

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**APPEAL NO. E341 OF 2024**

*(Before D. K. N. Marete)*

**FLASHCOM SECURITY LIMITED.....RESPONDENT/APPLICANT**  
**AND**  
**WICKLIFFE MOGAKA MARIERA.....APPELLANT/RESPONDENT**

**RULING**

This is an application dated 11th February, 2025 and comes out thus;

1. *This Honourable court be pleased to order payment of security of costs by the Appellant/Respondent as a condition for admission of the Appeal.*
2. *This Honourable court be pleased to order the Appellant/Respondent deposit as security the total sum of Kshs.591,587.50 or any other sum the court deems fit into a joint interest earning account held by the respective advocates of the Applicant and the Appellant/Respondent within 30 days of the order.*
3. *In the alternative to Prayer No. 2 of this Application, the Honourable court be pleased to order the Appellant/Respondent to deposit the total gross sum of Prayer No. 2 herein above into this Honourable court within 30 days of the order.*
4. *Costs to this Application be borne by the Appellant/Respondent.*

The application is premised on a judgment of court that was obtained in the event of non-attendance of court on the part of the Applicant/Respondent plus costs. The Applicant prays for a deposit of an amount of half of the claim being Kshs.469,387.50 and the costs of the suit and the later application being Kshs.97,200.00 and Kshs.25,000.00 respectively all totaling Kshs.591,587.50 in all. It is their

case that the Respondent has failed to meet the Applicant's costs awarded in the suit besides costs for the dismissed application and instead filed the present appeal. They therefore pray that the Respondent offers this security for performance of the Decree, costs of the dismissed application and those of the appeal.

The Applicant in an Applicant's Supplementary Affidavit sworn on 1st September, 2025 further re-enforces the application by refuting claims that it never served the Respondent with the Decree and certificate of costs by demonstrating this in an annexed letter dated 15th May, 2024 which is duly acknowledged by counsel for the Respondent. This is besides their case that the narration of the case at the trial court is not indeed a prosecution of the appeal but a demonstration of the Respondent's laxity and indolence in prosecuting their claim.

The Respondent in a Replying Affidavit sworn on 8th July, 2025 opposes the application and avers that the Applicant is misleading the court in seeking the order for a deposit of security to the tune of Kshs.591,587 being the amount claimed in their dismissed Memorandum of Claim. It is the Respondent's case that his non-attendance of the hearing at the trial court was occasioned by circumstances beyond his control and which were explained in the dismissed application seeking a reinstatement of the Claimant's suit.

The Respondent's further case is that he has not been served with the decree and certificate of costs and only came to know of the same via this application. Secondly, this application is coached in a way and comes out as the applicant's case on the merits of the appeal and a prophesy on the same even when this is yet to be canvas and determined by court. They therefore pray that the appeal be admitted and heard on its merits in the interest of justice.

The Applicant in their written submission dated 1st November, 2025 disparages the defence/Respondent for displaying a relaxed prosecution of the claim before the trial court thereby leading to its ultimate dismissal. It is their case that the Appellant at trial was awarded three open chances to be heard of his claim but failed to appear and prosecute the case. He was only awakened by a dismissal of the suit and judgment out of their favour.

In further buttressing of their case, the Applicant raises the issue for determination as whether an order for security for costs is reasonable in the circumstances of this case. They seek to rely on authority of the Court of Appeal Rules, 2020, Rule 107(3) which provides as follows.

*The court may at any time if it thinks fit, direct that further security for costs be given and may direct that security be given for the payment of past costs relating to the matters in question in the appeal*

The Applicant further seeks to rely on the authority of **Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others Petition No. 16 (E023) of 2021 the Westmont Case** where the Supreme Court outlined twenty-one principles that are to be considered in all cases of award of security of costs as follows;

- a. *the prospects of success of merits of the proceedings.*
- b. *the genuineness of the proceedings.*
- c. *the impecuniosity of the plaintiff.*
- d. *whether the Plaintiff's impecuniosity attributable to the defendant's conduct.*
- e. *whether the plaintiff is effectively in the position of a defendant.*
- f. *whether an order for security for costs would stifle the proceedings and/or impede access to justice.*
- g. *whether the proceedings involve a matter of public importance.*
- h. *whether there has been an admission or payment in court*

- i. whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant*
- j. the costs of the proceedings*
- k. whether the security sought is proportionate to the importance and complexity of the subject matter in dispute*
- l. the timing of the application for security for costs*
- m. whether an order for costs made against the plaintiff would be enforceable within the republic of Kenya*
- n. the ease and convenience or otherwise of enforcing a Kenyan court judgment or order in the country of a non-resident plaintiff or appellant*
- o. if the plaintiff is a natural person, an order for security for costs cannot be made merely on account of his or her impecuniosity*
- p. security for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct*
- q. if plaintiff fails to comply with an order under this rule, the court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed*
- r. the provisions of any Act under which the court may require security for costs to be given such as the Elections Act*
- s. a second motion for security for costs will not succeed unless there is an unforeseen and material change in circumstances since the first order for security an example of an unforeseen and material change in circumstances might be there a plaintiff has come into a sum of money sufficiently large that they could no longer make an impecuniosity argument*
- t. the defendant seeking increased security bears the onus of demonstrating a significant gap between the security ordered and the actual expenses which were not foreseeable and that in hindsight the original request for security for costs was based on an assessment of the complexity of the case which hindsight was not realistic*

- u. The jurisdiction to increase or decrease the amount of security already ordered should not be exercised lightly or be used to second guess the court that made the original order, whether on consent or otherwise, unless the gap between what was ordered and what later appears to be necessary is significant*

The Applicant seeks to rely on the trial court's ruling to reiterate and support their case that the Respondent was awarded adequate opportunities to be heard but squandered these through their indolence. He now seeks the court to aid this indolence. Moreover, the Respondent cites the impecuniosity of the Applicant and therefore disability to pay the costs of their Appeal should it be unsuccessful. This is demonstrated by the Appellant's disability to meet the costs that were awarded for the dismissed application and the suit. This is a display of lack of good faith when the same Appellant was not keen to prosecute his case at trial.

The Applicant further submits that the purpose for security for costs is to forestall the concerns of potential difficulties in seeking to recover costs. It is their other case and submission that their search for security for costs is appropriate and further that the application is filed without delay and does not in any way impede access to justice.

The Appellant/Respondent submits that their failure to prosecute their claim was due to circumstances beyond their control and this were explained in the dismissed application seeking reinstatement of the claim at trial court. This court notes that indeed, on the ruling of the trial court made on 7th November, 2024 the Appellant/Respondent that on two occasions, that is 17.09.2023 and 13.12.2023, the Appellant travelled from Kisii to attend court and was unable to reach Nairobi on time. His cellphone number lost power and went offline and he was therefore unable to communicate. He had relocated Kisii, to his rural home in Kisii after he lost his job and also lost his

mobile phone hence his challenges in communication between the years 2021 and 2022. Again, on 13.03.2024, confusion arose between the Appellants and counsel and the matter was dismissed while he was in the counsel's offices at 900 hours.

This raises the big question on the jurisdiction of this court. The court enjoys national jurisdiction. It is not restricted to localized or regional jurisdiction boundaries. This is intended to facilitate parties to file and thrash out their matters anywhere within the national boundaries of Kenya. Again, this is for good measure. Industry and employers are a national facet and are sometimes located in various sections of Kenya. More importantly, and at the risk of being accused of being a sympathizer of or holding brief for employees, these can, on termination of employment, relocate and file their matters in dispute at their new places of residence and abode. They are not confined to litigating their grievances at the place or jurisdiction of occurrence. In the instant case this matter, ought to have been filed to the convenience of the Appellant/Respondent and not necessarily Nairobi.

A look at the respective cases of the parties tilts this application in favour of the Respondent. They have, on a balance of probabilities established that they had difficulties in prosecuting the claim at the trial court and this ultimately led to its dismissal. Efforts to redeem through an application for restatement on the claim which thoroughly explained the circumstances behind the failure to attend court were thwarted by its dismissal.

A further look at the authority of **Westmont Holding SDN BHD** (supra) establishes that the conditionalities set out as watchdogs for an award of security for costs by the Supreme Court come out in favour of the Respondent; a denial of a grant of this application for security of costs. These include, *inter alia* taking into account the prospect of success of the proceeding, the guinness of the

proceedings and whether an order for security for costs would stifle the proceedings and or impede access to justice. These in all dispel a case of issue of the orders sought to the Applicant.

Of critical notation is the fact that the Appellant is pursuing a case of unlawful termination of employment. Having lost his job and livelihood, he is now retired to his rural home in Kisii where he is eking a living by whatever means. Whereas it is agreeable that he should have lived on after such dismissal from employment, it is clear that he is not a man of means any more. Asking for a deposit of Ksh.591,587.00 from such a soul would be tantamount to stifling these proceedings or in toto impeding his access to justice. This is unfathomable and unjust. With a walkover across most of the requirements for issue of security for costs, the Respondent's case takes sway.

I am therefore inclined to dismiss the application with costs to the Respondent.

Delivered, dated and signed this **25th** day of **February** 2026.

**D. K. Njagi Marete**  
**JUDGE**

Appearances:

1. Mr. Mwasi instructed by Mwasi & Company Advocates for the Respondent/Applicant.
2. Mr. Rakoro instructed by Rakoro & Company Advocates for the Appellant/Respondent.