



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 16 OF 2015

HENRY SHIKHONGA WAMUKOYA (Suing as administrator/legal

representative of estate of the late **ELPHAS**

WAKHULE WAMUKOYA- (DECEASED).....APPELLANT

V E R S U S

SYLVESTER MAKOKHA.....RESPONDENT

R U L I N G.

1. The respondent herein has filed a notice of motion dated 5th March, 2018 seeking for orders :

- (a) That the Appellant be ordered to deposit a sum of Kshs. 250,000/= or such other sum as the court may find appropriate as security for costs pending hearing and determination of the appeal.
- (b) That such other or further directions be given with respect to this appeal and its disposal/determination.
- (c) Costs be in the cause.

2. The application is premised on the grounds enumerated on the face of the application and the annexed affidavit of the advocate for the respondent, Lydia Kipyego. The grounds in support of the application are:

- (i) That the appellant has been paid the full decretal sum totalling to Kshs. 1,418,165/= emanating from the court's judgment in Kakamega CMCC No.365 OF 2012.
- (ii) That the said payment was made in 2015 and the respondent is wary that if the appeal is dismissed the appellant may not be able to meet the costs of the appeal.

3. The application was opposed by the respondent through his grounds of opposition which are:

- (1). That the application is only an afterthought intended to delay justice and hearing of the appeal.
- (2) That the threshold of order 26 Rule 1 and Order 42 Rule 14 has not been met by the applicant to warrant the granting of the orders sought.
- (3) That the applicant has not demonstrated the substantial loss he stands to lose by evidence.

4. The advocates for the appellant/applicant relied on the grounds in support of the application as set out in the affidavit of **Lydia Kipyego advocate**. The grounds are that the respondent have been paid the decretal sum in full and that they filed the appeal after they had been paid. That the advocates are apprehensive that if the appellant lost the appeal he may not be able to meet the costs of the appeal.

5. The advocate for the appellant **Mr. Ombito** opposed the application and argued that a litigant should not be hindered from accessing justice by an issue of security for costs. They cited the case of Silvanice **Ojwang Odero Vs Eldoret Express Co. Ltd & Another (2012) eKLR** which held that lack of financial muscle should not bar a citizen from accessing justice.

Further that for the application to be granted the respondent has to demonstrate that the appeal has no chance of success. That the respondents have to demonstrate that the appellant will not be able to meet the costs if the appeal fails. The advocates urged that the affidavit by the respondent's advocate does not disclose that they will suffer any loss if the application is not allowed.

6. The application is made under **order 26 Rule 1 of the Civil Procedure Rules** that provides that:

In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.

7. The rationale for calling for security for costs was stated by the Court of Appeal in **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others (2014)eKLR** where the court stated that:

'The rationale for security for costs is to ensure firstly, that a party is not left out 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'.

8. The court has discretion under order 26 Rule of the Civil Procedure Rules to grant or reject an application for security for costs. The court in **Beta Healthcare International Limited Vs Grace Mumbi Githaga Vs 2 Others (2016) eKLR** held that:

*'The law is settled in this area that an order for security of costs is a discretionary one. Order 26 rule 1 of the Civil Procedure Rules actually confers discretion on the court, which is recognition that there may be cases where a call for security for costs may be refused. This discretion is however, to be exercised reasonably and judicially by taking absolute reference to the circumstances of each case. Such matters as, absence of known assets within the jurisdiction of the court, absence of an office within the jurisdiction of the court, insolvency or inability to pay costs'..,'- cited in **Adan Kassim Hussein & Another Vs Gapco Kenya Limited (2018) eKLR**,*

9. The Court of Appeal in **Ocean View Beach Hotel Ltd Vs Salim Sultan Moloo & 5 Others (2012) eKLR** adopted the following principles as laid down in **Keary Development Company Limited Vs Tarmac Construction (1995) ALL ER 534** as a guide on how a court should exercise its discretion in an application for security for costs.

1. "The court has a complete discretion whether to order security and accordingly it will act in the light of all the relevant circumstances.

2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.

3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.

4. In considering all the circumstances, the court will have regard to the plaintiff company prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.

5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount, it is not bound to make an order of a substantial amount.

6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all circumstances, it is probable that the claim would be stifled.

7. The lateness of the application for security is a circumstance which can properly be taken into account."

It is clear from the above principles that the purpose of an order for security for costs is to protect a party from incurring expenses on a litigation which it may never recover from the losing side. It is not to deter the plaintiff from pursuing its claim- see **Aburili J. in Martha Wambui Vs Irene Wanjiru Mwangi & Another (2015) eKLR**

10. In this case the applicant/respondent is apprehensive that the appellant may not be able to pay costs if the appeal is unsuccessful. The onus was on the applicant to establish that the appellant will not be able to pay costs if the appeal is unsuccessful. In **Gatirau Peter Munya case (supra)**, the court stated that it is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The allegation has to be proved.

11. The applicant herein never made any attempt to show that the appellant is a person of straw. There was no claim that the appeal is frivolous or that it has no chance of success. The fact that the applicant has paid the claim in full is not a bar to the appellant filing an appeal. Mere apprehension that the appellant may not be able to pay costs if he lost the appeal is not enough. The applicant has thereby not adduced sufficient grounds in support of the application.

12. An application for security for costs should not be used to deter a party from accessing justice. That there are no sufficient grounds in support of the application denotes that that is what the applicant is attempting to do by this application. I thereby see no merits in the application. The same is dismissed with costs to the appellant.

Delivered, Dated and signed at Kakamega this 12th day of July, 2018

J. NJAGI

JUDGE

In the presence of :

N/A.....appellant

Arwanda Holding Brief Kibichi.....respondent

George.....court assistant

Parties:

Appellant.....Absent

Respondent.....Absent