



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 530 OF 2014**

**NATHANIEL NGURE KIHU.....APPELLANT**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA.....RESPONDENT**

**RULING**

1. The respondent has filed a notice of motion dated 18<sup>th</sup> June, 2015 seeking orders that the appellant does within a time to be fixed furnish the respondent with security for costs in the aggregate of KShs. 128,268/- for the respondent's cost in CMCC No. 9427 of 2004 Nathaniel Ngure Kihui v. Housing Finance Company of Kenya and CMCC No. 2691 of 2013 Nathaniel Ngure Kihui Vs. Housing Finance Company of Kenya Limited; that the appellant do provide further security for costs of this appeal in the sum of KShs. 250,000/- or such sum as may be approved by this court within 30 days; that this appeal be stayed pending the deposit of security and that in default of security, this appeal be struck out with costs.

2. The respondent's legal manager Martin Machira swore an affidavit in support of this motion. It was claimed that in August, 2004, the appellant filed CMCC No. 9427 of 2004 alleging overpayment of a mortgage loan of an aggregate amount of KShs.500,000/- with the respondent. It is said that this was secured by way of a charge over L.R.No. Nairobi/block 90/186. That the suit was heard and judgment was entered in favour of the respondent dismissing the appellant's suit and awarding costs to respondent. The appellant then lodged an appeal against the said judgment HCCA No. 436 of 2011 seeking to set aside that judgment. The appellant is said to have also filed another suit against the respondent, CMCC No. 2691 of 2013 raising issues that were directly and substantially in contention in the previous proceedings i.e. CMCC No. 9427 of 2004. The respondent filed a preliminary objection to it and the preliminary objection was upheld. That it is the dismissal of the second suit that instigated the filing of this appeal. It is claimed that the respondent has obtained certificate of costs in respect of both CMCC No. 9427 of 2004 and CMCC No. 2691 of 2013 wherein costs in both causes were taxed and certified in the sum of KShs. 50,295 and KShs.77, 973 respectively. That the respondent's advocates have written to the appellant's advocates requesting them to provide costs for the two cases to no avail. That in the event this appeal is dismissed and judgment is entered in the respondent's favour, costs of this appeal will be in the region of KShs. 250,000/-. That in the event the appeal does not succeed the respondent is apprehensive that the appellant will be unlikely to pay the costs to the respondent given that he has already refused to pay for costs in the Magistrate's court and that without an order for security of costs the Respondent will be gravely prejudiced.

3. In its submissions the respondent cited **Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & 2 others (2014) eKLR, Johnstone Muthama Vs. Minister of Justice & Constitutional Affairs NRB Petition No. 198 of 2011 and Patrick Ngeta Kimanzi Vs. Marcus Mutua Muluvi & 2 Others HCC Election Petition 8 of 2013** wherein the rationale for security of costs was discussed. It was further submitted that the appellant ought to be ordered to pay security of costs having displayed unwillingness to

pay for costs. In this angle of argument, the case of **Lydia Maitha v. Naisula Lesuuda & another (2013) eKLR** was relied upon.

4. In response thereto, the appellant filed a replying affidavit on 7<sup>th</sup> August, 2015. He contended that while the two suits CMCC No. 9427 of 2004 and CMCC No. 2691 of 2013 pertain to disputes on the same loan, the matters therein are different and that the question whether or not res judicata applies is subject of this appeal. That considering that the suits are different, the costs awarded in CMCC No. 9427 of 2004 cannot be the subject of the respondent's application for security of costs in this appeal. Similarly the question of costs in CMCC No. 2691 of 2013 cannot be the subject of the application. He contended that this application is mischievous since he has an arguable appeal that raises substantive and solid matters of law and fact and has high chances of success. He contended that there are normal court procedures available to the respondent to enforce any order for costs that may be made against the appellant in the event the appeal fails. The appellant's submission was that this application is unconstitutional, misguided and punitive. That it is oppressive to the respondent for the applicant to pray that the payment of KShs. 378,268 be paid within 30 days failure to which the appeal should be struck out. It is argued that the said prayer offends Article 48 of the Constitution which guarantees access to justice. To support his case, the appellant relied on the decision of **Charterhouse Bank Limited v. Frank K. Kamau (2015) eKLR**. It was further argued that the respondent has not demonstrated that this appeal is unlikely to succeed so as to justify the submission that it will be awarded costs for which security should be given. That the respondent has not demonstrated that the appellant has taken any steps in relation to his assets that would make it difficult to enforce an order for costs against him.

5. The rationale for security for costs was discussed in the case of **Gatirau**(supra) as follows:-

***“The rationale for security for costs is to ensure, 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 -vs- Ranchhodbhal 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..”(Emphasis mine)***

***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-***

***a. ....***

***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;..”***

***Further, the High Court (Majanja, J.) in Patrick Ngeta Kimanzi -vs- Marcus Mutua Muluvi & 2 others- High Court Election Petition No. 8 of 2013 held:-***

***“Security of costs ensures that the respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level ground for all the***

*parties involved, in this case, the proportionality of the right of the petitioner to access to justice vis-a-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.”*

*See E. Muriu Kamau t/a Muriu Njoroge & Co. Advocate v. National Bank of Kenya Ltd Civil Application No. Nai. 258/2009 (unreported).*

*In the circumstances of this case, it is therefore, in the interest of justice for the 1<sup>st</sup> respondent to deposit security for costs.*

*The applicant sought security for costs for both past costs in the High Court and costs in the appeal. Rule 107(3) of the Court of Appeal Rules provides:-*

*“The Court may at any time if it thinks fit, direct that further security for costs be given and may direct that security be given for the payment of past costs relating to the matters in question in the appeal”*

6. The principles applicable in an application for security of costs are clearly enunciated in a number of cases but to cite a few: -

*“Lalji Ganji Nathoo Vs Nathoo Vassanjee [1960] EA 315, Noormohamed Abdulla -vs- Ranchhodbhal J. Patel & Another (1962), Marco Tools & Explosives Ltd Vs Mamujee Brothers Ltd [1988] KLR 730, Musena & another Vs Stallion Insurance Company Limited (2005) I KLR 431”.*

For emphasis, I would like to quote from an extract in the case of **Lalji Ganji Nathoo Vs Nathoo Vassanjee** (supra) where the Court of Appeal for Eastern African when faced with a similar application for security for costs delivered itself thus: -

*“Under Rule 60 the burden lies on the Applicant for an order for further security, as it normally lies on the Applicant to a court for any relief, to show cause why that relief should be granted, and that he cannot merely by averring that the security already deposited for costs of the appeal, is inadequate, or that costs in the action below, ordered in his favour, have not been paid, impose obligation upon the court or judge or registrar to grant his application.*

7. In an application for security of 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. This was the holding of the court in the case of **Kenya Education Trust Limited Vs Katherine S. M. Whitton**, Civil Appeal No. 301 of 2009. The same finding was adopted by the court in the case of **Hall Vs Snowdon Hubbard & Company (1) 1899 IQB593**, where the learned judge 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.”*

8. It should, however, be noted that much will depend on the circumstances of each case though the final result must be reasonable and modest. In the **Macro Tool Case** (supra) this point was enunciated by the court in the following terms: -

*“The exercise of the courts power is discretionary. However, the onus is on the Applicant to prove such inability or lack of good faith that would make the order for security reasonable.”*

9. In the present application, it is alleged that if the Appellant does not succeed in the appeal, it is highly unlikely that he would pay the costs to the Respondent, given that he has already refused to pay for costs in the Magistrate's court. It is worthwhile to note that the Respondent has not stated anywhere in the

supporting affidavit that the Appellant will be unable to pay the costs should the appeal fail. Even assuming that was the reason, it is not enough just to allege that a Respondent will be unable to pay the costs. The same must be proven. The Respondent herein avers that the Appellant has refused to pay the costs in the lower court matters. He has not even shown what efforts if any, he has made to recover the costs and if he has faced any problems in the process. It was important for the Appellant to demonstrate that the costs which were awarded in the lower court cannot be recovered through the normal execution process, see the case of **Chepkoech A. Rotich (Suing as the legal representative of the estate of Caroline Jeruto Kochei v. John Masinde Simiyu (2012) eKLR**

10. The Respondent has argued that his right to access justice is guaranteed by Constitution and that no hurdle should be placed before his exercise of that right. The Court of Appeal in the case of **Charterhouse Bank Limited Vs Frank N. Kamau**, Civil Appeal No. 87 of 2014 with regard to this line of argument had this to say when it was faced with an application for an order of payment of further security: -

*“An order of payment of further security of costs would be tantamount to shutting out the Respondents from pursuing their undoubted right of appeal, in the event that they were unable to make payment for security of costs, this would scuffle the appeal contrary to the spirit of the overriding objective of achieving the just resolution of appeals as enunciated under Section 3A of the Appellant Jurisdiction Act, it would be contrary to Article 48 of the Constitution that provides that payments required in accessing justice should be reasonable and should not impede access to justice.”*

The court dismissed an application for security for costs on that basis.

11. For the foregoing reasons, I find that the Notice of Motion dated 18<sup>th</sup> June, 2015 has no merits and its dismissed with costs.

Dated, signed and delivered at Nairobi this 9<sup>th</sup> day of February, 2017.

.....

**L NJUGUNA**

**JUDGE**

***In the presence of***

.....**for the Appellant**

..... **for the Respondent**