



**Kimuta v Kamau & another (Civil Appeal E270 of 2022)
[2024] KEHC 5794 (KLR) (Civ) (13 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5794 (KLR)

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

CIVIL

CIVIL APPEAL E270 OF 2022

CW MEOLI, J

MAY 13, 2024

BETWEEN

JOSEPH GAKURE KIMUTA APPELLANT

AND

PETER THUO KAMAU 1ST RESPONDENT

JAMES KAMAU THUO 2ND RESPONDENT

RULING

1. This ruling is predicated on the Notice of Motion dated 25th April, 2023 (the Motion) brought by Peter Thuo Kamau and James Kamau Thuo (hereafter the 1st and 2nd Applicants) supported by the grounds set out on its face and the facts stated in the affidavit of the Applicants' advocate, Stanley Mwandoo Righa and seeking an order striking out the present appeal, and in the alternative an order that Joseph Gakure Kimuta (hereafter the Respondent) do deposit security for costs in the sum of Kshs. 100,000/- being the minimum amount prescribed by the Advocates Remuneration Order, within 30 days, failing which the appeal should stand dismissed.
2. In his supporting affidavit, the Applicants stated that the trial court delivered its judgment on 6th April, 2022 in favour of the Respondent, following which the said Respondent sought settlement of the judgment sum from the Applicants in accordance with the costs tabulated in the bill of costs vide a letter dated 22nd April, 2022. The advocate stated that on 3rd June, 2022, his firm forwarded cheque number 697828 dated 2nd June, 2022 for the sum of Kshs. 407,818/- to the Respondent's advocate, which cheque constituted full settlement of the judgment sum. That consequently, the file was marked as closed on 11th June, 2022.
3. That to his dismay, his firm was later served with a memorandum of appeal in respect of the present appeal on 15th September, 2022 which appeal constitutes an afterthought in view of the already settled



- judgment sum. It was the advocate's assertion that pursuant to his evidence tendered during the trial, the Respondent is a man of meagre means and hence it is imperative that he provides security for costs to the Applicants, should the appeal be dismissed. Otherwise, the advocate urged the court to find the appeal incompetent and misconceived, and to strike it out as a result.
4. The Respondent swore a replying affidavit on 19th May, 2023 to resist the Motion and to dissuade the court from granting the orders sought, by asserting his constitutional right of appeal under Article 50 of the Constitution and that being dissatisfied with the decision rendered by the trial court, he exercised such right. The Respondent further averred that the mere fact that the judgment sum was settled by the Applicants in no way bars him from exercising his right of appeal against the said judgment. The Respondent proceeded to state that he wishes to challenge the judgment by the trial court on the premise that the award made on general damages was inordinately low and not commensurate to the injuries he suffered. On the subject of security for costs, it was the Respondent's averment was that the Applicants have not demonstrated that he is unable to meet the costs, should the appeal fail. On the basis of those averments, the Respondent urged the court to dismiss the Motion, with costs.
 5. When the parties attended court for hearing, the court directed that the Motion be dispensed with through written submissions. Submitting in support of the Motion, the Applicants' counsel anchored his submissions on the decisions rendered in Jayesh Hasmukh Shah v Narin Haira & Another [2015] eKLR; Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR and Westmont Holdings SDN. BHD v Central Bank of Kenya [2017] eKLR regarding security for costs. Counsel then proceeded to submit that in view of the fact that the Motion was timeously filed, coupled with the Respondent's indirect admission of receipt of the judgment sum in full, then it only serve the interest of justice for the court to order him to provide security for costs. The Applicants' counsel reiterated his earlier averments regarding the Respondent's lack of financial ability or known assets to ascertain to pay the costs, in the event that the appeal fails. On those grounds, the court was urged to allow the Motion as prayed.
 6. In opposition, the Respondent's counsel on his part by and large reiterated the averments made in the replying affidavit. And citing the decision in George Kabura v SMM (a minor suing through his mother and next friend JMN) [2021] eKLR to support the position that the mere fact that the decretal sum was settled does not bar an appellant from challenging an award of damages, upon his or her dissatisfaction with it. On the subject of security for costs, it was counsel's argument that the Applicants have no basis upon which to claim such security in the absence of any sums owed to them. Counsel further reiterating that it has not been demonstrated that the Respondent lacks the means to meet the said costs should the need arise. Resultantly, the court was urged to dismiss the Motion.
 7. The court has considered the grounds laid out on the body of the Motion; the facts deponed to in the affidavits supporting and opposing the Motion; and the rival submissions on record plus the authorities cited therein. The main prayer in the Motion seeks the striking out the appeal, and in the alternative an order for the provision of security for costs.
 8. Beginning with the order seeking to have the Respondent's appeal struck out, the primary ground is that the Respondent having benefited by receiving full settlement of the judgment sum from the Applicants, cannot benefit a second time by pursuing an appeal. Seeking to challenge the very award on which he has received payment. In contrast, the Respondent averred and argued through his counsel that the mere fact that the decree arising from the judgment was settled, does not preclude him from exercising his right of appeal against the very judgment.
 9. The trial court delivered judgment on 6th April, 2022 in Milimani CMCC No. E7324 of 2020 in favour of the Respondent and against the Applicants, in the total sum of Kshs. 405,550/- (less 20%



contributory negligence) bringing the judgment sum to Kshs. 324,440/- plus costs, which came to a total sum of Kshs. 407,818/- (Annexure SMR-1 of the Motion). It is apparent from the record that upon the request of the Respondent's advocate vide a letter dated 22nd April, 2022 (Annexure SMR-2) the Applicant's advocate forwarded the cheque number 697828 dated 2nd June, 2022 for the sum of Kshs. 407,818/- (Annexure SMR-4a) to the Respondent's advocate vide a letter dated 3rd June, 2022 (Annexure SMR-4b), being full settlement of the judgment sum. The Respondent does not dispute receipt of the said sums. However, subsequently, the Respondent filed a memorandum of appeal dated 28th April, 2022 on 4th May, 2022 on the quantum of damages.

10. That said, the question arises whether the settlement of the judgment sum awarded by the trial court would necessarily preclude or otherwise bar the Respondent from pursuing an appeal against the very judgment. The court thinks not. In the court's view, the mere settlement of a decree does not in and of itself, legally or procedurally bar a party from exercising his or her right of appeal or otherwise render such appeal invalid. Consequently, the court finds that the Applicants have not brought forward sufficient cause to warrant the striking out of the appeal.
11. This leads to the alternative prayer in the Motion, namely for the provision of security for costs. The applicable provision on this is Order 42, Rule 14 of the CPR, which expresses thus:
 - (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.
 - (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.
 - (3) If security for costs is not given within the time ordered the court may dismiss the appeal.
12. The principles undergirding the matter of security for costs were considered by the Court of Appeal in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR where it rendered itself thus:

“In an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven. See *Hall -vs- Snowdon Hubbard & Co. (I)*, (1899) 1 Q.B 593, the learned Judge at page 594 stated:-

“The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made.”

In *Marco Tool & Explosives Ltd – vs- Mamujee Brothers Ltd.* (supra), this Court expressed itself thus:-

“The onus is on the applicant to prove such inability or lack of good faith that would make an order for security reasonable.”
13. The Court went on to state the following on the above subject:

“The rationale for security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party



is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party. In *Noormohamed Abdulla v Ranchhodhbhal J. Patel & Another* (1962) E.A. 448, it was held:-

“The order for security for costs in such a case is not directed towards enforcing payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties..”

It is therefore imperative in consideration of an application for security of costs, for the court to balance the competing rights of the parties, that is the right to access to justice and the right to security for costs. Article 24 (1) (d) of the *Constitution*, provides:-

24(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

.....

d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;..”

In *Johnson Muthama v Minister of Justice and Constitutional Affairs and Others - Nairobi Petition No. 198 of 2011*, the Petitioner sought a declaration that Section 78 of the Elections Act as unconstitutional on the ground that it violated Article 48 of the Constitution which guaranteed the right to access to justice. The High Court in dismissing the Petition held:-

“Provision of payment of costs by a party coming before the court does not in my view, violate any provision for the constitution. It is a common practice in civil proceedings intended to safeguard the interests of the party against who a claim is brought and to prevent abuse of the court process. Given the nature of elections, it serves a useful and rational purpose of ensuring that only those who have a serious interest in challenging the outcome of an election do so.”

14. It is clear from the foregoing, that whether or not to grant an order for security of costs is a matter purely within the court’s discretion, upon weighing the competing interest of the parties before it.
15. The premise upon which the Applicants sought the said order is that there is a likelihood the Respondent may be unable to meet the costs of the appeal, in the event that it is dismissed. To counter these assertions, the Respondent stated and argued that no evidence has been tendered indicating his inability to meet the said costs in the unlikely event that the appeal fails.
16. As earlier mentioned, the onus is on the Applicants to prove the Respondent’s financial inability, in order for the order for provision of security to be granted. The Applicants did not tender any credible



material to support their assertions on the Respondent's inability to meet the costs should the need arise.

17. Be that as it may, in the circumstances of this case, and based on the decision of *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* (supra) the court deems it fair to safeguard the interest of the Applicants, who have already settled the decretal sum arising from the trial court's judgment and who are now the Respondents in the appeal.
18. In the result, the Notice of Motion dated 25th April, 2023 partially succeeds. Consequently, the Appellant/Respondent is hereby ordered to provide security for costs in the sum of Kshs. 100,000/-, payable into court within 20 days from this day, failing which the appeal shall stand dismissed. In the circumstances, a fair order on costs is to direct each party to bear its own costs of the Motion.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF MAY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Mr. Lucheli

For the Respondent: Mr. Kwanga

C/A: Erick

