



**Pambazuka Mart (K) Ltd v Javed (Civil Appeal E018 of 2023)
[2024] KEHC 5451 (KLR) (7 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5451 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E018 OF 2023
SN MUTUKU, J
MAY 7, 2024**

BETWEEN

PAMBAZUKA MART (K) LTD APPELLANT

AND

SYED IQBAL JAVED RESPONDENT

RULING

1. The Applicant brought a Notice of Motion dated 6th June, 2023 under Order 42 Rule 4, Order 51 Rule 1 of the [Civil Procedure Rules](#) and Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law seeking the following orders:
 - i. That before the subject appeal is prosecuted any further, the Defendant do furnish security for costs by depositing the entire decretal sum as awarded to the Respondent in CMCC No. E027 of 2021- Kajiado being Kenya Shillings Eight Hundred and Fifty-Four Thousand Four Hundred and Eighty-four shillings only (Kshs 854,484/-) as the security for costs with the Respondent or such other reasonable sum and within such reasonable time as the Honourable Court shall deem sufficient and reasonable.
 - ii. That the said security for costs amount as shall be determined by the Honourable Court as per prayer (1) above be held in a joint interest earning bank account under the names of the advocates for both parties pending the hearing and determination of the appeal herein.
 - iii. That if the security for costs is not deposited within the time ordered this Honourable Court shall dismiss the appeal.
 - iv. That cost of this application be provided for.
2. The applicant has advanced grounds in support of the Application on the face of the Notice of Motion and in the supporting affidavit sworn by the Applicant on the same date where he has stated that he



is an investor and a Pakistan national residing in Kenya; that the grounds raised in the Memorandum of appeal are baseless, frivolous, vexatious and an abuse of court process; that the appeal is intended to deny him the fruits of his judgement and therefore the Appellant should be ordered to deposit the decretal sum as security.

3. He has stated further that the financial stability of the Appellant company is not known; that the Appellant company has no known well-established assets or properties which can be used to settle the decretal sum should the appeal fail and that he is likely to suffer irreparably if the orders sought are not granted.
4. The Application is opposed by the Respondent through grounds of opposition dated 14th December, 2023 listed below:
 - i. That the application is frivolous, incompetent, scandalous and an abuse of the court process for reasons that there are no provisions of the law and/or precedent that contemplate dismissal of an appeal at the High Court on Application of a Respondent.
 - ii. That the provisions of law relied upon by the Respondent, to wit; Order 42 Rule 4, does not in any way contemplate the right of a Respondent to move court to seek that security be deposited in court or otherwise during the pendency of an appeal, or the resultant dismissal of an appeal, if said security is not deposited.
 - iii. That no supporting provisions of the law to support the Respondent's application considering there is no contemplation of a Respondent to compel an Appellant to deposit security in court for the simple reason that the mandate only rests with the court and/or an Appellant, as contemplated by the provisions of Order 42 Rule 6(2)(b) of the *Civil procedure Rules*.
 - iv. That the provisions of Order 42 Rule 6(2)(b) contemplated that an order for security is discretionary and is not tied to any specific amount and as such the Respondent cannot act as a player in the arena of dispute and an umpire simultaneously by dictating the amount of security that ought to be deposited.
 - v. That the application is premature and untimely for reasons that the Appellant herein has not yet filed any application seeking orders of stay pending the hearing and determination of the appeal and that the Respondent herein cannot purport to represent the interests of a represented Appellant.
 - vi. That in any event, when the Appellant decides to prefer its application as contemplated under the provisions of Order 42 Rule 6(1) it shall offer through affidavit declaration and affirmation that it is willing and ready to deposit security as a condition for grant of stay orders.
 - vii. That the Application is an omnibus and a mongrel of different prayers governed by different rules and parameters and thus the said pleadings are incapable of any proper response, adjudication and that any further continuance with the same defeats the sacred and sacrosanct principles of reasonableness and rules of procedure.

Applicant's submissions

5. The Application was canvassed through written submissions. The Applicant filed submissions dated 22nd January, 2024 and raised three grounds for determination as follows:
 - i. Whether the Appellant should deposit the decretal sum as security for costs.



- ii. Whether the Applicant will suffer loss if the Appellant does not deposit the security for costs before proceeding with the appeal.
 - iii. Whether this Honourable court has the discretion to determine the payable security for costs.
6. On the first issue the Applicant argued that he has a right to enjoy the fruits of his judgement and that the Appellant should be compelled to deposit the decretal sum as security to ascertain that it is capable of satisfying the award for judgement and to show that the appeal is not a delay tactic. The Applicant relied on various authorities on the face of the submissions including *Gianfranco Manenthi & Another vs- African Merchant Assurance Co. Ltd* [2019] eKLR, where the court held that:
- “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 degree in order to enjoy the fruits of his judgment in case the appeal fails.
- Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a 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 judgement 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.”
7. On the second issue, it is argued that the Applicant is at the risk of suffering loss as the Appellant and its directors are all foreigners and are a flight risk who may flee the country before settling the decretal sum. Further, that the only known asset of the Appellant is a mini market which is being advertised for sale and that there are no other known assets that can be used to settle the decretal sum.
8. The Applicant relied on *Standard Assurance Co. Ltd vs- Alfered Mumema Komu* [2008] eKLR where it was held that:
- “the proof of loss must be substantiated by the one who alleges it and that it would be unfair to deny a Respondent the fruits of a regular judgement just because the Applicant has filed an appeal.”
9. On the third issue it is submitted that an order to deposit security is discretionary. The Applicant relied on *Jayesh Hasmukh Shah vs- Narin Haira & Another* (2015) eKLR to support his submissions that an order for security for costs is a discretionary one and that the court in exercising that discretion takes into account certain matters as the absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; inability to pay costs; the general financial standing or wellness of the Plaintiff; the bona fides of the Plaintiff’s claim; or any other relevant circumstance or conduct of the Plaintiff or the Defendant.
10. It was submitted that the burden of proof lies with the Appellant to prove to this court that it has assets sufficient to pay the decretal sum should the appeal fail as was stated in *National Industrial Credit Bank Ltd vs- Aquinas Francis Wasike & another* [2006] eKLR.



Appellant's submissions

11. The Appellant has raised three issues for determination in its submissions dated 20th January, 2024:
 - i. Whether there is any legal basis and/or justification for the prayers sought.
 - ii. The propriety of the Application.
 - iii. Who should bear the costs of the Application.
12. On the first issue it was submitted that no provision of the law under Order 42 of the *Civil Procedure Rules* or any other law supports the Applicant's orders that contemplate the right of a Respondent to move the court to seek that security be deposited in court or otherwise during the pendency of an appeal, or the resultant dismissal of an appeal, if the said security is not deposited. It was submitted that the application as framed seeks to curtail the Appellant's right to be heard on appeal contrary to Article 50 of the *Constitution*.
13. It was further submitted that the Respondent has not demonstrated that if the Appellant is unsuccessful in the Appeal, it would be unable to pay the decretal sum and therefore the application is incompetent and unmeritorious and ought to be dismissed with costs to the Appellant. the Appellant relied on the case of *Kenya Education Trust -vs- Katherine S.M Whitton* Civil Appeal No 310 of 2009 to support its submissions.
14. On the second issue it was submitted that the application is premature and untimely as the Appellant has not yet filed any application seeking orders of stay pending the hearing and determination of the appeal and that the Respondent cannot purport to represent the interest of a represented Appellant. Further, that the appeal is yet to be set down for hearing and that there has been no non- attendance by it and that this court cannot be inclined to dismiss an appeal on account of the Respondent's unfounded fears.
15. On the third issue it was argued that costs follow the event and that the Respondent dragged them to court on a premature application and they should therefore be condemned to settle the costs.

Analysis and Determination

16. I have considered the application, the affidavit in support as well as the grounds of opposition and the submissions filed by the parties herein. The main issue that requires determination, in my view, is whether the application has merit.
17. From the facts of the case judgment was entered in the lower court in CMCC No. E027 of 2021 where the court awarded the Applicant Kshs. 854,484/-. There is no application filed by the Appellant seeking stay of execution pending the determination of the appeal.
18. Order 42 Rule 6 of the *Civil Procedure Rules* provides that:
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.



- (2) No order for stay of execution shall be made under subrule (1) unless—
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
19. To my mind, this order contemplates that it is the party that is preferring an appeal that moves the court through an application for stay of execution pending that appeal. In almost all the cases where an appeal arises, it is the losing party who moves the court and not the party in whose favour the judgment was issued.
20. The Applicant has based his application on Order 42 rule 4 on an application in which he wants this court to order the Respondent to pay security. Order 42 Rule 4 provides as follows:
- The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule: Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.”
21. This provision has nothing to do with the order of stay of execution pending an appeal. Besides, the Appellant has not moved the court seeking stay of execution pending an appeal. While I note that powers to grant stay are discretionary, I note that the Applicant has moved this court citing wrong provision of the law that does not aid his cause and that he has prematurely moved this court to order the Appellant to provide security for costs.
22. This application is misconceived. It is frivolous and an abuse of the court process. He ought to have waited for the Appellant to file such an application so that he can then seek payment of security for costs as a condition precedent before the application was allowed. Consequently, the prayers sought cannot succeed. The Notice of Motion dated 6th June 2023 is hereby dismissed with costs to the Appellant.
23. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 7TH MAY 2024.

S. N. MUTUKU

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Ms Waithira for Respondent/Applicant.

Mr. Itaya for the Respondent - Absent

