

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 67 OF 2017

AUGUSTINE ALALA.....APPELLANT

VERSUS

PARAPET COMPANY LIMITED.....RESPONDENT

RULING

1. The respondent filed a notice of motion dated 19th February, 2018 seeking orders that the appellant be ordered to give security for costs for KShs. 637,000/- or any other sum the court deems fit into a joint interest earning account to be opened by the advocates as security for the costs of the respondent within 30 days of the order and that the appeal be struck out with costs in default of the provision of the said security within the prescribed period.

2. The motion is based on grounds that the appellant will not be able to pay the respondent's costs if the appeal is unsuccessful, that the appellant is a person of unknown means and may not be able to settle the costs in the event the appeal fails and that the respondent has already settled the subordinate court decree and will be exposed to loss and prejudice if the costs are not given.

3. A replying affidavit was filed by the appellant on 27th February, 2018 that the respondent partially settled the lower court's judgment sum by paying KShs. 637,000/- instead of KShs. 804,773.70. That he held on executing the balance of KShs. 167,773.70/- and appealed but the respondent never filed a cross appeal. That whereas the record of appeal was duly served upon the respondent on 29th September, 2017, it has taken the respondent over 6 months to fashion the present application. That the same is baseless, frivolous and vexatious and is an abuse of the court process and that the respondent should avail the balance of the decretal sum.

4. In its opening in the submission, the respondent highlighted the essence of an order for security of costs that the purpose of an order for security of costs is to protect a party from incurring expenses on a litigation which it may never recover from the losing side. That it is not to deter the plaintiff from pursuing claim. The cases of **Ocean View Beach Hotel Limited v. Salim Sultan Moloo & 5 Others (2012) eKLR**, **Edward Kamau & Another v. Hannah Mukui Gichuki & another (2015) eKLR** among others were cited in that regard. To illustrate the principles that guide court in exercising its discretion whether or not to allow an application for security of costs, the cases of **Mama Ngina Kenyatta & another v. Mahir Housing Company [2005] e KLR** and **Ocean View Beach Hotel (supra), Keary Development v. Tarmac Construction (1995) 3 ALL ER 534** were relied upon. It was argued that the application for security of costs was promptly made since the record was served upon the respondent on 29th September, 2017 and the application was filed on 20th February, 2018. The respondent cited among other **Agip (Kenya) Limited v. Highlands Tyres Limited [2001] KLR 630** and **Sagoo v. Bhari [1990] KLR 459** in which eight months delay was found not to be inordinate. The respondent enjoined the court to consider the prospects of success of this appeal and whether the order for security will stifle a good claim. That the appellant is urging the superior court to interfere with the discretion of the trial court which had the benefit of conducting trial and award higher damages than has been awarded by the trial court. That the appellant has averred that he is a person of unknown means and the respondent is apprehensive that he might not be able to recoup expenses if the appeal fails. The appellant's submission was on the other hand a reiteration of his averments in the supporting affidavit.

5. The Appellant has not filed an affidavit of means to establish his financial capability or otherwise of paying the costs in the event his appeal is unsuccessful. He has therefore not rebutted the respondent's allegations and an inference is made in favour of the respondent. The Appellant's means is a matter within his knowledge and he should therefore confirm by evidence that he has the wherewithal to refund the Respondent in the event his appeal is unsuccessful. Indeed security for costs is a pre-requisite in the determination of appeals since at the end of the day there will be a requirement that one of the parties will have to satisfy the decree which shall be binding upon him. The Respondent has since paid the Appellant the decretal sums awarded by the trial court and now that the Appellant has preferred an appeal against the trial court's award, I find it is only fair and just that the Appellant should be ordered to deposit security. Consequently, I find the Respondent's Application dated 19/2/2018 merited and is allowed in the following terms:

- a. The Appellant is ordered to deposit half of the decretal sums into a joint interest earning account in the names of both Advocates for the parties within the next 30 days from the date hereof.**
- b. In default to comply, the appeal shall stand struck out.**
- c. The costs of the Application to abide in the appeal.**

Orders accordingly.

Dated and delivered at Machakos this 9th day of October, 2018.

D.K. KEMEI

JUDGE