



**Muchori v Muchori & another (Civil Appeal E702 of 2023)
[2025] KEHC 18762 (KLR) (Civ) (18 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E702 OF 2023

LP KASSAN, J

DECEMBER 18, 2025

BETWEEN

IRENE WANJIKU MUCHORI APPELLANT

AND

HEMOCRAFT GROUP LTD 1ST RESPONDENT

EDWARD MUSUNGU MAGERO 2ND RESPONDENT

RULING

1. By the motion dated 10.09.2024, brought pursuant to Section 3A of the *Civil Procedure Act* (CPA) and Order 42 Rule 12 & 14(2) of the Civil Procedure Rules (CPR), Homecraft Group Ltd and Edward Musungu Magero (hereafter the 1st & 2nd Respondent/Respondents) seek orders as against Irene Wanjiku Muchori (hereafter the Appellant) that -;
 - i. Spent.
 - ii. The instant appeal be struck out with costs for being frivolous, vexatious and an abuse of the Court process for having flouted mandatory rules of procedure;
 - iii. In the alternative and without prejudice to prayer (2) above, the honorable Court be pleased to order the Appellant to furnish security for costs within 14 days of the order at a minimum of Kshs. 556,477.20/- being the costs awarded to the Respondents in the lower Court or any other sum the Court deems fit and the amount to be deposited into a joint interest earning account to be opened by the advocates herein;
 - iv. Pending provision of the security for costs by the Appellant, all other and or further proceedings be stayed;



- v. In the event of default by the Appellant to comply with prayer (iii) above the instant appeal to stand dismissed with costs.
 - vi. Costs of the application be borne by the Appellant.
2. The motion is premised on the grounds on its face thereof amplified by the supporting affidavit deposed by Edward Musungu Magero, on even date, who cites being a director of the 1st Respondent duly authorized to depose the affidavit. That the Appellant's claim Nairobi CMCC No. 5422 of 2017 (hereafter lower Court Suit) was dismissed vide a judgment dated 30.06.2023. That on 28.08.2023, the Respondents advocate on record wrote to the Appellant requesting party and party costs assessed at a sum of Kshs. 556,477.20/- be settled however the same did not elicit a response. He goes on to depose that the first time the Respondents encountered the appeal was on 09.09.2024 when their advocate was served with copies of the Appellant's written submissions. Upon due diligence, it was discovered that the appeal was filed on 28.07.2023 however the Appellant neither served or filed a return of service in respect of filed Memorandum of Appeal. He states that non-service was deliberate in order to steal a march.
 3. That it can be noted from the record of proceedings that the Appellant has been attending to the matter ex parte despite directions by the Court on service of notices upon the Respondents meanwhile the Appellant connivingly had the appeal admitted on 14.05.2024. He states that it is obligatory of the Appellant pursuant to Order 42 Rule 12 of the CPR to serve the memorandum of appeal on any and all Respondent(s) relevant to the appeal. That by failing to effect service, the Appellant flagrantly flouted rules of procedure thereby prejudicing the Respondents right to a fair hearing. He states that the Appellant is not ordinarily a resident of Kenya and neither does she have any known properties therefore the Respondents are apprehensive that they will be unable to recover costs. In summation, he states that the Court ought to allow the motion as prayed.
 4. The Appellant opposes the motion by way of grounds of opposition dated 20.11.2024. She takes issue with the motion on grounds;- that the motion is bad in law, misconceived, frivolous and an abuse of the Court process; that the motion contravenes the overriding objectives espoused in Section 1A & 1B of the CPA and principles enshrined in Article 159(2)(d) of the Constitution; that the motion misrepresents and misconstrues the judgment dated 30.06.2023 appearing on pages 182-188 of the Record of Appeal dated 03.06.2024 on the aspect of costs; and that the motion is therefore incompetent, fatally defective and does not lie and the same ought to be struck out or dismissed with costs.
 5. The Respondents motion was disposed of by way of submissions, of which, the Court has duly considered alongside the rival material. In light of the aforestated the Court postulation that the singular issue for determination concerns:
 - a. Whether the Court ought to strike out the appeal for failing to comply with the provisions of Order 42 Rule 12 of the CPR?
 - b. Whether the Court ought to order for provision for security for costs in the sum of Kshs. 556,477.20/- ?
 - c. Who ought to bear the costs of the motion?



Whether the Court ought to strike out the appeal for failing to comply with the provisions of Order 42 Rule 12 of the CPR?

6. At the outset, it warrants mentioning that in opposition to the motion, the Appellant preferred to file grounds of opposition. While Order 51 Rule 14 (1) of the CPR recognizes grounds of opposition as one of the modes, to wit, a the party may oppose an application, recently the Court of Appeal in *Blue Thaitian SRL (Owners of the Motor Yacht ‘Sea Jaguar’) v Alpha Logistics Services (EPZ) Limited (Civil Appeal (Application) E012 of 2020) [2022] KECA 1240 (KLR)* observed that the effect of filing grounds of opposition in response to an application confines a party to issues of law and legal arguments only.
7. That said, Order 42 Rule 12 of the CPR provides that;
Where the judge admits the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.
8. Thus, to confirm whether the appeal was in compliance of Order 42 Rule 12 of the CPR, the Court must revisit the record. The instant appeal was filed on 28.07.2023 whereafter directions pursuant to Section 79B of the CPA as read with Order 42 Rule 11 of the CPR alongside those on disposal of the appeal were issued by Meoli, J on 14.05.2024. The Respondents contention is that they first came to learn of the appeal on 09.09.2024.
9. As earlier noted, the Appellant eschewed filing an affidavit in response to the Respondents’ contestation. As such, the Court is at a disadvantage of knowing when the Memorandum of Appeal in the instant matter was actually served.
10. Whereas the Respondents assert that they only came to know about the appeal on 09.09.2024, a perusal of the Case Tracking System (CTS) and record before this Court, it appears to be true that the latter came to learn about the appeal when their counsel filed a Notice of Appointment on 09.09.2024. That said, the record still does not disclose when the Memorandum of Appeal was served upon the Respondents in line with Order 42 Rule 12 of the CPR and on the backdrop of directions issued on 14.05.2024 by Meoli, J.
11. However, it is notable that the CPR does not provide for the consequential effect of the Appellant’s failure to serve its Memorandum of Appeal. However, it expressly prescribes that the upon directions being issued pursuant to Section 79B of the CPR, the Registrar must notify the Appellant of the said directions.
12. Nevertheless, it must be stated that dismissal of appeal is expressly provided for pursuant to Order 42 Rule 35 of the Rules and is hinged on directions having been issued on the appeal pursuant to Order 42 Rule 13. While, I note that the said directions were posted on the CTS, there is no indication from either the CTS or the original record that the said directions were served by the Registrar upon the Appellant, as prescribed by the CPR.
13. I reasonably believe that, application of Order 42 Rule 12 of the CPR is to the effect that, only after the Registrar’s notification of Court directions upon the Appellant does the requirement of service of the Memorandum of Appeal within seven (7) days, kick in. As earlier noted, it would appear it was not until 09.09.2024 that the Respondents came to learn of the appeal despite the same having been filed on 28.07.2023 and directions pursuant to Section 79B being issued on 14.05.2024.



14. Ordinarily, good practice would require that upon filing for the Memorandum of Appeal the same is served upon Respondent. Unlike the Court of Appeal Rules which specifically provides for timelines on service of the Notice of Appeal, Memorandum of Appeal and Record of Appeal, upon filing, the CPR does not replicate such provisions whereas service of the Memorandum of Appeal seems to be contingent on directions being issued and thereafter the Appellant being notified of such directions by the Registrar.
15. While I agree it would be improper practice for the Appellant to sit on an appeal and fail to serve the same promptly upon Respondent(s), in the instant matter it would be prejudicial to dismiss or strike out the appeal where there was no compliance with strictures of statute, concerning directions pursuant to Section 79B.
16. The latter would appear to be the only saving grace in the face of obvious delay by the Appellant in serving the Memorandum of Appeal. Consequently, the Respondent's objection Order 42 Rule 12 of the CPR cannot succeed in light of this Court's finding on the issue as presented.

Whether the Court ought to order for provision for security for costs in the sum of Kshs. 556,477.20/-?

17. Here, concerning provision of security for costs pending appeal, the same is expressly provided for in Order 42 Rule 14 of the CPR. It states that-;
 - (1) At any time after the memorandum of appeal has been served the court, in its discretion, may order the appellant to give security for the whole or any part of the costs of such appeal.
 - (2) If the appellant is not ordinarily resident in Kenya and has no sufficient property in Kenya (other than property to which the appeal relates) the court shall order the giving of security for the whole or part of the costs of the appeal within a time to be limited in the order.
 - (3) If security for costs is not given within the time ordered the court may dismiss the appeal.
18. From the above provision, it is my understanding that an order for security for costs is dependent on two situations, either by discretion of the Court or where the Appellant is not ordinarily a resident within the jurisdiction of the Court and has no sufficient property within the jurisdiction of the Court. By their affidavit material the Respondents have asserted that the Appellant is not ordinarily a resident of Kenya and neither does she have any known properties therefore this Court ought to order for provision of security of costs. The Appellant did not offer any riposte to the above assertion by either stating that she is a regular and or a resident in Kenya or that she has property within the Republic.
19. Majanja, J. in *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 others* [2013] KEHC 3481 (KLR), addressing himself to the purport of security for costs observed that-;

“Security of costs ensures that the respondent is not left without a recompense for any costs or charges payable to him. The duty of the court is therefore to create a level playing 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.”
20. Here, the Respondents justified why the Court ought to order provision for security for costs pending appeal whereas the Appellant has failed to offer any substantive rebuttal on the issue. To the latter end, the Respondents have evinced a certificate for costs from the lower Court in the sum of Kshs.



556,477.20/-. In the circumstance, applying my discretion, I am inclined to allow the prayer for provision for security for costs. As such the Respondent motion succeeds in the following terms;

- a. The Appellant to provide security for costs in the sum of Kshs. 556,477.20/- pending hearing and determination of the instant appeal within fourteen (14) days of this ruling.
- b. That failure to comply with the above, the appeal will automatically stand dismissed.
- c. The costs of the motion in the sum of Kshs. 7,000/- are awarded to the Respondents in event.

21. Orders Accordingly!

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 18TH DAY OF DECEMBER 2025.

HON L P KASSAN

JUDGE

In the presence of;

No appearance for Appellant

Kimanthi for Respondent

Carol – Court Assistant

