



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: WAKI, SICHALE & OTIENO-ODEK, J.J.A.)

ELECTION PETITION APPEAL (APPLICATION) NO. 5 OF 2018)

BETWEEN

HON. CYPRIAN AWITI.....1ST APPELLANT

HON. HAMILTON ORATA.....2ND APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER,

HOMABAY COUNTY.....2ND RESPONDENT

HON. JOSEPH OYUGI MAGWANGA.....3RD RESPONDENT

HON. JOSHUA ORERO.....4TH RESPONDENT

(An application for orders that the Appellants do deposit security for

costs from the judgment and decree of the High Court of Kenya

at Homabay, (Karanja, J.) dated 20th February, 2017,

in

H.C.E.P. NO. 1 OF 2017)

RULING OF THE COURT

The applicants, **JOSEPH OYUGI MAGWANGA** and **HON. JOSHUA ORERO** (who are the 3rd and 4th respondents in the appeal) filed a Notice of Motion under **Rules 27** of the Court of Appeal (Election Petition) Rules of 2017 and **Rules 42, 47, 107(3)** of the Court of Appeal Rules and all other enabling

provisions of the law. They sought the following orders against **HON. CYPRIAN AWITI, HON. HAMILTON ORATA** (the 1st and 2nd appellants respectively) and the **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)** (the 1st respondent) and the **RETURNING OFFICER, HOMA BAY COUNTY** (the 2nd respondent):-

“1. Spent

2. That the appellants and the 1st respondent herein be ordered to provide security for the past Costs of the Suit giving rise to the Appeal currently capped at Ksh. 6 million and further Security for the Costs of this Appeal, in the total sum of Ksh.20million or such other sum in the Superior Court’s ratio of 1:2 or in such other manner as may be approved by the court within 14 days of the order herein or such other period as the Court may order to be held in an interest-bearing account in the joint names of the Advocates for the Appellants, 1st respondent and the Applicants herein;

3. That the Appellant’s Appeal as against the 3rd and 4th Respondents herein as well as the Appeal by the 1st and 2nd Respondents as per their Notice of Appeal dated 23rd February 2018 be stayed pending the deposit of such security to be held in a manner acceptable to the 3rd and 4th respondents.

4. That alternatively, in default of compliance with prayer (2) above, the appellant’s appeal as against the 3rd and 4th Respondents/applicants be struck out with costs.

5. That the costs of this application be provided for.”

The motion was supported by the grounds on the face of the motion as well as the supporting affidavit sworn by **Hon. Joseph Oyugi Magwanga** on 19th March, 2018 in which he deponed that the Election Petition dated 6th September, 2017 filed by him against the appellants and the 1st and 2nd respondents was successful; that vide a judgment dated 20th February, 2018 the trial court awarded costs to the applicants which were capped at Ksh.6 million (subject to taxation); that on account of past conduct of the appellants and the 1st respondent, the applicants are apprehensive that they may never recover their costs; that if certification for four counsel is granted, the costs of the trial court are likely to rise to Ksh.20 million.

The motion was resisted by the filing of two affidavits by Hon. Cyprian Awiti on his behalf and on behalf of the 2nd appellant and that of Michael Kosgei on behalf of the 1st and 2nd respondent.

In his affidavit dated 11th April, 2018, Hon. Cyprian Awiti deponed that he paid Ksh.500,000/- as mandatorily required by **Rule 17** of Court of Appeal (Election Petition) Rules (hereinafter referred to as “**the 2017 Rules**”); that the 1st and 2nd appellants are the sitting Governor and Deputy Governor respectively serving their second terms of office; that if excessive security of costs was to be ordered, then this may impede access to justice; that contrary to the applicants’ assertions, he has not previously failed to pay fees as he has not engaged the applicants in any other proceeding/s, either personally or through proxy.

On behalf of the 1st and 2nd respondents, **Michael Kosgei**, the County Returning Officer, Homa Bay County, swore an affidavit dated 20th April 2018 and deponed that the 1st respondent is a Constitutional Commission and derives its funds from Parliament. He further asserted that the 1st respondent’s existence is in perpetuity.

On 10th May, 2018 the motion came before us for plenary hearing. The applicants relied on their written submissions dated 6th April, 2018 and its list of authorities of even date. The applicants’ counsel submitted that the right to security for costs does not militate against the appellants’ rights of access to

justice as access to justice cuts both ways; that the applicants, just like the appellants should be treated equally and each party's rights of access to justice protected he cited the case of **Johnson Muthama vs. Minister For Justice Constitutional Affairs, & Others NBI Petition No. 196 of 2011** which was cited in **Peter Munya vs Dickson Mwenda Kithinji & 2 others [2014] eKLR** where this court underscored the need to protect a party from frivolous claims by ordering for payment and that by so doing this was not tantamount to a denial of access to justice and is not a violation of the constitutional guarantee on access to justice as stipulated in **Article 48** of the Constitution. Counsel further submitted that poverty was not the only criterion to be considered in an application for security for cost, but also the types and *bona fides* of the litigants and the nature and merits of their cases. Counsel relied on this Court's decision of **Abdinasir Yasin Ahmed & 2 Others vs. Abass & 2 Others [2014] eKLR** for the proposition that "... respondents should not be made to needlessly suffer astronomical costs that they will have no chance of recovering". In view of the novelty, complexity and importance of the petition before us, pleaded counsel, this court ought to consider ordering security for costs to the tune of Ksh.20 million. It was counsel's conclusion that:-

"Ancillary to the above, if the court be persuaded by the applicants which the applicants much confidence they have, they further plead the Court to adopt the position (sic) ABDINASIR YASIN AHMED & 2 OTHERS VS AHMED IBRAHIM ABASS & 2 OTHERS (supra) and stays the hearing of the appeal until payment of security for costs ordered by this court and in the event the appellants do not deposit the said security for costs, the appeal shall abate within 30 days of the orders on security thereof."

In opposing the motion, Senior Counsel, **Prof. Ojienda** reiterated the appellants' written submissions dated 18th April, 2018 and relied on his list of authorities of the same date. It was counsel's submission that the motion seeks past and further security for costs; that **Rule 27(1)** of the 2017 Rules provide for the deposit of Ksh. 500,000/- that the 2017 rules do not provide for further security unlike **Rule 107** of the Court of Appeal Rules 2010 (herein after the "**2010 Rules**"); that by dint of **Rule 4(3)** of the 2017 rules which provide that "**where there is a conflict between these Rules and the Court of Appeal Rules 2010 on matters relating to Election Petition Appeals the provisions of these Rules shall prevail**", the 2017 Rules prevail. Secondly, it was counsel's contention that the applicants had been unable to establish that the appellants would be unable to pay the fees capped at Ksh.2 million against the appellants who are the sitting governor and his deputy serving second terms in office. He reiterated that excessive security, for costs is tantamount to undermining the right of access to justice.

On behalf of the 1st and 2nd respondents, learned counsel, **Mr. Orego** relied on the submissions filed on 23rd April, 2013 and its list of authorities of the same date. He urged us to find that the IEBC is a Constitutional body established pursuant to **Article 88** of the Constitution and that "**... in furtherance thereto Parliament has enacted the IEBC Act to make provisions for the finances of the Commission.**"; that its existence is in perpetuity and that is a fallacy to contend that it is unlikely to pay costs. He further observed, that the 1st and 2nd respondents had filed a Notice of Cross Appeal hence becoming cross appellants whilst the rules make reference to an appellant and not a cross appellant. An order for security for costs should not therefore be visited upon it.

In his brief response, Mr. Kanjama contended that an appellant includes a cross appellant.

We have considered the motion and its supporting affidavit, the affidavits sworn in opposition to the motion, the rival written and oral submissions, the authorities cited and the law.

Rule 27 of the 2017 rules provides as follows:-

"27(1) the appellant shall, upon filing an appeal, deposit a sum of five hundred thousand shillings as security for costs of the appeal.

(2) If no security is given, the Court may, on its own motion or on an application by the respondent, issue an order directing the dismissal of the appeal and for payment of the respondent's costs.

(3) The Court may, at any time if it thinks fit, direct that security be given for the payment of past costs relating to the matters in question in the appeal.

(4) The Registrar may pay costs from the sum deposited as security for costs either by consent of the parties or in conformity with the decision of the Court and having regard to the rights of the parties thereunder.”

On the other hand **Rule 107** of the 2010 rules on security for costs in Civil Appeals provides as follows:-

“107. (1) Subject to rule 115, there shall be lodged in Court on the institution of a civil appeal as security for the costs of the appeal the sum of two thousand shillings.

(2) Where an appeal has been withdrawn under rule 96 after notice of cross-appeal has been given, the Court may, on the application of any person who is a respondent to the cross-appeal, direct the cross-appellant to lodge in Court as a security for costs the sum of two thousand shillings or any specified sum less than two thousand shillings, or may direct that the cross-appeal be heard without security for costs being lodged.

(3) 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.

(4) Where security for costs has been lodged, the Registrar may pay out the same either by consent of the parties or in conformity with the decision of the Court and having regard to the rights of the parties thereunder.”

From the above, we are in agreement with senior counsel, Prof Ojienda that the 2010 Rules make provision for an order for payment of Ksh.2000 and of further and/or past security. The 2017 Rules, however, make provision for payment of past security and a deposit of Ksh.500,000 only. There is no provision for security of further costs. We are also in agreement that in the event of conflict between the 2010 Rules and the 2017 Rules then by dint of rule 4(3) of the 2017 Rules, the 2017 Rules prevail. **Rule 4 (3)** of the 2017 Rules provide:

“(1) These Rules apply to the conduct of appeals from decisions of the High Court in election petitions and matters relating thereto.

(2) Where there is no applicable provision in these Rules, the provisions of the Court of Appeal Rules, 2010 relating to civil appeals shall apply to an election petition appeal in so far as they are not inconsistent with these Rules.

(3) Where there is a conflict between these Rules and the Court of appeal Rules, 2010 on matters relating to election petition appeals, the provisions of these Rules shall prevail.

(4) A decision of the Court that a provision prevails over another provision does not invalidate but the latter provision shall be inoperative to inconsistency.”

[Emphasis added].

Senior counsel also cited the decision of ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR*** (supra) wherein it was stated:

“In an application for 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. The same must be proved.”

It is therefore clear that the law places the onus on the applicants to prove that the respondents will not be able to pay the costs. The 1st and 2nd appellants are the Governor and Deputy Governor of Homa Bay County. They are serving their second terms. We were not told that they are impecunious. We want to believe that by virtue of their positions, they draw salaries and allowances and will be able to pay for the costs of the appeal, should they be unsuccessful.

Mr. Kanjama contended that they have previously been engaged in litigation with the appellants and that they have a record of them failing to pay costs. However, there was no proof of this. As for the 1st and 2nd respondents, counsel submitted that the 1st respondent is a Constitutional body and that it draws its funds from parliamentary allocations and refuted the applicants' contention that it may not be able to meet its financial obligations. Again, the applicants did not provide proof that the 1st respondent has previously failed to meet its financial obligations.

We however, disagree with Mr. Oregó's contention that an order for security for costs cannot be made against the 1st respondent as it is a cross appellant and not an appellant. **Rule 93(1)** of the Court of Appeal rules allow "***A respondent who desires to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, ...***" to give notice to that effect. The sum total of the above is that a cross-appellant engages in further litigation by way of a cross-appeal and it is preposterous for such a litigant to argue that he/she is not an appellant but a cross appellant. In our view, this is tantamount to splitting hairs and we reject that argument.

For the reasons stated above, we find no merit in the motion. It is dismissed with costs.

Dated and Delivered at Kisumu this 14th day of June, 2018.

P. N. WAKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

OTIENO - ODEK

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JUDGE OF APPEAL

I certify that this is

a tre copy of the original.

DEPUTY REGISTRAR.