million only. The security being offered is valued nearly one and a half times more. 3. For the forgoing reasons, I am satisfied that the Applicant has demonstrated sufficient reason to warrant the review of the subject order. Accordingly, the application is hereby allowed.....”

13. On the other hand, the counsel for the Respondent framed three issues for determination namely;

(i) Whether the motor vehicle logbook proposed as security is sufficient and secure.

(ii) Whether the appeal should be dismissed should the security be found insufficient.

(iii) Costs of the application.

14. On the first issue, the counsel's submissions were that the Respondents have well grounded fears to justify their opposition to the substitution in that the nature of the motor vehicles leads to wear and tear over time resulting in depreciation of value. The counsel went on to refer to Section 7(2) (c) (sic) of the second schedule of the Income Tax Act which provides that the annual depreciation rate of all machinery is 12.5%.

15. The counsel urged that unless the Appellant/Applicant can prove to the court of his clairvoyant abilities, neither he nor anyone else can estimate how long the appeal proceedings will last and/or the effectiveness of the collateral at the end of the proceedings. The Respondents further contend that the Appellant's/Applicant's nature of business, being the proprietor of the Hardware Enterprise, does not offer much confidence as to the expected state of the value of the vehicle at the end of the proceedings.

16. The Respondents further contend that the Appellant's/Applicant's attempt to water down the question of security to a procedural step that can be overlooked is an incorrect interpretation of the overriding principle in that security must be sufficient and secure. The counsel pointed out that this is not a question of court procedure but rather a requirement of the law to provide an assurance where an obligation exists. The counsel however did not cite any particular provision of the law or authority upon which his submissions were anchored.

17. Regarding the second issue, the Respondent's counsel's submissions were that since the Appellant/Applicant states that he is unable to raise Kshs. 300,000/= in compliance with the Ruling dated 26th June, 2020, the Respondents should be allowed to execute.

18. As for the costs of the application, the counsel was of the view that the Respondents should be awarded costs.

19. Having read the application, the replying affidavit and the submissions filed by the counsel on record for the parties, I do note that the Appellant/Applicant has quoted Article 164 (3) of the Constitution and Section 66 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya among other provisions of the law. For the record, Article 164(3) of the Constitution provides for the jurisdiction of the Court of Appeal to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament. Similarly, Section 66 of the Civil Procedure Act provides that appeal from the decrees of the High Courts and for that matter, equal status shall lie to the Court of Appeal.

20. This court not being Court of Appeal, the Appellant/Applicant ought not to have brought the instant application under the aforementioned Article 164 (3) of the Constitution and Section 66 of the Civil Procedure Act.

21. Be that as it may, I will presume that the Appellant/Applicant intended to file the instant application before this court and not at the Court of Appeal. In any case, the overriding objective is to ensure substantive justice is done to the parties herein.

22. Essentially this is an application for review under Order 45 Rules 1 and 2 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act. As such, I am of the view that that the only issue for determination is whether or not this court should review the order issued vide the ruling delivered on 25th June, 2020.

23. The gist of the Appellant's/Applicant's application is that he is unable to raise the sum of Kshs. 300,000/= which he was ordered on 25th June, 2020 to deposit in an interest earning account in the joint names of the advocates on record for the parties due to cash flow brought about by Covid-19 pandemic.

24. The valuation report annexed to paragraph 6 of the Appellant's/Applicant's further affidavit shows that motor vehicle reg. No. KBT 867W is licensed as a commercial vehicle and one therefore would have expected the Appellant/Applicant to annex copies of audited accounts to support the disposition that he is unable to raise the sum of Kshs. 300,000/=. I say so because the Appellant/Applicant alludes to being a businessman. Running a business requires regular preparation of accounts.

25. The valuation report further shows that the vehicle has a third party insurance cover issued under the Insurance (Motor Vehicles Third Party Risks) Act Chapter 405 of the Laws of Kenya. The Appellant is not covered in case of the vehicle being written off as a result of an accident. If an accident were to occur, the Appellant would have to sue for damages and this would explain the Respondent's fear over the substitution of security of Kshs. 300,000/= with a logbook of a motor vehicle that has a third party insurance cover. (Emphasis are mine)

26. Be that as it may, I have taken judicial notice of the fact that Kenya and the entire world were struck by Covid-19 pandemic at the beginning of the year 2020. Indeed, as the Appellant/Applicant has indicated in his affidavit evidence, that the pandemic caused serious economic hardship to one and all. That being the case, I am satisfied that there is sufficient ground to review the order issued by this court on 25th June, 2020.

27. Consequently, in addition to the Appellant/Applicant being required to deposit Kshs. 300,000/= in an interest earning joint account in the names of the advocates for the parties on record, he has the alternative of depositing in court a letter of guarantee from a reputable financial institution for the said amount within a period of 45 days from the date hereof in default of which the Defendants/Respondent will be at liberty to execute. It is so ordered.

Signed, dated and delivered at Makueni via email this 28th day of May, 2021.

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HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi