



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL CASE NO. 286 OF 2014

MARTHA WAMBUI.....
.....APPELLANT

VERSUS

1. IRENE WANJIRU
MWANGI
2. THE REGISTERED TRUSTEE MATER HOSPITAL.....
RESPONDENT

JUDGMENT

This appeal arises from the interlocutory rulings of Mr. Nchoe Resident Magistrate and Hon. Kabaria (Ms) delivered on 13th June 2014 and 8th July 2014 respectively in CMCC No 2923 of 2014 at Milimani Chief Magistrate's Court, Nairobi.

The Memorandum of Appeal dated 12th September 2014 and filed in court on 16th September 2014 sets out 11 grounds of appeal challenging the above two rulings

The background to this appeal is that on or about 7th May 2014, the deceased John Mwangi Kariuki died while undergoing treatment at the Mater Hospital Nairobi. Following his demise, a row ensued between two ladies Irene Wanjiru Mwangi and Martha Wambui, each of them claiming to be the lawful and bona fide widows of the deceased, and having prior right to collect his body from the mortuary at the Mater Hospital for interment. Each of them therefore wrote to the Mater Hospital administration cautioning that no other person was entitled to the deceased's body except them. The hospital administration was thrown into confusion and advised each of the claimant/disputant to obtain legitimate orders from a court of law, which order would determine who, between the two ladies would be entitled to remove the body from the said hospital facility for interment.

The deceased was a Senior Civil servant working at the Treasury as Chief Internal Auditor. The paternal family of the deceased and his workmates attempted to intervene to mediate the dispute between the two ladies, appellant herein and 1st Respondent but all those efforts went to nought. At one time, the record shows that there was some understanding that the body be handed over to the deceased's father to inter at the ancestral home in Karatina and then other succession matters would follow, but this arrangement again flopped when the appellant walked out of the mediation meeting.

By a plaint dated 23rd May 2014 filed in court on the same day, the 1st Respondent Irene Wanjiru

Mwangi lodged a suit against the appellant herein and the 2nd Respondent the Registered Trustees of the Mater Hospital, seeking for a permanent injunction to issue against the 2nd Respondent not to release the deceased's body to the first Defendant / appellant. She also sought for an order compelling the second Defendant to unconditionally release the body of the deceased for burial.

In addition, the 1st Respondent sought for an order that the appellant herein had no rights whatsoever over the body of the deceased. She also sought for costs of the suit and any further relief.

The said plaint was filed contemporaneous with a notice of motion dated 23rd May 2014 seeking for interim/ temporary injunction to issue in terms of the main prayers sought in the plaint.

The Chief Magistrate's court did on the same day issue an interim temporary injunction preventing the 2nd Respondent herein from releasing the body of the deceased to the appellant herein pending hearing of the application inter partes on 27/5/2014 and encouraged the parties to negotiate for a settlement.

On 27th May 2014, the appellant herein filed her replying affidavit to the Notice of Motion, contending that she was the deceased's lawful wife and that they had 4 issues. She sought orders that the deceased's body should be released to her for burial in Karatina, according to his expressed wishes.

In the meantime, the appellant had also filed a similar suit and application at the Milimani HCC 139/2014 on 22nd May 2014, in which she had sought similar orders against the 1st Respondent and 2nd Respondent herein, but when the matter came up before Hon. Ougo J on 22/5/2014, she directed that the application be served upon the Respondent for inter partes hearing on 26/5/2014. She declined to grant any ex parte orders. when the said application came up before Hon. Ougo J on 26/5/2014 for inter partes hearing, both parties agreed and by consent, the matter was transferred to the Chief Magistrate's court at Milimani to be heard and disposed of thereof there. The said matter was expeditiously transferred and accorded case file number CMCC 2985/2014.

On 27/5/2014, the two matters (CMCC 2985/2014) and CMCC 2923 of 2014 were consolidated for hearing together, by consent of both parties appearing before Hon. T.S. Nchoe (Mr) Ag. SRM and the suit was then slated for full hearing on 5/6/2014 and the hearing did commence in earnest on the said date at 10.00 am. The hearing continued to 6/6/2014 and was adjourned for further hearing on 11th, 12th and 13th June 2014 at 10.30.

On 11/6/2014, when the suit came up for further hearing, Mr. Billy Amendi advocate for the Defendant/appellant herein notified the court that his client had received crucial evidence which was not in her possession at the time the matter commenced for hearing and was therefore seeking leave to adduce that evidence and that she had filed a further affidavit on 11th June 2014, annexing copies of the documents that she intended to rely on, in addition to the earlier documents filed. The indulgence was sought pursuant to section 68 & 69 of the Evidence Act.

The oral application was argued and was opposed by the plaintiff/ 1st Respondent herein who, through her lawyer Mr. Mukele that, the introduction of new evidence at that stage after his client had testified would prejudice her, urging the court to disallow the application. The suit was then re-scheduled for further hearing on 17/6/2014 at 11.00 am and a ruling reserved for 13/6/2014 at 11.00 am.

On 13/6/2014, Hon T.S. Nchoe (Mr) gave directions to the effect that “**The application for availing of documents to the 1st Defendant by the 2nd Defendant is hereby allowed on condition that the 1st Defendant deposits sum of shs. 500,000 as security for costs by close of business on 17/6/2014. The plaintiff be at liberty to recall any witness if need be**”.

The magistrate also fixed the suit for further hearing on 18/6/2014 at 11.00 o'clock. The appellant herein then sought for stay of proceedings pending appeal, which stay was rejected on the ground that it was a burial dispute. The learned magistrate further directed that any dissatisfied party could file an application

for review or setting aside of his orders.

On 18/6/2014 when the matter came up for further hearing, the 1st Respondent's counsel intimated to court that parties were exploring a settlement and sought to converge on 19/6/2014 when it became apparent that there was no consent reached between the parties.

On 20/6/2014 when the matter came up before Hon. T.S. Nchoe, he recused himself from hearing the dispute, on the grounds that he had engaged the parties in mediation attempts to try and resolve the matter and in the process, he had heard a lot of information that was not on record. He then referred the matter to the Ag. CM for further directions.

The Ag. CM, Hon Obulutsa then set down the matter for further hearing on 26/6/2014 before R.M L.W Kabaria (Ms).

Meanwhile, on 18/6/2014, the appellant herein had, following the directive and ruling of 13/6/2014 filed an application for review of the order on deposit of security for costs. The application dated 18/6/2014, was amended and filed on 20th/6/2014, adding a prayer for stay of proceedings pending hearing of the said application.

That amended application was disposed of by way of written submissions. By her ruling delivered on 8th July, 2014, Hon L.W. Kabaria (Ms) RM dismissed the appellant's application for review of orders of Hon. T.S. Nchoe of 13/6/2014 with costs to the respondents.

The parties then agreed to set down the matter for hearing. However, the appellant herein, on reflection, and being dissatisfied with the orders of TS Nchoe issued on 13th June 2014 directing her to deposit shs. 500,000 as security for costs, and the order of L.W. Kabaria M/s- RM issued on 8th July 2014, dismissing an application for review of the order of TS Nchoe issued on 13/6/2014, filed this appeal

Vide her Memorandum of Appeal dated 14th July 2014 and filed on 15th July 2014 challenging both orders of 13th June 2014 and 8th July 2014, the appellant sets out 11 grounds of Appeal these are:-

1. That the learned trial magistrate erred in law and fact by ordering deposit for security for costs where none applied.
 2. That the learned trial magistrates erred in law and fact by making orders that were beyond their jurisdiction.
 3. That the learned trial magistrates erred in law and fact in purporting to preclude the appellant from adducing her evidence.
 4. That the learned trial magistrates erred in law and fact in making unconstitutional and irregular orders.
 5. That the learned trial magistrate erred in law and fact by finding that security for costs be furnished by the appellant herein by applying the wrong principles in her direction in the award of security of costs.
 6. That the learned magistrates erred in law and fact by proceeding to give an order of security for costs whereas no party had made an application for the same and a court cannot purport to exercise discretion without any materials on which discretion can be exercised.
 7. That the learned magistrates erred in law and fact by not appreciating that there was no misconduct by the applicant.
 8. That the learned magistrates erred in law and fact by proceeding to decide on issues not before the court and thereby exercising her discretion judicially.
 9. That the learned magistrates erred in law and fact by giving an order of security of costs at the interim stage before the main suit was determined.
- 10) That the learned trial magistrates erred in law and fact by giving an order of exorbitant security of costs of shs.500,000 to be furnished by the appellant within 5 days yet the appellant was a successful party in the application before the court.

11) That the learned trial magistrate erred in law and in fact by giving an order of security of costs to the appellant to the tune of shs.500,000 without appreciating that she is of no means having lost the sole bread winner her husband John Mwangi Kariuki who is the subject of the Civil suit number 2923 of 2014.

The appellant prayed that the orders of 13/6/2014 and 6/7/2014 be set aside and the court do allow the application of adducing further evidence without an order for security of costs together with costs of this appeal.

I will however summarise the said grounds of appeal into the following issues for determination

1. Whether the appeal herein as filed is competent.
2. Whether the learned magistrates erred in law and fact in ordering the appellant to deposit security for costs of shs. 500,000.
3. Whether the trial magistrate erred in law and fact in rejecting the appellant's application for review of the ruling of 13/6/2014.
4. What orders should this court make.
5. Who should pay costs of this appeal and costs of application for review in the subordinate court.

On whether this appeal is competent before this court, the 1st Respondent submits that no leave of court was sought to file this appeal against the orders of 13/6/2014 and 8/7/2014 as no appeal lies from those orders as a matter of right. I have carefully perused the provisions of order 43 (1) (o) and (x) of the Civil Procedure Act, and undoubtedly, an appeal lies to the High court from an order of Security for costs under order 26 of the Civil Procedure Act as a matter of right. Further, an appeal lies as a matter of right to this court, from an order for review.

The other issue raised on the competence of this appeal is that it was filed out of time without leave of the court.

I have examined the two orders issued on 13/6/2014 and 8/7/2014 giving rise to this twin appeal, and the Memorandum of Appeal filed on 15/7/2014 together with the record of appeal. There is no indication that any leave of court was sought or obtained to file this appeal.

However, the appellant filed a certificate of delay dated 1st October 2014 which states:-

“This is to certify that Billy Amendi & Co Advocates applied for certified copies of proceedings and judgment on the 15th day of August 2014 and the same were ready for collection on the 4th day of September 2014. The period from 15/8/2014 to 4/9/2014 was requisite for preparation and delivery of the same.

Dated at Nairobi this 1st day of October 2014

Signed by

Principal magistrate

Milimani Commercial Courts”

The issue therefore is whether leave of court to appeal against the two rulings was necessary.

As the two orders are appealable as a matter of right, it was expected that the appellant would file an appeal against the order of 13/6/2014 within 30 days, by 12th July 2014. On the other hand, the order of 8/7/2014 would be appealable by 7/8/2014. This is a requirement under Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya and it provides:-

“79G: Every appeal from a Subordinate court to the High court shall be filed within a

period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time”.

The above provision of the law is also backed by Section 75 of the Civil Procedure Act which provides that:-

“75 (1) An appeal shall be as of right from the following orders; and shall also be from any other order with leave of court making such order or of the court to which an appeal would be if leave were granted...

a)

b) any order made under the rules from which an appeal is expressly allowed by rules”.

Under Section 65 (1) of the Civil Procedure Act,

“Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall be to the High court.

a)- deleted

b)- from any original decree or part of a decree of a Subordinate court, other than a Magistrate’s court of the third class, on a question of law or fact.”

Therefore, whereas I find that the appeal herein against the order of 8/7/2014 was filed in time within thirty days on 15/7/2014, and therefore there would be no need for such leave of court being sought and obtained, and neither did she require a certificate of delay to file this appeal, the concern by the 1st Respondent that the appeal herein as against the order of 13/6/2014 is statute barred and incompetent requires an examination. In other words, would the certificate of delay issued by the Magistrate’s court on 1/10/2014 be sufficient to validate an appeal that is filed out of time against the order of 13/6/2014?

To my understanding, Section 79 G of the Civil Procedure Act mandates an aggrieved party to lodge an appeal against an order or decree passed against them within 30 days from the date of the order or decree, and any appeal filed outside that time frame without leave of court as set out in the proviso is incompetent.

Section 79G of the Civil Procedure Act is divided into two parts, with the 1st part stopping the running of time for the filing of an appeal to the High court until the Lower court does certify the period that was required to supply a certified order or Decree, and from the date of such certification, an appeal should therefore be filed within 30 days.

In this case, I observe that by the time the appellant applied for certified copies of proceedings on 15/8/2014, the time for filing of an appeal against the orders of 13/6/2014 had lapsed on 12/7/2014.

The other observation I make is that the appellant herein filed one appeal against two decisions made on different dates.

Regrettably, the appeal against the order of 13/6/2014 does not lie together with the appeal against the order of 8/7/2014 for reasons that I will turn to later in this judgment.

When the court made the order of 13/6/2014, the appellant did not demonstrate any intention to appeal against that decision. She sought for a review, which application for review was dismissed on 8/7/2014.

She did not even apply for certified copies of proceedings or ruling. In my view, Section 79G of the Act only applies or allows for extension of time to file an appeal out of time using a certificate of delay where a party applies for certified copy of the proceedings or order appealed against/ from, within the 30 days period, but the same are not supplied until after the time for appealing has lapsed. And where such time has lapsed, the only option left for the applicant is to seek leave of court to extend the period within which an appeal should be filed. However, that is not the case here.

The appellant showed no desire of appealing against the ruling of 13/6/2014. Instead, she applied for review of the same. That being the case, she cannot hide under the provision of the first part of section 79G of the Civil Procedure Act and rely on a certificate of delay for filing an appeal out of the 30 days stipulated period.

In **Kulwant Singh Roopra Vs James Nzili Maswili (2014) Eklr**, Hon Ngaa Jairus J discussed the above issue as follows:-

“In this case, the applicant was caught out by time such that he could not file his appeal against orders issued by the Magistrate’s court without extension of time.

He had applied for a certified copy of the proceedings and judgment/orders”.

He ultimately got the certified copies of the proceedings and judgment and was also issued with a certificate of delay that certified the period required to prepare the proceedings and judgment, apparently, it is the delay in preparation and delivery of these documents that occasioned the delay in the filing of the applicant’s appeal.

When the appellant filed his appeal, the learned judge (shields J, as he then was) held that the certificate of delay which was filed with the appeal was not the one contemplated under Section 79G of the Act Cap 21. He struck out the appeal and when the appellant appealed to the court of appeal, the latter upheld the High court’s judgment and said at page 187:

“The appellant was entitled to appeal to the High court against these orders if he felt aggrieved by them. Section 65 (1) of the Civil Procedure Act confers a right of appeal on him. But in order to set on foot a competent appeal, the appellant must have filed his appeal within 30 days from the date of the order....this period may be extended provided he obtained from the Magistrates court a certificate of delay within the meaning of section 79G of the Act. The section allows the thirty days to be extended by such period as was required to make a copy of the “decree or order of the court”

As the appeal was to be filed beyond the 30 days prescribed by the rules, the appellant ought to apply and file with the Memorandum of appeal, not only the order of the court but also a certificate of delay.

This means that whenever one intends to file an appeal under Section 79G it is incumbent upon the intended appellant to apply for an order or a decree which he will file together with the Memorandum of appeal, apart from (Sic) the Memorandum of appeal and the decree the applicant must obtain and file a certificate of delay certifying the time taken to prepare and deliver the order or the decree should his appeal be filed outside the 30 day period.

The court explained this better in its judgment at page 187:-

“The question is what documents must the appellant file within 30 days or within the time lawfully extended by the certificate of delay? Since the question contemplates that the appeal is against a decree or order, the appellant is obliged to apply first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the court, if available. Rule 1A of order 41 permits this latter document to be filed as soon and in any event within such a time as the court may order”

Therefore, a certificate of delay within the true intendment of Section 79G must certify the time it took to prepare and deliver to the appellant

“a copy of the order” of the magistrate.

But the certificate of delay exhibited by the appellant did not speak of a decree or order. No such order was sought or extracted. What the appellant, in error, sought and what the court dutifully supplied, were “the proceedings and judgment”

Having found that the 1st part of Section 79G of the CPA is of no assistance to the appellant, I move to the proviso under the said Act which, as stated in this judgment above, starts: **“provided that an appeal may be admitted out of time”**.

In my view, the use of the term **“admitted”** connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time (see **Masoud M Y Noorani Vs General Tyres Sales Ltd (2014)** eKLR where Kasango J (as she then was) cited with approval **Gerald M Limelane Vs Joseph Kangangi (2009)** eKLR where the court stated:-

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out the stipulated period. To do so would actually be an abuse of the court’s process under Section 79B”.

In the instant case, it is apparent that the appellant’s appeal against the order of 13/6/2014 was filed out of the statutory 30 days for filing such appeals. She never sought for the proceedings and or ruling even orally, to enable her lodge the appeal. Not even the order thereof.

She waited until after the time for appeal had lapsed and her application for review had been dismissed is when she appealed against both the order for security for costs made on 13/6/2014 and order of dismissal of an application for review made on 8/7/2014. When this appeal was admitted to hearing on 19/11/2014, she did not even seek out the court to enlarge time and admit the appeal out of time.

The Respondent has urged this court to find that the appeal against the ruling of 13/6/2014 was filed out of time and should therefore be struck out, I agree. But I must also address another aspect of that appeal that renders part of it incompetent and incurably defective not on a point of procedure but on substantive law established.

The issue is that the appellant herein having elected to seek for review of that order of 13/6/2014, which review is what gave rise to the order of 8/7/2014, she was estopped by law from lodging a substantive ground of appeal challenging the substantive orders of 13/6/2014. The appellant filed this appeal challenging those twin orders that were made on different dates, with the orders of 8/7/2014. Each of those orders were appealable as a matter of right under section 75 of the Civil Procedure Act and order 43 of the Civil Procedure Rules.

Section 80 of the Civil Procedure Act which is the substantive law relating to Review provides:-

“ Any person who considers himself aggrieved as by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred.

Or;

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or order therein as it thinks fit”.

On the other hand, the procedural provisions of order 45 (1) of the Civil Procedure Rules provides that:-

“45 (1) Any person considering himself aggrieved- as by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being responded, he can present to the appellate court the case on which he applies to the review”.

From the above provisions of Section 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same judgment/decreed or order. One must elect either to file an appeal or to apply for a review.

Under Order 43 1(x) of the Civil Procedure Rules, an appeal from an order dismissing or allowing an application for review lies as of right. Similarly, under Order 43 (1) (0), an appeal under order 26 rules 1 and 5 (2) (security for costs) is appealable as of right. It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order. Accordingly, I find the appeal herein as against the order of 13/6/2014 incompetent and proceed to strike it out.

The second issue for determination is whether the learned Magistrate erred in law and fact in ordering the appellant to pay security for costs of shs. 500,000.

Having struck out that part of the appeal that challenges the order of 13/6/2014 directly, I find that the answer to this issue lies in my analysis above.

The third issue for determination is whether the trial magistrate erred in law and fact in rejecting the appellant's application for review of the order of 13/6/2014. In my view, this is the main issue for determination in an appeal challenging an order dismissing an application for review.

This court, being the first appellate court, has examined and analysed the record and the affidavit evidence as deposed by both parties to the suit below, together with the submissions by their respective counsels on record, and makes its own conclusion, bearing in mind that it never saw or heard the parties as they submitted before the trial court.

It is worth noting that the impugned order was made following a ruling on an oral application by the appellant, after the 1st Respondent had called evidence of 2 witnesses. The appellant then sought to introduce more new evidence which was not contained in the affidavit's that she had earlier filed in compliance with the pre-trial requirements. The trial magistrate allowed her to introduce that new evidence on condition that she deposits shs.500,000 as security for costs which order she challenged by way of a review application which was dismissed on 8/7/2014 prompting the filing of this appeal.

She submits that the trial magistrate failed to consider her argument that she had no means of raising the said colossal sums of money as her sole breadwinner was the deceased, subject of the dispute.

The 1st Respondent on the other hand submits that the trial magistrate was correct in dismissing the application for review as there was no new or important matter or evidence raised in the application for

review as all the evidence or matters that she was raising were within her knowledge and disposal and as she had all along claimed to be a widow and next of kin of the deceased.

Further, that she had not demonstrated that there was any error or mistake apparent on the face of the record to enable the court review its ruling of 13/6/2014 on security for costs.

My observation from the submissions by both counsels for the parties is that they appear to have concentrated on whether or not the application for leave to adduce additional further evidence by the appellant had any merits or not. In my view, that is to miss the point which I understand to be that the court below did grant the appellant leave to adduce new and additional evidence as contained in the appellants' latter affidavit sworn on 9th June 2014 and filed in court on 11/6/2014.

However, the order was conditional upon her depositing in court security for costs in the sum of shs.500,000 and it is that condition that she was aggrieved by and sought a review thereof in her favour.

The power to make an order for deposit for security for costs is a discretionary one. Order 26 Rule (1) of the Civil Procedure Rules provides that:

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

In **Gatiau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others (2014) e KLR**. The court of Appeal held that 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.”

The court of Appeal in **Ocean View Beach Hotel Ltd Vs Salim Sultan Moloo & 5 Others (2012) Eklr**, citing with approval the decision in **CA 9/2003 Messina & Another Vs Stallion Insurance Co. Ltd** which embraced the principles laid down in **Keary Development Vs Tarmac Construction (1995) 3 ALL ER 534** as a guide on how a court should exercise its discretion on whether to order a plaintiff limited company to provide security for costs to a Defendant in a suit.

The principles laid down in Keary Development Ltd were summarized as follows:-

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.”

These principles, though not exhaustive, will guide me in determining this matter.

From the above principles, it is clear 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.

In this case, however, there was no application on the part of the 1st Respondent, for an order for security for costs. The order was made on the court's own motion upon hearing an oral application by the appellant for leave to adduce further additional evidence.

But an examination of Order 26 rule 1 of the Civil Procedure Rules does not tie the court to making such an order on an application. It says **“the court may order that security for the whole or part of the costs of any defendant or ...be given by any other party”**.

Albeit the appellant was the 1st Defendant in that suit, it should be noted that she was also the substantive plaintiff in HCC 139/2014 which was transferred to the Chief Magistrates Court No 2985/2014 and by consent of both parties consolidated with CMCC 2923/2014.

In my view, therefore, the courts discretion to give an order for security for costs is unfettered under order 26 rule (1), depending on the circumstances of the case. Consequently, albeit it was submitted by the appellant that the court had no jurisdiction to make an order for security for costs. I find that submission and argument unsupported and dismiss it.

I am fortified by the principles set out in the case of **Mbogo Vs Shah (1968) EA 93** that a court of Appeal should not interfere with the exercise of discretion of a Judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been an injustice.

In this case, I find that the learned magistrate did not misdirect himself or that he arrived at a wrong decision or that he was clearly wrong in the exercise of his discretion and I will proceed to give my reasons in the succeeding parts of this judgment.

Further in the case of **Marco Tool & Explosives Ltd Vs Mamuyee Brothers Ltd (1988) KLR 730, the Court of Appeal at page 733 held that:-**

“As the cases show the court has unfettered though judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance from Noor Mohamed's case is that the final result must be reasonable and modest”

A similar decision was reached in **Kenya Educational Trust Ltd Vs Katherine S.M. Whitton CA (Appl) 301/2009** and in **Hall Vs Snowdon Hubbard & Co I (1899) 1 QB 593**, where the Judge held at P. 594.

“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 the **Marco Tool & Explosives Ltd case (Supra)** the court of Appeal 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”.

I have perused the application by the appellant for leave to adduce new evidence under the provisions of

section 68 and 69 of the Evidence Act. The said application was made orally on 11/6/2014. The appellant submitted that the new evidence will go a long way in helping the court to arrive at an informed decision. The said evidence was contained in a further affidavit of evidence sworn by the appellant. The application was also made pursuant to the provisions of section 170 (1) and 173 of the Evidence Act.

In response, thereto Mr. Mukele advocate for the 1st Respondent /plaintiff submitted that it was for the court to decide the importance of the evidence. Nonetheless, he made it clear that his client would be prejudiced if evidence was given at that stage.

Mr. Mwaura for the 2nd Respondent/ Defendant too opposed the application as he had not been served with any documents and that the trial had progressed too far. Further, that leave had not been sought to file that further affidavit.

On 13/6/2014, the trial court gave “directions” allowing the appellant/ 1st Defendant’s application to have the 2nd Defendant to “**avail the documents on condition that she deposits shs. 500,000 as security for costs by end of 17/6/2014**”. The 1st Respondent herein was granted latitude to recall any witness if need be and the 2nd Defendant allowed to file further response documents.

It is the above ruling/directions that compelled the appellant herein to seek stay of proceedings which the court declined and advised the parties to apply for review as the case proceeds to hearing owing to the nature of the dispute. The proceedings are a little mixed up as the direction came before the ruling, with some form of duplication.

The parties then proceeded to attempt mediation and when it failed to materialize they returned to court with an application for review of the ruling made on 13/6/2014 on security for costs by the appellant herein. The application for review is dated 20/6/2014, wherein the appellant argued that no such prayer for security for costs was advanced by the respondent and that being a housewife who was dependant on the deceased, it was unjust for her to be condemned to deposit security for costs as she had no means. That at the time the ruling was made, it was not within the knowledge of the court that she was a widow dependant on the deceased for provision and that she had retired to care for him hence she had no means to raise kshs. 500,000 which was a colossal sum. That the order was ambiguous for not disclosing consequences of failure to comply and that there was an error on record in that the ruling was unclear whether the application to adduce for evidence had been allowed or denied.

In opposing submissions by the respondents and as I have stated above, it was submitted that the appellant was interested in frustrating the 1st Respondent as the evidence sought to be introduced was in their possession at the time of hearing the application for leave to adduce further evidence and that there was no new issue that was not in the courts knowledge as the issue of costs was apparent after she staked a claim to the deceased’s body as her next of kin in her affidavit.

The 2nd Respondent contended that no new & important matter was disclosed, which matter was not within the appellant’s knowledge, that no error apparent on record was disclosed and that she had contradicted herself by stating that she was the guarantor of the hospital’s bills for the deceased.

The trial magistrate did not find any error apparent on record to warrant a review and neither did she find that there was any new and important matter from the record and dismissed the appellant’s application thereby provoking this appeal.

Therefore, on the issue of whether trial magistrate erred in law and fact in rejecting the appellant’s application for review of the ruling of 13/6/2014, on security for costs, this court finds the following:

That the order for review is a discretionary one and as was held in the case of **National Bank of Kenya Ltd Vs Ndungu Njau (CA) No 211/1996 UR** when the court of Appeal (**Kwach, Akiwumi & Pall JJA**) stated that

“A review may be granted whenever the court considers it necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review”.

In **Pancras T Swai Vs Kenya Breweries Ltd (2014) eKLR** the court of Appeal GBM Kariuki, Kiage & J. Mohamed JJA held that

“26 we do not find it necessary to comment on the exercise of court’s discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard.

Although the decision reached by Lesiit, J was correct, it was however not based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi J.

27. We think Bennet J was correct in Abasi Belinda Vs Fredrick Kangwamu and another (1963) EA 557 when he held that:

“a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal.”

29. It seems clear to us that the appellant, in basing his review application on the failure by the court to apply the law correctly faulted the decision on a point of law.

That was a good ground for appeal but not a good ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction. The power to review decisions on appeal is vested in appellate courts. Order 44 Rule 1 (now Order 45 rule 1 of 2010 Civil Procedure Rules) gave the trial court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason”.

The appellant did not bring his application within any of the limbs nor did he show that there was any sufficient reason for review to be granted. As repeatedly pointed out in various decisions of this court, the words “for any sufficient reason” must be viewed in the context firstly of Section 80 of the Civil Procedure Act, which confers an unfettered right to apply for review and secondly, on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.

In Sarden Mohamed V Charan Singh Nard Singh and Another (1959) EA 793, the High Court correctly held that Section 80 of the Civil Procedure Act conferred an unfettered discretion in the court to make such order as it thinks fit on review and that the omission of any qualifying words in that section was deliberate.

In Shanzu Investments Ltd Vs Commissioner of Lands CCA 100 of 1993) this court with respect correctly invoked and applied its earlier decision in Wangechi Kimata & Another Vs Charan Singh (CA 80 of 1985) (UR) wherein this court held:

“any other sufficient reason need not be analogous with the other grounds set out in the rule

because such restriction would be a clog on the unfettered right given to the court by Section 80 of the CPA, and that the other grounds set out in the rule did not in themselves form a genus oror things which the third general head could be said to be analogous.

30. The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now order 45) relates to issues of facts which may emerge from evidence. The discovery does not relate to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to

Applying the above decisions of the court of Appeal to this appeal, I find that first the application by the appellant to adduce new evidence was made orally. The responses too were orally made. At that point in time, the plaintiff and one of her witnesses had already testified although she had not closed her case. The trial magistrate did allow the application on condition that a deposit of security for costs of shs.500,000 be made by end of business on 17/6/2014. That is a clear order that cannot be said to be ambiguous in any way, unless the appellant does not know what she was seeking from the court when her counsel implored the court to allow her to adduce further evidence which had been filed by her further affidavit and which she was simply seeking for a validation.

Furthermore, the trial magistrate allowed the other parties to respond thereto and or to also file other documents in response. The plaintiff was also allowed to recall her evidence if need be.

It is now clear to me that the appellant was dissatisfied by that order. But she elected to apply for review and left out the option of appealing against it.

I reiterate that the order for security for costs is discretionary order which the trial court, having considered the circumstances of the case and noting that the application by the appellant to adduce further evidence had come late in the day when the plaintiff's suit had progressed, ought not to have been disturbed.

The ruling did not delve into the legal intricacies of the application. The court granted the prayer subject to deposit of security of costs, albeit none of the adverse parties sought for the order for security for costs. In my view, the trial magistrate was correct in making that order, which was in any event, never appealed against. Regrettably, the appellant is introducing that as a ground of appeal which I find inappropriate as she had that opportunity to appeal against that decision but opted not to. Having squandered that opportunity, she cannot have a second bite at the cherry, and more so, through what I can describe as the back door.

On the other hand, examining the ruling of L.W. Kabaria (Hon) on the application for review, it is clear that the said ruling is premised on two grounds: whether or not there was an error apparent on the face of the record and (2) whether there was, any discovery of any new and important matter.

In both instances, in my view, the trial magistrate correctly found that there was none of the two conditions fulfilled to warrant a review of the order of 13/6/2014.

However, section 80 of the Civil Procedure Act and order 45 rule 1 of the Civil Procedure Rules as exemplified in the **Pancras T Swai (Supra)** case and as set out in the **Wangechi Kimata & Another (Supra)** case, the court could still review the order made on 13/6/2014 on "**any other sufficient reason**", which ground need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the Civil Procedure Act, and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous".

The appellant in her application for review, regrettably in my view fell short of arguing out the real issue and went on her own frolic by stating what she called new and important matter as being the fact that there was new evidence that showed that she was a next of kin and that the court did not know those facts.

To my mind, that was an irrelevant argument since the court had already allowed her to adduce that very new evidence on conditions, and she was arguing for review as if the court had declined to allow her application to adduce new evidence which was not the case.

The only factor that the court could have considered in that application is whether as deposed in her affidavit sworn on 19/6/2014 the appellant being a widow and housewife who depended on the deceased as sole breadwinner, and therefore, unable to raise the shs. 500,000 security for costs, that deposition in itself would qualify to be “**any other sufficient reason**” to warrant a review of the order of 13/6/2014.

This court has had occasion to examine the record and documents filed in support of HCC 139/2014 which include admission form dated 3/5/2014 of the deceased at the Mater Hospital, documents from Coptic Hospital, Menelik Chest Clinic, and affidavit allegedly sworn by the deceased himself on 14/6/2013 and an affidavit sworn by Jane Wambui Mureu on 26th May 2014.

In those documents, the appellant is described as either wife/spouse or person undertaking to pay the deceased’s hospital bills. In this court’s view, there appears to have been an intimate relationship between the deceased and the appellant herein but as to whether that relationship translates into a marriage is for the trial court to determine.

That being the case, and with paragraphs 11,12 & 13 of her supporting Affidavit in support of her application for review stating that she was not in formal employment or doing business, one would wonder how she would be guaranteeing the payment of the deceased’s medical bills whenever the deceased was hospitalized.

Nonetheless, the deceased having been a Senior Civil Servant, he was no doubt covered by National Hospital Insurance Fund which caters for both inpatient as well as outpatient treatment.

Furthermore, at the time the deceased was allegedly swearing an affidavit dated 14/6/2013 which is on record. It was indicated that the appellant herein was the owner of motor vehicle registration no KBF 748D whose Insurance Police No.KTD/101/005752/2009 comp was in the deceased’s name.

In my humble view, therefore, had the trial magistrate considered the above facts, she could have exercised her discretion and reviewed the order of 13/6/2014, which review, in my view, would not have necessarily been confined to setting aside the entire order for security for costs, but the fact of being unemployed raised by the appellant in her affidavit would have guided the trial magistrate to determine whether or not the depositions as to her means formed “**any other sufficient reasons**” to warrant a review of the order on security of costs.

In Abdalla Vs Patel & Another (1962) EA 447 the court of Appeal for Eastern Africa, the predecessor of the court of Appeal stated:-

“It is right that a litigant, however poor should be permitted to bring his proceedings without hindrance and have his case decided”.

This is not to say that the appellant was poor perse, as she has not brought any proceedings in forma pauperis, and neither does she state when she ceased being a business person as per her undated annexure MW-3 from Menelik Chest Clinic which shows her place of work as “business”. The above annexure is annexed to her affidavit in support of the application for an injunction in HCC 139/2014.

In addition, a pauper, by any stretch of imagination would not own a Land Rover KBF 748D in her own name as at 14/6/2013, whose condition or whereabouts is not disclosed to the court.

Further, as a condition precedent to getting stay of proceedings in the Subordinate court pending hearing and determination of this appeal, the appellant had to comply with the order of Hon. Onyancha J made on 23/7/2014 for depositing of shs.106,400 in court as security towards mortuary expenses within 14 days.

This court agrees with the concerns and observation made by the trial magistrate that the application to adduce further additional evidence by the appellant had come too late in the day, and that rights come with obligations. No doubt, the additional evidence was coming after the plaintiff and her witness had testified, and therefore the new evidence would necessitate a retreat to reconsider her testimony and that of her witness which would mean delaying the suit which involved the burial of the deceased whose body was lying at the Mater Hospital and attracting more preservation charges at the morgue.

However, re-examining the provisions of Order 26 Rule 5(1) which provides:-

“5 (1) If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit.”

The above provision, as earlier alluded to, applies to the appellant herein whose suit was consolidated with the 1st Respondent's suit for hearing and determination. She being a plaintiff (claimant) as well laying claim to the deceased's body, is regarded as a plaintiff. It therefore follows that if she failed to comply with the order for security for costs, then she could either withdraw her claim or on application by her adversary, her claim (suit) would be dismissed.

Under Order 26 rule 2. **“if a suit is dismissed Under Sub rule (1) and the plaintiff proves that he was prevented by sufficient cause from giving the required security for costs, the court may set aside the order dismissing the suit and extend the time for giving the required security”.**

From the above provision, the trial court on the application for review of the order of 13/6/2014, had wide and unfettered discretion to either extend the time for depositing security which had been fixed by the close of business on 17/6/2015 and or reduce the amount of security ordered to enable the appellant comply having regard to all the circumstances of the case and facts placed before her. No doubt, the trial magistrate erred in failing to exercise that discretion.

In my opinion, there was sufficient reason and sufficient cause to apply the above provisions of Order 26 for the following reasons:

- i. That the issue of lack of means was a matter of fact and not law. The law only recognizes that fact as constituting sufficient cause. Those facts emerged from affidavit evidence
- ii. The appellant had been given three days to raise shs.500,000 which in my view, was too short a period for the appellant to raise that kind of money, in the absence of evidence that such kind of money was at her disposal within that period.
- iii. The trial magistrate could have and had the discretion to extend the period or time for giving the required security for the appellant to comply before her defence was heard.
- iv. The trial magistrate had the discretion to revise the ordered security, having regard to all circumstances of the case.
- v. In case the trial magistrate was in doubt, she could have reverted to the objects of Section 3A of the Civil Procedure Act which empowers the court to do complete justice between the parties and to make such order, appropriate to the ends of justice.

I hasten to add that the provisions of Orders 26, 45 and Section 80 of the Civil Procedure Rules and Civil Procedure Act respectively are all procedural underpinnings that are amenable to the substantive justice principles of Article 159 of the constitution **“to decide all cases according to substantive justice without undue regard to procedural technicalities and without undue delay.”**

In **Peter Munya Vs Dickson Mwenda (Supra)** the CA held that:

“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 Noor Mohamed Abdulla Vs Ranchhotdhabal J Patel & Another (1962) EZ 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 for costs, for the court to balance the competing rights of the parties, that is the right to access justice and the right to security for costs. Article 24 (1) (d) of the constitution provides:-

“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...”

The appellant’s complaint in the instant case is that the order for security for costs ought to have been reviewed as she had no means to raise that colossal sum, which default would have the effect of driving her from the judgment seat. She did not say that had the court reduced the amount or granted her more time, she would have complied. The consequences of failure to review that order have been the delay of 8 months. All this time, the deceased’s body lies at the Mater Hospital Mortuary attracting preservation charges.

Applying the principles laid down in the case of **Keary Development Vs Tarmac Construction (Supra)** which I have already enumerated in this judgment, and the holdings in the several court Appeal decisions **including Johnstone Muthama Vs Minister of Justice & Constitutional Affairs NRB** Petition No. 198 of 2011 cited with approval in **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others Supra** that

“.....provisions of payment of costs by a party coming before the court does not in my view violate any provisions of the constitution.

It is a common practice in Civil proceedings intended to safeguard the interests of the party against whom 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 to do so”, and Majanja J in **Patrick Ngeta Kimanzi Vs Marcus Mutua Muluvi & 2 Others HCC Election Petition 8/2013 where he held that:**

“Security for 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 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”.

The same principles as above were upheld in **Harit Sheth Advocate Vs Sharmas Charama CA 68/2008**

where the court of Appeal held:

“The principle aims of the oxygen principle include the need to act justly in every situation, the need to have regard to the principles of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as it is practicable, to place the parties on equal footing”

Indeed, the trial magistrate had in mind the fact that the deceased’s body lying at the Mater Hospital attracted preservation charges and therefore any delay in the determination of the dispute pitying two ladies each of them claiming to have superior rights to the body of the deceased for interment influenced her to order for security for costs, which order I uphold.

However, I find that the trial magistrate failed to properly exercise her discretion under Section 80 and Orders 26 and 45 of the Civil Procedure Act and Rules respectively, in favour of the appellant, having regard to the fact that the appellant was not possessed of sufficient means to deposit security for costs in the sum of shs.500,000 which was excessively high in the circumstances, within 3 days given.

For those reasons, I allow this appeal to the extent that the trial magistrates Order made on 8/7/2014 dismissing the appellants’ application for review of the order for security of costs made on 13/6/2014 is hereby set aside and in place thereof I substitute the order of dismissal with an order allowing that application for review dated 18th June 2014 as amended and filed in court on 20th June 2014 on the following terms:-

1. That the appellant deposits in court a sum of shs. 300,000 surety for costs towards mortuary expenses for the preservation of the body of the deceased John Mwangi Kariuki within 21 days from the date hereof or before the date fixed for defence hearing of the case pending before the subordinate court, whichever is the earlier.
2. That the said sum of shs. 300,000 shall be inclusive of shs. 106,400 deposited in court by the appellant pursuant to the order of Hon. Onyancha J made on 23/7/2014.
3. That the case pending before the Subordinate court to proceed to hearing on priority basis.
4. In default of compliance with order No (1) above, the appellant’s leave to adduce additional further evidence shall stand discharged.
5. This being a burial dispute, although the appellant has substantially succeeded, in the interest of justice, I order that each party bear their own costs of this appeal and the application for review in the subordinate court.

Dated, Signed and Delivered at Nairobi this 9th Day of March, 2015.

R.E. ABURILI

JUDGE

9/3/2015