



**Mogaka v Diamond Trust Bank of Kenya Limited & 2 others (Environment & Land Case 29 of 2019) [2023] KEELC 16442 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16442 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 29 OF 2019**

**M SILA, J**

**MARCH 23, 2023**

**BETWEEN**

**ESTHER KEMUMA MOGAKA ..... PLAINTIFF**

**AND**

**DIAMOND TRUST BANK OF KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**STEPHEN KARANJA KANG'ETHE T/A DALALI TRADERS  
AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**ALYSSA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application before me is that dated 5 October 2022 filed by the 1<sup>st</sup> defendant. It seeks orders that the plaintiff do furnish security for costs before the suit is set down for hearing. The application is based on grounds that since the institution of this suit, apart from filing frivolous applications, the plaintiff has not been keen to prosecute the case; that the plaintiff had earlier filed the suit Kisii ELC No. 264 of 2017 together with an interlocutory application which was dismissed with costs; that she then filed a notice of appeal out of time and the same was struck out after the applicant filed the case Kisumu Civil Application No. 45 of 2017 before the Court of Appeal; that the plaintiff then unsuccessfully filed Civil Application E153 of 2021 before the Court of Appeal for extension of time to file appeal out of time which was dismissed with costs; that the plaintiff filed another application, No. E147 of 2021, which she withdrew with costs being awarded to the applicant; that the plaintiff currently resides in the United States of America and the applicant does not know if she has property in Kenya that will be sufficient to pay for the costs of the case should the case be decided in favour of the applicant; that the plaintiff should thus be ordered to deposit security for costs. The application is supported by the affidavit of Faith Ndonga who has more or less elaborated on the grounds upon which this application is based and which I have already set out above. I see no need of repeating them.



2. The plaintiff opposed the motion by filing a replying affidavit. She avers that the court will handle the issue of costs upon determination of the suit, and one cannot be asked to provide for costs for filing applications and because it is not known where one's assets are located. She believes that her right to access justice should not be curtailed by imposing restrictions to furnish costs in anticipation that she will lose the case.
3. Counsel relied on the affidavits filed and I have considered them.
4. I find it strange that the applicant complains that this suit has not proceeded because the plaintiff has been filing one application after another, yet this is one interlocutory application that the applicant also wants this court to entertain instead of concentrating on hearing the case on merits.
5. Be that as it may, the application is more or less based on the grounds that the plaintiff had filed numerous earlier applications that were dismissed and that she resides in the United States of America. First, the mere fact that the plaintiff resides in the United States of America, by itself, is no reason to ask her to deposit security for costs. On the other ground, it does indeed appear that the plaintiff has filed some applications which have been dismissed but I have no evidence that attempts to obtain costs have been futile. I have no evidence before me that there have been attempts at executing for costs which have been unsuccessful and hampered because the plaintiff resides out of the jurisdiction of this court.
6. This to me is another application that simply leads to the delay in conclusion of this case and I do not intend to waste too much time on it. Parties need to stop filing application after application that is not aimed at leading towards the resolution of this case.
7. For the above reasons, this application is dismissed with costs to the plaintiff.
8. Orders accordingly.

**DATED AND DELIVERED THIS 23 DAY OF MARCH 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

