

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ELCEPA NO. E002 OF 2025

JOSEPH MIARI

MKOTA.....

APPELLANT

VERSUS

EMMUEL WAWOLE

MOCHAWARESPONDENT

RULING

1. This ruling is in respect to the Respondent’s Notice of Motion dated 16th December 2025 which was brought under the provisions of **Order 42 Rule 14, Order 26 Rules 1, 4 and 5 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act**. The Application seeks the following orders:

i) ...Spent.

ii) THAT the Honourable Court be pleased to grant orders compelling the Appellant to deposit

in court any such amount or such security as is sufficient to cover the costs of the Respondent in the Appeal.

iii) The Honourable Court be pleased to dismiss this appeal upon failure of the Appellant to deposit such security with the court.

iv) THAT this Honourable court be pleased to make any other or further order as it deems fit.

v) Costs of the application be provided for.

2. The application is premised on the grounds on its face and the supporting affidavit of the Respondent sworn on 16th December 2025.
3. It is the Respondent's contention that the trial court delivered its judgment on 7th August 2025 in favour of the Respondent and also granted costs of the suit. The Appellant has no known movable and immovable assets or otherwise situate in Kenya and the Respondent is apprehensive that he will not be able to secure his costs for defending this appeal.
4. The Application was opposed by the Appellant vide grounds of opposition dated 22nd January 2026. It was argued that

the prayers sought in the application will impede and hinder access to justice since the Appellant has a right to pursue his appeal. The application is not merited and that granting the orders sought will prolong the determination and expeditions disposal of the appeal.

5. During the plenary hearing of the application, Learned Counsel **Mr. Wahome** made oral submissions in opposition to the application while the Respondent **Mr. Wawole** acting in person submitted in support of the application.
6. I have considered the Application, the response and oral submissions made by parties. The issue which in my opinion arise for determination is whether or not the Respondent has made out a case to warrant the court to direct the Appellant to provide security for the costs pending the hearing and disposal of the Appeal.
7. Under **Order 42, rule 14 of the Civil Procedure Rules**, after a memorandum of appeal has been served, the court in its discretion, may order the appellant to provide security for the whole or part of the costs of the appeal. If the appellant is not ordinarily resident in Kenya and lacks sufficient property in Kenya (apart from property related to the appeal), the court may order security be given for all or

part of the costs. Failure to provide the ordered security within the time specified can lead to the appeal being dismissed.

8. It is also worth noting that mere inability is however not enough, the Court must satisfy itself that it will be just to make the order for costs on the facts and circumstances of the case. Other factors that the Court would consider are the residence of the party whom the order is sought against as well as the conduct of the parties.

9. In **Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others, CA No. 38 of 2013 [2014] eKLR**, the Supreme Court emphasized that:

“In an application for further 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. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable.”

10. Equally in the Supreme Court case of **Westmont Holdings SDN BHD v Central Bank of Kenya & 2 Others (Petition 16 (E023) of 2021) [2023] KESC 11 (KLR)**, The Supreme Court held that while the law permits security for costs and appellate courts have jurisdiction to make such orders under **Order 42, rule 14 of the Civil Procedure Rules** and **Rule 107 of the Court of Appeal Rules**, the exercise of that discretion must not stifle access to justice.
11. In the present case, the Respondent has alleged that the Appellant does not have any known property in Kenya, and that in the event that he is successful his appeal, he will experience difficulties in recovering costs that may be awarded.
12. The Court must exercise this power judicially and particularly to ensure that it meets the end of justice as opposed to assisting a party act in the abuse of the Court process. In the case of **Peter Munya (supra) and Westmond Holdings (Supra)**, the Apex Court emphasized that in an application for further 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 merely allege without sufficient evidence that a Respondent will be unable to pay costs in the event that he is unsuccessful. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable.

13. When faced with such an application, the court should also balance the competing interest between the parties to ensure that the order for security for costs does not impede on the right to access to justice as enshrined under the Constitution.

14. **Article 48 of the Constitution** guarantees the right of access to justice while **Article 159(1) of the Constitution** requires the Court in exercising judicial authority to be guided with the principle that justice shall be done to all irrespective of their status. The Appellant argued that the current application was tantamount to seeking this Court to deny him access to justice.

15. In considering whether or not to grant the application and in line with the principles set out in the authorities cited herein, I have perused the supporting affidavit sworn by the Respondent on 16th December 2026 January 2021 and I noted that he did not furnish this court with any cogent

evidence to support his claim that the Appellant is financially unstable so as to justify his averments that he will experience difficulties in recovering costs from the Respondent should he be successful in the Appeal. In other words, no material was placed before this court to show that the Appellant is in dire straits such that he will be unable to meet their financial obligations for costs should he lose the case. Further it is also worth noting that the costs awarded by the trial court have not been assessed and hence are not recoverable as at this stage.

16. In view of the foregoing, I am unable to uphold the Respondent's argument in support of his application. Consequently, the Application dated 16th December 2026 is declined and dismissed with orders that costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS
9TH DAY OF FEBRUARY 2026.**

**E. K. WABWOTO
JUDGE**

In the presence of: -

Mr. Wahome for the Appellant.

**Mr. Emmanuel Wawole Mochawa the Respondent
appearing in person.**

Court Assistant; Mary Ngoira.