



REPUBLIC OF KENYA



**Mohamed & 10 others v Kajoji & 17 others (Environment & Land Case 99 of 2019 & 28 of 2020 (Consolidated)) [2023] KEELC 21073 (KLR) (23 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21073 (KLR)

*[FORMERLY MOMBASA ELC CASE NO. 93 OF 2014]*

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**ENVIRONMENT & LAND CASE 99 OF 2019 & 28 OF 2020 (CONSOLIDATED)**

**MAO ODENY, J**

**OCTOBER 23, 2023**

**BETWEEN**

**MAHMOUD ABDALLA MOHAMED & 9 OTHERS ..... PLAINTIFF**

**AND**

**GABRIEL KATANA KAJOJI ..... 1<sup>ST</sup> DEFENDANT**

**NEWCENTURY MARINE TRADING EA COMPANY ..... 2<sup>ND</sup> DEFENDANT**

**CHI FUNG LAM ..... 3<sup>RD</sup> DEFENDANT**

**PATRICK KAVINYA MULWA ..... 4<sup>TH</sup> DEFENDANT**

**KALAMA RIMBA GONA ..... 5<sup>TH</sup> DEFENDANT**

**KAJOJI RIMBA GONA ..... 6<sup>TH</sup> DEFENDANT**

**CHARO RIMBA GONA ..... 7<sup>TH</sup> DEFENDANT**

**KEA RIMBA GONA ..... 8<sup>TH</sup> DEFENDANT**

**FLORENCE NINGALA CHIMEGA ..... 9<sup>TH</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT & LAND CASE 28 OF 2020**

**BETWEEN**

**FLORENCE NINGALA CHIMEGA ..... PLAINTIFF**

**AND**

**MAHMOUD ABDALLA MOHAMED & 8 OTHERS ..... DEFENDANT**



## RULING

1. This ruling is in respect of a notice of motion dated April 6, 2022 by the plaintiff/applicant seeking the following orders;-
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. Spent.
  - e. That this Honourable court be pleased to direct the 9<sup>th</sup> Defendant to provide security of costs in this suit by depositing the sum of Kenya Shillings Seventy Seven Million Five Hundred and Forty Thousand (Kshs. 77, 540,000/-) in Court or in alternative in a joint bank account of both counsels for the Plaintiffs and the 9<sup>th</sup> Defendant or as may be stipulated by this Honourable court taking into account the substantial value of the suit property and the fact that the 9<sup>th</sup> Defendant has no known assets and or property within the jurisdiction of this honourable court pending the hearing and determination of this suit.
  - f. That the costs of this application be provided for.
2. The application is based on the grounds on the face of the application together with the supporting affidavit sworn by the 1<sup>st</sup> Plaintiff's Attorney Abdalla Said Abdalla, who has a Power of Attorney dated 17<sup>th</sup> December 2018. He deponed that the Plaintiffs were at all material times from the year 2013 the registered owners of the property L.R No. MN/III/783 situated at Kikambala Maweni within Kilifi County and that the Plaintiff in Malindi ELC Case No. 28 of 2020, also the 9<sup>th</sup> Defendant herein, sought leave to amend her claim for adverse possession to 2.4acres of the suit property (the disputed area) as opposed to the entire suit property. That the order of status quo granted by this court affect the entire suit property.
3. Mr. Abdalla added that since the commencement of this suit, the Plaintiffs have suffered loss and expenses to the tune of Kshs. 77, 540,000/-. That on 3<sup>rd</sup> March 2022, the 1<sup>st</sup> and 9<sup>th</sup> Defendants demolished part of the perimeter wall surrounding the suit property, causing loss valued at Kshs. 5,850,000/- and that the said Defendants stole building materials from the suit property valued at Kshs. 1,700,000/-. According to Mr. Abdalla, in the event that the 9<sup>th</sup> Defendant's claim was not successful, she would not be able to compensate the Plaintiffs for the loss incurred, and that she has no known assets.
4. The 9<sup>th</sup> Defendant opposed the application vide a Replying Affidavit dated 6<sup>th</sup> May 2022 where she deponed that with regard to prayer no. 5 of the application, the Plaintiffs had not filed any pleadings claiming compensation from her in the sum of Kshs. 77,540,000/-. According to her, the application was baseless and filed in bad faith. She urged the court to dismiss the application with costs.
5. The application was canvassed by way of written submissions. Notably, prayer No. 3 was granted following a consent order dated 28<sup>th</sup> April 2022.



## Plaintiffs' submissions

6. Counsel for the Plaintiff gave a brief background to the case and stated that Pursuant to the Application dated 17th June, 2021, the Plaintiffs in ELC Case No.28 of 2020 at Malindi formerly ELC Case No.93 of 2014 at Mombasa had applied to amend her Originating Summons seeking to claim 2.4 Acres of Title No. CR.27548 purportedly by adverse possession and the Plaintiffs in ELC Case No. 139 of 2015 at Malindi and ELC Case No.99 of 2019 at Malindi opposed the claim of adverse possession.
7. Counsel further stated that the Plaintiffs' Application dated 6<sup>th</sup> April, 2022, the Plaintiffs in ELC Case No. 139 of 2015 at Malindi and ELC case No.99 of 2019 at Malindi sought to be granted the use and development of the portion of the suit property as the Order of the Status quo issued by the Honourable Court was affecting the entire property and the 9<sup>th</sup> Defendant claims only 2.4 acres.
8. Further vide a consent order issued on 28<sup>th</sup> April, 2022, the Plaintiffs' Application dated 6<sup>th</sup> April, 2022 was heard and the Honourable Court allowed the Application dated 17<sup>th</sup> June, 2021 by consent for the Amendments as prayed with no orders as to costs and also the Plaintiffs' application dated 6<sup>th</sup> April, 2022 prayer No. 3 allowed the Plaintiffs to use and develop the suit property except 2.4Acres pending the hearing and determination of this suit.
9. Counsel also stated the Plaintiffs have suffered loss and expenses valued to the tune of Kenya Shillings Seventy Seven Million Five Hundred and Forty Thousand (Kshs. 77,540,000/-) since the commencement of this suit and that in the event the 9<sup>th</sup> Defendant is not successful in these proceedings she would not be able to pay / compensate for the loss which the Plaintiffs have so far incurred.
10. Counsel identified two issues for determination namely; whether the Plaintiffs have presented sufficient grounds for this Honourable court to grant orders for security and whether the 9<sup>th</sup> Defendant has shown a bona fide defence. Counsel submitted that the purpose of the security of costs order was only to protect the Plaintiffs from incurring further expenses in this suit which they may not recover. To counsel, the 9<sup>th</sup> Defendant's claim for adverse possession could not be sustained against the Plaintiffs since the latter only acquired the suit property on 6<sup>th</sup> November 2013.
11. Counsel relied on several cases in respect of security costs namely: *Garsu Pasaulis, UAB v Systemedia Technologies Limited* (Civil Appeal E034 of 2021) [2022] KEHC 298 (KLR) (Commercial and Tax) (28 April 2022) (Ruling) where the court relied on order 26 of the *Civil Procedure Rules* and held that the court may order that security for the whole or any part of the costs of any Defendant or third or subsequent party be given by any other party.
12. Counsel also relied on the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR where the Supreme Court held that, in an application for further security for costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty.
13. Counsel therefore urged the court to allow the application as prayed.

## 9<sup>th</sup> Defendant's Submissions

14. Counsel for the 9<sup>th</sup> Defendant submitted that the Plaintiffs' intention of the application for security of costs was to frustrate the 9<sup>th</sup> Defendant from pursuing her claim and therefore against the spirit of articles 48 and 50 of *the Constitution* of Kenya.
15. It was counsel's further submission that at the costs claimed could not be substantiated as they were not founded on any pleadings, judgment or the Advocates Remuneration Order and relied on the



cases of *Marco Tools and Explosives Ltd v Mamujee Brothers Ltd* [1988] KLR 730; *Mohansons Food Distributors Ltd and another v KCB Ltd and another* Misc. Civil Application No. 163 of 2021; and *Morange and Company Advocates v Kenya Airports Authority* [2014] eKLR.

16. Counsel argued that in such an application, the court's power is to be exercised judicially and that an Applicant was required to prove that an opposing party will not be able to pay costs at the end of the suit. To counsel, it was not enough to allege that an opposing party will be unable to pay. Counsel relied on the cases of *Kibiwott and 4 others v The Registered Trustees of Monastery of Victory* Nakuru HCCC No. 146 of 2004 and *Gatirau Peter Munya v Dickson Mwenda Githinji and 2 others* CA No. 38 of 2013 [2014] eKLR.

### **Analysis and Determination**

17. The sole issue for determination in these proceedings is whether the 9<sup>th</sup> Defendant should be compelled to deposit the sum of Kshs. 77, 540,000/- as security for costs pending the hearing and determination of the suit.

18. An order for security for costs is a discretionary one as per the provisions of order 26 rule 1 of the *Civil Procedure Rules*, which is the relevant provision in these circumstances. The rule provides as follows:-

In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.

19. The discretion is, however, to be exercised reasonably and judicially putting into consideration the circumstances of each case. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR Where the Supreme Court the purpose of security for costs as follows:-

“The rationale for security for costs is to ensure firstly, that a party is not left without recourse for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty, secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, to be disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party.”

20. The burden of demonstrating that an order for security for costs should be made lies upon an Applicant. The Supreme Court in the *Gatirau Peter Munya* case expressed further that;

“In an application for security for costs, the applicant ought to establish that the respondent, if successful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proved.....

...In *Marco Tool & Explosives Ltd v Mamujee Brothers Ltd* (supra) this court expressed itself thus:-

“The onus is on the applicant to prove such inability or lack of good faith that would make an order for security reasonable”

21. Similarly in the case of *Jayesh Hasmukh Shah Vs Narin Haira & another* (2015) eKLR the court held that;

“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 bonafides of the plaintiff's claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account”.

22. In this case, it must first be noted that the amount of Kshs. Kshs. 77, 540,000/- was not substantiated. Secondly, the Plaintiffs' only evidence that the 9<sup>th</sup> Defendant would be unable to meet the costs of this suit was that the 9<sup>th</sup> Defendant has no known assets.
23. The Applicant alluded to the fact that the Respondent may not be successful in her claim for adverse possession, it should be noted that at this stage we are not dealing with the merits of the case or the 9<sup>th</sup> defendant's defence.
24. I have considered the application, the submissions by counsel and the relevant judicial authorities and find that the Plaintiffs have failed to demonstrate that the 9<sup>th</sup> Defendant would be unable to meet any possible award of costs against her hence the application is dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 23<sup>RD</sup> DAY OF OCTOBER 2023.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

