



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL SUIT NO. 13 OF 2020

BETWEEN

WILLY KIHARA NJOKI.....PLAINTIFF

VERSUS

MARY WANJIKU KANYOTU

T/A THE DAM RED HILL.....RESPONDENT

RULING

1. **WILLY KIHARA NJOKI** the plaintiff filed this action against **MARY WANJIKU KANYOTU** the defendant. He has pleaded in his plaint that he and the defendant in 2014 set up a recreational facility at **L.R. KIAMBU/REDHILL 166/5** the suit property. He pleads as follows:-

“The plaintiff handled all the operations of setting up the project, which included design work, strategy implementation, hiring and supervising contractors, recruiting employees, purchase of materials and equipment and generally all decision making.

The plaintiff and defendant jointly funded the project and upon completion of the construction in December, 2015, they operated the project with trust and mutual respect.”

2. The plaintiff tabulated the items of properties he contributed towards the project such a speed boat, motor vehicle amongst others.

3. His prayer is for an order directing the defendant to release those items of property he allegedly contributed and in alternative, and or for the defendant to pay him Kshs.5,813,999. He also claims for Kshs.30 million from the defendant.

4. The plaintiff seeks by notice of motion application dated 25th January, 2021 for an order for the defendant to deposit into court Bank bond or other property to answer to his claim of Kshs.35,813,999 and an order of injunction to stop the defendant from selling the suit property.

5. The plaintiff relies on the matters pleaded in his plaint. He additionally stated that the defendant is in the process of sub-dividing and selling the suit property.

6. **Order 39 Rule 5** of the Civil Procedure Rules provides:-

“5(1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

a. is about to dispose of the whole or any part of his property; or

b. is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) *The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.*

(3) *The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.*

7. It will be noted that the applicant moving under the provisions of the above Rule bears the onus of proof to prove the defendant is about to dispose the whole or any part of his property; or is about to remove the whole or any part of his property from the local limits of the court's jurisdiction.

8. The property the plaintiff alleges is in the process of being sold by the defendant, part of it is being sold by the administrators of the estate of **Stephen Kanyotu** deceased. One of those administrators is the defendant. The plaintiff does not prove to this Court that the defendant is selling or disposing any property that she owns in her own right.

9. The invocation of **Order 39 Rule 5** of the Civil Procedure Rules calls upon the court to exercise its discretion and such discretion ought to be exercised reasonably. See the case **AGGREY SHIVONA VS. STANDARD GROUP PLC (2020) eKLR** as follows:-

“The same principles were espoused in the case of JAYESH HASMUKH SHAH VS NARIN HAIRA & ANOTHER (2015) eKLR in which the court held;

“It is now settled Law the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors as absence of known assets in the Country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the bona fides of the plaintiff's claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account”.

10. Further, it is usual to consider the holding in **EQUATOR BOTTLERS LIMITED VS. EUNICE RAHEL ACHIENG (221) eKLR** where the court discussed what should be considered in an application for security for costs, which is akin to the present prayer, and stated:-

“6. In the case of KURIA KANYOKO T/A AMIGUS BAR & RESTAURANT Vs FRANCIS KINUTHIA NDERU & OTHERS [1985] 2 KAR 126 emphasized that;

“The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Order 38, rule 5 (which is equivalent to the current Order 35 rule 5), namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction, with intent to obstruct or delay any decree that may be passed against him.”

11. There is no basis laid by the plaintiff why the order for deposit of amount claimed into court should issue. Additionally, having considered the defendant's affidavit in replying it is clear that the alleged transactions between the plaintiff and defendant may not be as stated by the plaintiff. The defendant alleges fraud on the part of the plaintiff.

12. The prayer the plaintiff seeks for injunction to stop subdivision and sale of the suit property is misconceived. The defendant cannot be enjoined to stop selling property which does not belong to her. She is merely an administrator of the deceased's estate and it is in that capacity she is transacting over the suit property.

13. In conclusion, I find the notice of motion dated 25th January, 2021 devoid of merit. It is dismissed with costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 24TH DAY OF MARCH, 2022.

MARY KASANGO

JUDGE

CORAM:

COURT ASSISTANT : MOURICE

FOR PLAINTIFF : -MR. RUIRU

FOR DEFENDANT : NO APEARANCE

COURT

RULING DELIVERED VIRTUALLY.

MARY KASANGO

JUDGE