REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 770 OF 2007

BARRACK OFULO OTIENO.....APPELLANT

VERSUS

INSTARECT LIMITED.....RESPONDENT

RULING

1. The Appellant sued the Respondent in Milimani Chief Magistrate's Court in CMCC No. 10553 of 2005 seeking recovery of damages. The trial court dismissed his claim occasioning the filing of this appeal.

2. The Respondent subsequently filed a notice of motion dated 7th December, 2011 and filed on 2nd October, 2012 seeking that the Appellant gives security for costs for this entire appeal. The application is supported by the affidavit of Njeri Kariuki sworn on 8th December, 2011. She deposed that the Respondent is apprehensive that the Appellant will not be able to cater for the costs of this appeal in the event this appeal fails and as such the Respondent will be greatly prejudiced. That the Appellant has not established that this appeal has high chances of success and the same is continuing to drain the Respondent's resources in defending the appeal. It was further deposed that four (4) years have lapsed since the appeal was filed and the Respondent continues to incur unnecessary costs as the matter progresses and it is in the interests of justice that it should not further be prejudiced by this appeal. That it is in the interests of justice that the Appellant deposits security for costs of this appeal should the same fail pursuant to Order 42, Rule 14 (1) of the Civil Procedure Rules, 2010 and that the parties herein will not be prejudiced in any way if the orders sought are granted.

3. In response, the Appellant filed the following grounds in opposition. That; there is no reasonable evidence in support of the application; that a court cannot exercise its discretion on mere unsupported or unsubstantiated apprehensions by a non-party or counsel acting for a party; that counsel has become a witness which is unacceptable in law; that even a poor Kenyan is entitled to have his day in court and that is why such a Kenyan can even sue as a pauper on application; that the means of the Respondent is unknown and undisclosed and that there has been undue and or unexplained delay in making the application and or it is an afterthought.

4. This application was canvassed by way of written submissions. The Respondent based its arguments on Order 42 Rule 14 (1) of the Civil Procedure Rules, 2010. It was submitted that the above provision does not give any conditions to be fulfilled in order for the orders sought to be granted neither does it give a timeline within which the instant application should be brought. It was submitted that the court has discretion to grant the orders sought which discretion should be exercised judiciously bearing in mind the rights of both parties to the appeal. It was the Respondent's position that the orders should be granted for the reasons that there is an appeal filed and the Respondent's costs ought to be secured before the matter can proceed and secondly, for the reason that the Appellant is taking an unnecessarily long time to prosecute the appeal while the Respondent continues to incur costs to defend the appeal. The Respondent

cited **Aggrey Peter Thande v. ABN Amro Bank & Another (2005) eKLR** and **Butt v. Rent Restriction Tribunal (1982) eKLR**.

5. The Appellant's submissions were a reiteration of the grounds of opposition.

6. I have duly considered the depositions together with the submissions tendered. The issues for determination are the effect of the Njeri Kariuki, advocating swearing the Supporting Affidavit; whether or not there was delay in the filing of the application and the effect thereof and finally whether the Appellant should give security for costs.

7. The learned authors of **Halsbury's Laws of England, 3rd Edition, Paragraph 845** say as follows with regard to affidavits:-

> ***" Affidavits filed in the High Court must deal only with facts which the witness can prove of his own knowledge, except that, in interlocutory proceedings or with leave, statements as to a deponent's information or belief are admitted, provided the sources and grounds thereof are stated...For the purpose of this rule, those applications only are considered interlocutory which do not decide the rights of the parties but are made for the purpose of keeping things in status quo till the right can be decided, or for purpose of obtaining some direction of the court as to the conduct of the cause."***

8. However, under our law (Advocates Practice Rules) Rule 9 Advocates are not permitted to swear Affidavits in contentious matters. The issue of whether security for costs should be paid is a contentious matter. I think it was improper for Counsel to have sworn the Supporting Affidavit.

9. As for the issue of delay in filing the application, I note that this appeal was filed on 14th September, 2007 while this motion was filed on 2nd October, 2011. While I agree with the Appellant that Order Order 42 Rule 14 (1) does not give a time limit within which such a motion ought to be filed, it is in public interest that court business be undertaken within reasonable time. Unreasonable time is such time that can amount to miscarriage of justice and prejudice to the other party. There is nothing on record to explain why the Respondent took close to four (4) years before lodging the application if indeed it was clear to it that the Appeal was just a waste of time. For the said failure I find that the delay is unreasonable and the the application is but an afterthought.

10. The principles on which a court exercises its discretion in an application for security for costs were considered in the case of **Keary Development v. Tarmac Construction (1995) 3 ALL ER 534.** Applying that decision in **Ocean View Beach Hotel Ltd v. Salim Sultan Mollo & 5 Others (2012) e KLR** F. Tuiyot J outlined the principles 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 pursing 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 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.***
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> ***4. In considering all the circumstances, the court will have regard to the plaintiff's 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 the 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."

11. I accordingly, apply the said principles in this matter. The discretion to order for security for costs is to be exercised reasonably and judicially by taking into consideration to the circumstances of each case. Such matters as; 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 a party; the bona fides of the party's claim; or any other relevant circumstance or conduct of the party. Such conduct will include activities which may hinder recovery of costs, for instance recent closer or transfer of bank accounts, and disposal of assets. The conduct of the adverse party or rather the applicant includes, filing of application for security for costs as a way of oppressing or obstructing the other parties claim.

12. The factors advanced by the Respondent is that the Appellant will not be able to cater for the costs of this appeal. In the current application, it is upon the Respondent to prove that the Appellant has no sufficient property in Kenya and is not domiciled in Kenya. The Respondent has not so established. Further, the Respondent opted to bring this application too late in the day which in my view seems to be an afterthought. The same is not brought in good faith. In light of the foregoing, I decline to grant the orders sought. The upshot is that the application is dismissed. Costs shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 10th day of July, 2015.

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A. MABEYA

JUDGE