



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 164 OF 2006

CHEPKOECH A. ROTICH (Suing as the Legal Representative

Of the Estate of CROLINE JERUTO KOCHEI).....APPELLANT

VERSUS

JOHN MASINDE SIMIYU.....RESPONDENT

RULING

The Nakuru CMCC No. 1732 of 2004 was struck out by Honourable Magistrate, Mutembei on 25/10/2006. The Appellant was aggrieved and filed this appeal challenging the said decision. The appeal is scheduled for hearing on 25/7/2012.

In the meantime, the Respondent has filed the application dated 31/2/2012 seeking that the Appellant do provide security of the costs on appeal and costs of the lower court. Counsel for the Respondent, Mr. Mahida swore an affidavit in support of the application. He deponed that in the Lower court, costs claimed are Kshs.20,845 and that despite demand, they have not been paid. It is his view that if the appeal does not succeed, the Appellant may not be in a position to pay the costs to the Respondent.

The application was opposed and Mr. Kisila, counsel for the Appellant, filed grounds of opposition to the effect that no credible reasons have been given as to why the orders should be issued; that the application is brought in bad faith with the intention of locking out the Appellant from his right of appeal; that the application is made six years after the filing of the appeal which is prejudicial to the Appellant since the appeal has hearing date; that the Applicant is guilty of laches and the affidavit in support of the application is incompetent. This application is brought pursuant to **Order 26 of the Civil Procedure Rules. Order 26 Rule (1) of the Civil Procedure Rules** reads as follows;

“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”.

The above rule gives the court discretion to consider whether or not to order that security be provided.

This appeal was filed in 2006. **Mr. Mahida**, counsel for the Respondent wrote to Sheth Wathigo Advocate on 14/4/2010 demanding payment of the costs incurred in the Lower Court. Despite the fact that the Appellant threatened to seek stay of this appeal if the costs were not paid, nothing was done till Mr. Mahida filed this application about two years later. I find it curious that the Respondent would come to seek payment of costs at this stage when he would have done so soon after the filing of the appeal. I do agree with the Appellant that the Respondent is guilty of laches. I would agree with the finding of *Justice Kasango* in **Shakhalaga Khwa Jirongo Vs The Board of Trustee of National Social Security Fund –**

Hcc No. 957 of 2000, that an application brought six years later is prejudicial to the Respondent and should have been brought soon after filing of appeal. There is no explanation why the delay.

I have read the affidavit of Mr. Mahida. The only reason for seeking an order for security for costs is that the Appellant failed to pay the costs when a demand was made in April, 2010. It has not been demonstrated to the court that the Appellant is unable to pay the costs in the event that the appeal is disallowed. And if the Appellant did not pay the costs, there is no evidence that the Respondent attempted to execute for the costs and failed to realize the costs from the Appellant. I do agree with Appellant's counsel that it has not been demonstrated that the costs which are only Kshs.20,000 cannot be recovered through the normal execution process. As held in **Marco Tool & Explosives Ltd Vs Mamujee Brothers Ltd (1988) KLR 730**, the onus rests on the Applicant to prove the Respondent's inability to pay the costs or lack of good faith, in order to show that an order of security for costs is reasonable.

This appeal is scheduled to be heard on 25/7/2011. The date was taken on 21/12/2001. It is curious that even after knowing that the appeal had a hearing date, the Applicant then came to court on 25/2/2012 and managed to obtain the date of 3/6/2012 for the hearing of this instant application. The application can only have been meant to derail and delay the hearing of the appeal. To halt the hearing of the appeal would be prejudicial to the Appellant because he will have been denied the right of appeal.

The Respondent deponed that if security is given, the Appellant will not be able to pay them. It seems the Applicant is suggesting that the Respondent is unable to pay the costs due to poverty but it has been held that poverty is not a ground for ordering security for costs. In **Menno Travel Services Ltd Vs Co-operative Bank of Kenya Limited – Hcc 421 of 2006**, the court relied on the case of **Fauji Auto Trading Company Limited Vs National Bank of Kenya, Hcc No. 3459 of 1995**, where *Justice Kuloba* said;

“what all these considerations mean is that unless it be shown that an order for security is necessary for the protection of the defendant, the court ought not to make an order for security. As it is almost uniformly said in major reference books, the basic principle is that poverty is itself no ground for ordering security for costs, and a poor person is not to be debarred from suing merely because if he lost the suit he could not pay the defendant his costs”.

In conclusion, I decline to order that the Appellant provide security for costs. The appeal comes up for hearing on 25/7/2012 and this application should not stand in the way of the determination of this appeal which has been pending for the past six years. Accordingly, the application dated 31/1/2012 is hereby dismissed with costs.

DATED and DELIVERED this 6th day of July, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Ngure holding brief for Mr. Kisila for Appellant

Mr. Simiyu holding brief for Mr. Mahida for Respondent

Kennedy – Court Clerk