



**Olengo v Shah (Employment and Labour Relations Appeal  
E154 of 2021) [2023] KEELRC 1046 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1046 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E154 OF 2021**

**B ONGAYA, J  
APRIL 27, 2023**

**BETWEEN**

**BEATRICE NABRIYO OLENGO ..... APPELLANT**

**AND**

**SUNIT JAYANTILAL SHAH ..... RESPONDENT**

*(Being an appeal from the judgment of Hon.L.L. Gicheha, Chief Magistrate in CMELRC  
No. E868 of 2020 in Chief Magistrate's Court at Nairobi delivered on 29.10.2021)*

**RULING**

1. The respondent has filed the application dated September 16, 2022 through CW Chege & Company Advocates. It is brought under Order 26 Rule 1 & 6, Order 42 Rule 14(1) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and sections 1B, 3A of the Civil Procedure Act and all the enabling provisions of law. The application is for orders:
  - a. The plaintiff (appellant) to be ordered to give security for costs of Kshs 300,000.00 or any other sum the Court deems fit into a joint interest earning account to be opened by the Advocates herein as security for costs of the respondent pending hearing and determination of the appeal.
  - b. Pending the provision of the said security, the appeal be stayed until the security aforementioned is furnished by being deposited in a joint interest earning account to be opened by the Advocates herein.
  - c. The costs of the application be awarded to the respondent.
2. The application was based on the annexed supporting affidavit of Sunit Jayantilal Shah and upon the following grounds:



- a. The appellant being the plaintiff in Cause No E868 of 2020 against the applicant and whose judgment being subject of the present appeal was ordered to pay costs of the suit assessed at Kshs 77,275.00.
  - b. The claimant had been employed by the respondent as a cook at Kshs 15,000.00 per month and does not have any known moveable or immoveable property in Kenya.
  - c. The respondent is apprehensive that in event that the appellant herein is unsuccessful in the appeal the appellant will not have the capacity to meet the costs of the appeal.
  - d. The respondent stands to suffer irreparable loss as he will not be able to recover the costs incurred as a result of the proceedings. It is in the interest of justice that the application is allowed.
3. The replying affidavit of the appellant was dated February 14, 2023 and filed through Ochieng' Ogotu & Company Advocates. The appellant urged as follows:
- a. The applicant was awarded costs by the trial court but the applicant had not followed the procedure for claiming costs as provided in law because he was not involved in any way in the assessment of the costs as required. The certificate of costs and decree are therefore null and void.
  - b. The appellant has not refused to settle the costs but is objecting to the amount and the manner of assessment and an objection notice dated July 14, 2022 was served objecting to the Kshs 77,275.00 as was assessed for costs.
  - c. The appellant is a cook as known to the applicant and is currently engaging in personal business and it is condescending for the respondent to presume that the appellant will not be able to pay simply because she is not in the applicant's employment.
4. The applicant filed a supplementary affidavit of Sunit Jayantil Shah sworn on February 27, 2023. It was urged as follows:
- a. The appellant never objected to assessment of the costs per Order 21 Rule 9B and 9C of the Civil Procedure Rules, 2010 but upon demand of the payment it was replied that parties await the outcome of the appeal process. The procedure invoked to object to assessment of costs by the Lower Court is strange in law. Rule 11 of the Advocates Remuneration Order is with respect to taxation of costs by the taxing master in proceedings before the High Court.
  - b. The appellant has provided no evidence of capacity to settle in event the appeal fails. Thus the application for deposit of security for costs in the sum of Kshs 300,000.00 is well justified.
5. The applicant filed submissions but the appellant failed to do so. The Court has considered the parties' respective positions and all material on record. The Court returns as follows.
6. As submitted for the applicant, Order 42 Rule 14(1) of the Civil Procedure Rules, 2010 states that 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. Under Order 26 Rule 1 of the Civil Procedure Rules, in any suit the court may order that security for the whole or any part of the costs of any defendant or third party be given by any other party.
7. In *Scotch Whisky Association & 2 Others -V- Africa Spirits Limited [2020]eKLR*, Okwany J held '10. It is trite law that security for costs can be ordered by a trial Court in its discretionary power. In the case of *Marco Tools & Explosives Ltd -V- Mamujee Brothers Ltd [1988]KLR 730*, it was held: 'the Court has



unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance is that the final result must be reasonable and modest. In an application for security of costs, the Applicant must demonstrate that the plaintiff will not be able to satisfy an order for costs made at the end of trial should he lose the case. In *Europa Holdings Limited – V- Circle Industries (UK) BCLC 320 CA*, it was held that it must be proved that the plaintiff would not be able to pay the costs at the end of the case. 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 Plaintiff as well as the conduct of the parties.'

8. Again, Mabeja J in *Barrack Ofulo Otieno – V- Instarect Limited [2015] eKLR* held, '10. The principles on which a court exercises its discretion in an application for security for costs were considered in the case of *Keary Development – V- Tarmac Construction (1995)3 ALL ER 534*. Applying that decision in *Ocean View Beach Hotel Ltd – V- Salim Sultan Mollo & 5 Others [2012]eKLR*, Tuyot J outlined the principles as follows:

- ' 1. The court has a complete discretion, whether to order security, and accordingly it will act in the light of all the relevant circumstances.
2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.
3. The court must carry out a balancing exercise. On one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.
4. In considering all the circumstances, the court will have regard to the plaintiff's prospects of success. But it should not go into the merits in detail unless it can be demonstrated that there is a high degree of probability or failure.
5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount, it is not bound to make an order of a substantial amount.
6. Before the Court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be satisfied.
7. The lateness of the application for security is a circumstance which can properly be taken into account.'

9. The Court has considered the principles to be invoked against the facts and circumstances of the instant application. The Court returns as follows:

- a. The applicant seeks security for costs in the sum of Kshs 300,000.00 against the appellant's claim for a sum of Kshs 269,278.00 – a substantial claim in the circumstances of the case. The Court finds that the applicant has offered no justification of such substantial prayer for security for costs as awarding the prayer would amount to the appellant's stifle from pursuing the appeal.



- b. The applicant has not demonstrated that the appellant would not be able to satisfy costs if the appeal is unsuccessful. It is not enough to allege that the costs awarded in the lower Court have not been satisfied in circumstances that the appellant is appealing against the whole decree and judgment including the award of costs. On the other hand, it is not in dispute that the appellant is a cook engaged gainfully as such or with such potential and residing within the Court's jurisdiction. The Court considers that in such circumstances, there is no established justification that the appellant would not be available and able to satisfy terms of the judgment on appeal as may issue.
- c. The applicant has not shown that the appeal has no reasonable chance or probability of success as that point is not urged at all. The Court has considered the memorandum of appeal on record and it raises serious arguable points such as whether the reason for termination was true and fair as found by the trial Court; whether the appellant accepted the dues as paid by the applicant as final terminal dues; and whether the claim was amenable to dismissal with costs as was done. In view of the grounds of appeal it cannot be found that the appeal has no chance of success.

10. In the circumstances, the Court returns that the application will be dismissed with costs in the cause.

In conclusion, the application is hereby dismissed with costs in the cause and the parties to take steps for the expeditious determination of the appeal.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 27<sup>TH</sup> APRIL, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

