



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: TUNOI, O’KUBASU & AGANYANYA, JJ.A.)**

**CIVIL APPEAL (APPLICATION) NO. 301 OF 2009**

**BETWEEN**

**KENYA EDUCATIONAL TRUST LIMITED.....RESPONDENT/  
APPLICANT**

**AND**

**KATHERINE S. M. WHITTON.....APPELLANT/  
RESPONDENT**

***(Being an application for the appellant to give security for the costs of the appeal from the ruling and decree of the***

***High Court of Kenya at Nakuru (Maraga, J.) dated 16<sup>th</sup> October, 2008***

**in**

**H.C.C.C. No. 56 of 2005)**

**\*\*\*\*\***

**RULING OF THE COURT**

***Civil Appeal Nos. 301 of 2009 & 302 of 2009 are consolidated. The appellants in the former and the latter***

are husband and wife. They were both employed by the respondent as teacher and Headmaster at Pembroke House School Gilgil respectively which was run by the respondent. By letters dated 27<sup>th</sup> June, 2004 separately addressed to the appellants the respondent terminated their services with immediate effects, but they were each paid salaries in lieu of notice period. They filed suit in the superior court at Nakuru to challenge the dismissals in *H.C.C.C. Nos. 56 & 57 of 2005*. There was an application by the respondent to the court for the striking out of those suits under **Order VI Rule 13(1)(b) and (c)** of the Civil Procedure Rules. The superior court heard the application on 23<sup>rd</sup> July, 2008 and a ruling thereon was made on 16<sup>th</sup> October, 2008. The learned Judge (*Maraga, J.*) formed the view that

***“There is therefore nothing left in either of the two cases to take to hearing consequently I find that the complaints in these suits are frivolous vexatious and otherwise an abuse of the process of the court and I accordingly strike them out including the costs of the application to the defendant.”***

The appellants have appealed against this order to this Court but pending the hearing of the appeal the applicant/respondent has filed an application under **rule 104(3)** of this Court’s Rules to pray that the appellants be ordered to give security for costs in the appeal in the sum of Kshs.250,000/= on the following grounds that:-

***“(a) The costs of the appeal will be greater than Kshs.6,000.00.***

***(b) The appellant/respondent is not resident in Kenya.***

***(c) The respondent/application has no knowledge of any assets belonging to the appellant/respondent.***

The application is supported by an affidavit of one *Vanessa Evans*, the chairman of the applicant/respondent. Apart from the estimated time the arguments may take an appeal the affidavit repeats the grounds set out on the face thereof.

An affidavit sworn by the defendants/respondent in ***Criminal Appeal No. 301 of 2009 Katherine S. M. Whitton*** and filed in this Court on 18<sup>th</sup> February, 2011 states that the security for costs in Kshs.250,000/= sought by the applicant is excessive in view of the fee scale prescribed under the Rules of this Court and that the security of Kshs.6,000/= paid on the filing of the appeal was satisfactory. She depones further that the applicant’s application is designed to act as a clog to her right of access to the Court.

The application was heard before this Court on 24<sup>th</sup> February, 2011 when ***Mr. Kiragu*** and ***Mr. Mbaluto***, learned counsel for the parties respectively submitted on it. They repeated what is contained in the supporting or replying affidavits.

We have considered the rival submissions on this application. **Rule 107(1)** of this Court’s Rules states:-

***“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.”***

The marginal note to the rule specifies it as:-

**“Security for costs in Civil Appeals.”**

However when the appeal was filed herein on 12<sup>th</sup> October, 2009 a sum of Kshs.6,000/= was paid by counsel of the applicant/respondent to satisfy the need for security for costs. Mr. Kiragu, learned counsel for the appellant/respondent feels this amount is too low compared to what costs would be awarded if the appeal fails and prays that further security be granted in the sum of Kshs.250,000/= , but Mr. Mbaluto, learned counsel for the applicant/respondent disputes this and states that the amount is excessive. **Rule 107(3)** of the Rules provides that:-

***“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.”***

As per the Rule, this is a discretionary remedy which can be granted if special circumstances permit. In this application the appellants though not Kenyans have given their place of abode in England and also revealed their yearly earnings. They also quote The Foreign Judgments (*Reciprocal Enforcement*) Act Chapter 43 of the Laws of Kenya as an avenue through which a judgment in Kenya can be enforced in England.

When considering whether or not to grant an order for a party to furnish security or further security the merit of the case/appeal nor is it a sufficient ground that the party against whom the security is sought is outside the jurisdiction of the Court – see ***Jimaji v Saheb & Another [1990] KLR 732.***

In view of the foregoing, we are of the view that the applicant has fallen short of satisfying us that it stands to lose costs in the event that the appeal fails. We cannot exercise our discretion to grant the order sought. This application fails and is dismissed but the costs thereof shall abide the outcome of the appeal

***Dated and delivered at Nakuru this 25<sup>th</sup> day of March, 2011***

**P. K. TUNOI**

.....

**JUDGE OF APPEAL**

**E. O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

DEPUTY REGISTRAR