Robert Mucinic v. Sky CAC LIMITED, Civil Appeal E1/2019, 7/6/2024

COURT OF APPEAL OF CYPRUS - CIVIL JURISDICTION

(Civil Appeal No. E1/2019)

7 June 2024

[PANAGIOTOU, President]

[AMPEEZAS, STYLIANIDOU, J.]

ROBERT MUCINIC Appellant

AND

1. SKY CAC LIMITED
2. MARIOS POLYVIOU

Respondents

Applications dated 22/2/24 and 4/3/24 for security for costs by the respondents - applicants

Despina Christodoulou (Ms.), for Heraklis Kyriakides L.L.C., for the Appellant. Yolanda Zachariou (Ms.), for Andreas V. Zachariou & Co. L.L.C., for the 1st Respondent. Charikleia Metti (Ms.), for Orphanides, Christofides & Partners, for the 2nd Respondent.

PANAGIOTOU, P.: The Court's decision is unanimous and will be delivered by Stylianidou, D.

DECISION

STYLIANIDOU, D.**:** Both Respondents in this case have filed applications requesting that the Appellant provide security for costs, to which the Appellant has submitted relevant

objections. The hearing of both applications was conducted simultaneously due to the common facts and legal issues involved.

It should be noted, however, that the 2nd Respondent's application for security for costs presents a particularity that we will examine as a priority:

In the relevant Form No. 34 for an Application in pending proceedings, based on Part 23(4)(6) of the Civil Procedure Rules of 2023 ("the Rules"), which was filed with the Court of Appeal, the section where the relief sought from the Court should be recorded was left blank. However, the section of the form describing the legal basis of the application was duly completed and includes the Rules relevant to the relevant to the security for costs. The form is accompanied by Annex A, the Witness Statement, which makes extensive reference to the history of the case and the circumstances related to the issue of security for costs. The statement includes the following verbatim declaration: "In light of the above, I consider it appropriate and just for the Honourable Court to exercise its discretion in favour of issuing the requested Orders for security for costs against the Appellant."

The Appellant filed an objection to the 2nd Respondent's application, stating as the first ground of objection that it is legally and/or substantively unfounded and irregular. However, we note that in the subsequent grounds of objection, as well as in the affidavit accompanying the objection, there is explicit reference to the 2nd Respondent's application for security for costs, and extensive substantive reasons and facts are presented for which, according to the Appellant, the application should be dismissed. It is also noted that while the argument of the learned counsel for the Appellant asserts that the application cannot proceed and be examined by the Court due to the lack of a specific relief request, they add that, without prejudice to the above, if the Court proceeds to examine the application, it will adopt their submissions made regarding the 1st Respondent's application for security for costs. In view of the above, we will therefore prioritise examining whether the aforementioned irregularity should lead to the dismissal of the 2nd Respondent's application without examining its merits.

In the decision of *Miltiades Neophytou Civil Engineering Contractors & Developers Ltd v. Municipality of Paphos*, Civil Appeal No. E5/2018, 16/1/2024, we examined an application that was not filed in the correct form (Form No. 34) and did not comply with the requirements of Part 23.4 of the Rules. It was decided as follows:

"In light of the above finding, we will next examine whether the omission by the respondent constitutes an irregularity that could be overlooked in order to preserve the process of the present application. The respondent's counsel referred in this regard to the Overriding Objective of the Civil Procedure Rules, which enables the Court to manage cases justly and at a proportionate cost.

Managing cases under the Overriding Objective includes, among other things, according to Part 1.2 (2), saving expense, ensuring cases are dealt with expeditiously and fairly, while also ensuring compliance with rules and orders. It also includes, according to Part 1.2 (2)(c), dealing with a case in ways that are proportionate to the importance of the case and the complexity of the issues.

Relevant to the matter are also the provisions of Part 3.8 of the Civil Procedure Rules of 2023, which state:

3.8 General power of the court to rectify matters where there has been a procedural error

(1) Where there has been a procedural error, such as a failure to comply with a rule:

(a) the error does not invalidate any step in the proceedings unless the court so orders; and

(b) the court may make an order to remedy the error.

(2) The court shall not make an order invalidating any step unless satisfied that:

(a) the procedural error was serious; and

(b) such an order is necessary in the interests of justice, having regard to the overriding objective.

Given the above provisions and despite our finding that the respondent's choice to pursue the request using the form of the old Rules' form was inappropriate, we judge that this procedural

error does not necessarily warrant the exclusion or dismissal of the application. The application includes all necessary elements for its promotion and examination, without affecting the rights of any third party.

Maintaining the process in this manner aligns, in our judgment, with the Overriding Objective of the Civil Procedure Rules of 2023—ensuring the right of access to the Court in a fair and effective manner and interpreting the Rules to avoid unnecessary procedures regarding procedural matters. It also corresponds with Part 3.8(1), which states that a party's failure to comply with the Rules does not invalidate the process, and that the Court can issue an order to remedy such non-compliance.

Furthermore, under Part 3.8(2), the procedure is not invalidated unless the error is serious, and invalidation is necessary in the interests of justice, considering the Overriding Objective. In the present case, for the reasons outlined above—such as the fact that the application includes all necessary elements for its examination without affecting the rights of any third party—we consider the error to be non-serious, making the invalidation of the application unnecessary for the purposes of justice. On the contrary, given all the above and keeping in mind the Overriding Objective of the Rules, we believe that it is in the interests of justice not to invalidate the present procedure, despite the incorrect application form used.

The same approach was followed by the Supreme Court in the case of *A.G. PAPHITIS & CO, LLC* Civil Application 112/2023 dated 22.9.2023, ECLI:CY:AD:202, which concerned a request for an extension of time to file an application for a prerogative writ of Certiorari, which was filed in the wrong form and not according to the forms specified in the Supreme Court (Jurisdiction for Issuing Prerogative Orders) Procedural Regulation of 2018.

It should be noted here that our conclusion not to invalidate the present procedure should clearly not be interpreted as encouragement for violating procedural rules by using incorrect forms. The present case is strictly judged based on its own circumstances, as outlined above, particularly in light of the recent implementation of the Civil Procedure Rules of 2023 and does not establish a judicial precedent for tolerating violations of these Rules.

In view of the above findings, we will proceed to examine the substantive request of the respondent for an extension of time to file a written submission."

We are of the opinion that applying the above reasoning to the circumstances of the present case —primarily the fact that the Appellant fully understood the nature of the requested order, as evidenced by his detailed response to all the positions of the 2nd Respondent in his objection—it is in the interests of justice to proceed with examining the merits of the 2nd Respondent's application.

Firstly, we note what was said regarding the general principles concerning applications for security for costs following the implementation of the Rules in YIANNOPLAST LIMITED, through its Liquidator *Christakis Iacovides v. CYPRUS POPULAR BANK PUBLIC CO LTD et al*., Civil Appeal No. 242/2022, 18/9/2023:

"A study of the substance of the matter, however, leads to the conclusion that the factors applicable to the exercise of the Court's discretion when considering an application for security for costs have not changed substantially with the introduction of the Civil Procedure Rules of 2023, since the provisions of Part 26.1 paragraphs (1) and (5) are identical to the provisions of the old Order 60. Where the difference is found is in the wording of the old Order 35 Rule 2, which provides that:

'...such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal'.

With this provision, the general criterion of ‘special circumstances’ was introduced, which, as stated in *Lemoniasis v. Municipality of Limassol*, Civil Appeal 436/17, dated 13.9.2019, ECLI:CY:AD:2019:A364:

“As the wording of the provision of Order 35 Rule 2 of the Rules under consideration stands, the rule is that at the appeal stage, no directions for security for costs are given. Such directions are only given when there are "special circumstances which justify the exercise by the Court of Appeal of its discretion to do so."

While the reference to ‘special circumstances’ is not found in Parts 26 and 41 of the Civil Procedure Rules of 2023, the Courts now aim to implement the overriding objective provided for in Part 1 of the New Rules when exercising any power conferred on them by the Rules and when interpreting any Rule. Furthermore, the Court has the power to take any other step or make any order to further the overriding objective as provided in Part 3.1(m). Under Part

1.2(c)(iv), the Court is obliged to handle the case in a manner proportionate to the financial circumstances of each party.

Bearing the above in mind, we consider that the jurisprudence, which held that the criterion of ‘special circumstances’ included the lack of property or financial incapacity, provides guidance in considering an application for security for costs under the Civil Procedure Rules of 2023.

In addition to their responses to the Appellant's objection, both learned counsel for the Respondents highlight, in support of their application that it is accepted that the Appellant is a resident of the USA, that he did not contest the Respondents' position that he lacks property within the Republic of Cyprus, and that through letters from their lawyers to the Appellant's lawyers, they attempted to recover the awarded costs from the initial proceedings without receiving any response. In view of the above, the criterion of habitual residence outside the European Union, as provided in Part 26.1(1) of the Regulations, is met. In *Genemp Trading Ltd v. Laiki Cypriot Bank* (2011) 1 ΑΑΔ 1314, it was stated that the possession of property by the Appellant within the territory could argue against the provision of security. In this case, such a circumstance does not exist.

In addition to the above positions, the learned counsel for the Respondents addressed the points of the Appellant's objection, which were further developed in the argument by the learned counsel for the Appellant as follows:

It was first argued that the application was filed with excessive delay, causing prejudice to the Appellant. The appeal was filed on 12/12/2018, while the applications for security for costs were submitted at the pre-trial stage in 2024. The learned counsel for the 2nd Respondent argued that any delay was due to what she described as the Appellant's failure to deliver a copy of the notice of appeal to the 2nd Respondent's lawyers.

In *Sister Markella et al. v. Archimandrite Sebastianos Stavrou et al.,* Civil Appeal No. 9/2016 dated 29.01.2021, ECLI:CY:AD:2021, with reference to the *Genemp* case above, it was stated that the timing of an application is an additional factor to be considered, and that a party’s delay in seeking security for costs, in conjunction with other supportive factors, may lead the Court to dismiss the request (see also, *Union Des Cooperatives Agricoles De Cereales De Semences v. Apak Agro Industries Ltd et al.* (No. 2) (1992) 1 ΑΑΔ 1170).

In the present case, we do not identify any other supportive factors that could, in combination with any alleged delay, justify dismissing the application. Furthermore, we find that the delay did not deprive the Appellant of any rights or adverse effects. Consequently, there is no prejudice to the Appellant that would warrant dismissing the application due to delay, which, in any case, has been adequately explained by the Respondents.

The next argument by the Appellant in favour of dismissing the application is their claim that they had a very strong case on appeal with a high chance of success, while the Respondents' chances of presenting a good defence are, according to him, negligible. As noted in *Demetris Elia Properties Ltd v. Kostaki A. Kourris*, Civil Appeal No. 286/19, dated 18/9/2023, "It has been established that where the chances of success are small or if the grounds of appeal are primarily based on assessment, then discretion is usually exercised in favor of granting the application for security for costs (see *Sister Markella et al. v. Archimandrite Sebastianos Stavrou et al.*, Civil Appeal No. 9/2016 dated 29.01.2021, ECLI:CY:AD:2021)."

In *Genemp*, (above), the following was stated regarding this issue:

"Among the broader criteria for providing security for costs is the strength of the plaintiff's case. If they have a strong case and the defence appears unsustainable, it would be contrary to the spirit of justice to order the provision of security for costs, thereby essentially rewarding the defendant and delaying the entire process."

In the present case, the grounds of appeal concern both the legal aspects and issues related to the evaluation of witnesses. We do not agree with the Appellant's suggestion that the Respondents' position on the likelihood of the appeal failing has negligible chances of success. At the same time, we emphasise that at this stage, the Court does not conduct a detailed examination of each side's chances of success. Therefore, we consider that in this case, this criterion does not provide a substantial factor that could influence the exercise of our discretion.

The Appellant further argues that issuing the requested orders would create a disproportionate obstacle to his constitutionally guaranteed right to access to the Court, referring to the following excerpt from the *Genemp* decision, (above):

“The appellant also contends that any order for security for costs would constitute a disproportionate obstacle to the right of access to the Court. Reference was made to the case of *Garcia Manibardo v. Spain* [2002] 34 E.H.R.R. 6, of the ECHR, as well as the references in the book by Clayton and Tomlinson: The Law of Human Rights, Vol. 1, 2nd ed. (2009), where on page 745, the decision *Nasser v. United Bank of Kuwait* [2002] 1 W.L.R. 1868 is mentioned, in which it was ruled that the provisions for providing security for costs on appeal should be examined in light of Article 6 of the European Convention on Human Rights. The issue is whether, in each case, the provision of security for costs is objectively justified given all the circumstances, as well as the potential burden on the party ordered to pay this security.”

It is noted that the above references do not apply to the present case. In *Nasser*, it was stated that the requirement to provide security for costs should not impede access to the Court, while the granting of leave to appeal indicated at least 'a real prospect' of success on appeal. However, in the current Cypriot system, the concept of granting prior leave to appeal does not exist, and thus the mere filing of an appeal is not an indication of its likely success. Furthermore, the sought amount of €5,000 would not pose a substantial barrier to accessing the Court of Appeal, especially when the appellant claims to have a sum of approximately 537,040 German marks available. Consequently, failure to comply with an order for security for costs cannot be a reason for denying access to the Court. Procedural provisions must be applied fairly to both parties, allowing the appellant to file an appeal while also permitting the respondent to reasonably seek security for costs. It is stated in The White Book Service 2006, Civil Procedure Vol. 1, p. 633, in the comments of paragraph 25.15.2, (with reference to Nasser), that the correct approach is to consider whether it is appropriate for an appellant to proceed with the appeal without the risk of covering the other side's costs in case of failure. It is also not implied that merely granting leave to file an appeal negates the necessity of issuing an order for security for costs.

We note on the development of case law regarding this issue, especially concerning natural persons, as analysed in the case of *Sister Markella* (above):

"Regarding the above issue, the general principle, as historically established by case law, is that if issuing an order for security for costs results in depriving the party against whom the order is made of their right of access to the Court, then the order will not be issued. In such a

case, the right of access to the Court prevails over the need to protect the party requesting the security for costs.

The following excerpt from the case *Conway v. Iliadis* (2002) 1 A.A.D. 1653 is relevant:

'However, if the applicant - the respondent - faces an insurmountable obstacle in advancing their application due to the financial inability of the respondent to meet this request.

The decision in *Continental Ins. Co of Hampshire v. O' Regan* (1998) 1 A.A.D. 1087 outlines the framework for the exercise of the Court's discretion under D.60, para.1, in light of the constitutional provisions that guarantee the individual's right of access to justice. As the Court pointed out in Continental Ins. Co of Hampshire v. O' Regan, security for costs is provided under the provisions of Article 30.2 of the Constitution and the corresponding provisions of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, which enshrine access to the Court as a fundamental right. Thus, the exercise of the Court's discretion is related to the ability of the plaintiff or appellant, depending on their financial capacity, to provide the required security. If they do not have the means, the request is denied. The rationale behind this decision is summarised in the statement that an order for security for costs cannot be issued if its issuance results in depriving the plaintiff or appellant of their right of access to the Court.'

More recently, in the case of G.K. *Theonell Building & Construction Ltd v. AIG EUROPE LIMITED*, Civil Appeal No. 98/2017, dated 3/6/2019, ECLI:CY:AD:2019, with reference to the case *Y. Liasides Developers Ltd v. Michael et al.*, Civil Appeal No. 123/2012, dated 2/6/2017, ECLI:CY:AD:2017, it was reiterated that concerning natural persons, the established principle is that an order for security for costs is not issued against a plaintiff who is without means.

Reference was also made to the English case *Cowell v. Taylor* (1885) 31 Ch D 34, 38, where 'the general rule is that poverty is no bar to a litigant, that, from time immemorial, has been the rule at common law, and also, in equity.' Otherwise, the order for security for costs would result in depriving the right of access to the Court."

In view of the above, to assess the appellant's argument regarding the limitation of their constitutional right, it would have been necessary for the actual basis of their inability to provide security for costs to be presented before us, which in this case, was not done.

Consequently, we conclude that the grounds of objection are not valid and are dismissed, while there is a basis before us to exercise our discretion in favor of issuing orders for security for costs.

Finally, in light of the non-payment of the costs of the first-instance proceedings by the appellant, we were requested, through the submission of the learned counsel for the 2nd Respondent, to provide security for costs for an amount that includes these costs, with reference *to Karaoglanian Ayda and Others v. Hagop Boyadjian* (2016) 1 AAD 1526. However, since the request was not specified in the affidavit accompanying the application, and in the absence, as mentioned above, of the relevant request in the application of the 2nd Respondent, we deem it not in the interest of justice for this issue to be examined under the present circumstances.

We have taken into account the calculation of costs submitted by the 1st Respondent, which estimates the costs of the appeal are estimated at €7,221. This is supported by the affidavit accompanying the application of the 2nd Respondent, which considers the amount of €5,000 to be reasonably appropriate. Considering these factors, along with the usual costs awarded in civil appeals, we find it reasonable for the security to be set at €5,000 for each applicant.

Consequently, orders are issued directing the appellant to deposit with the Registrar of the Court of Appeal, within 30 days from today, a guarantee of €5,000 as security for the costs of the 1st Respondent and a guarantee of €5,000 as security for the costs of the 2nd Respondent.

Furthermore, an order is issued suspending any proceedings in the appeal under the above number and title concerning each Respondent until the corresponding amount is deposited for each application. Should the 30-day deadline pass without the deposit of the security amount for each Respondent, the appeal concerning that Respondent will be considered dismissed.

The costs for the present applications are awarded in the amount of €2,000, plus VAT if applicable, in favor of each Respondent and against the appellant.

Al. Panayiotou, P.

Marios Abizas, D.

I. Stylianidou, D.