



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 322 OF 2015

MUGO MURUACHIMBA alias MUGO NYAGA ..... PLAINTIFF

VERSUS

MOFFAT NYAGA KAGAU ..... 1<sup>ST</sup> DEFENDANT

CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT

COUNTY LAND REGISTRAR – EMBU ..... 3<sup>RD</sup> DEFENDANT

R U L I N G

1. By a notice of motion dated 21.06.2019 brought **under Order 26 Rules 1 & 6 of the Civil Procedure Rules**, the 1<sup>ST</sup> Defendant sought the following orders:-

*a) That the Plaintiff be ordered to deposit Kshs.500,000/= as security for the 1<sup>ST</sup> Defendant's costs in this case within 30 days from the date of the order, pending the hearing and determination of this case and in default the Plaintiff's suit do stand dismissed.*

*b) That the said kshs.500,000/= be deposited in an interest earning Bank Account in the joint names of the Plaintiff's and the 1<sup>ST</sup> Defendant's advocates pending the hearing and determination of this case.*

*c) That costs of this application be provided for.*

2. The said application was based upon the grounds set out on the face of the motion and supported by an affidavit sworn by the 1<sup>ST</sup> Defendant on 21.06.2019. The gist of the application was that the Plaintiff was unknown to the 1<sup>ST</sup> Defendant hence it would be very difficult for the latter to pursue costs against the former. The 1<sup>ST</sup> Defendant contended that he did not know where the Plaintiff resided and if he had any assets. It was also contended that the Plaintiff's suit was statute-barred hence an abuse of the court process.

3. The Plaintiff filed a replying affidavit sworn on 19.9.2019 in opposition to the said application. The Plaintiff contended that the Defendants had acquired the suit properties fraudulently hence it would be unfair to order him to provide security for costs. The Plaintiff contended that the 1<sup>ST</sup> Defendant had failed to demonstrate that he would not be able to satisfy an order for costs. The Plaintiff further contended that he was a resident of Embu County hence within the jurisdiction of the court. He, therefore, urged the court to dismiss the 1<sup>ST</sup> Defendant's said application.

4. When the said application was listed for hearing on 24. 09.2019 it was directed that the said application be canvassed through written submissions. The 1<sup>ST</sup> Defendant was given 21 days to file and serve his written submissions whereas the Plaintiff was given 21 days upon the lapse of that period to file and serve his. The record shows that the Plaintiff filed his submissions on 25.10.2019 but the 1<sup>ST</sup> Defendant's submissions were not on record by the time of preparation of the ruling.

5. The court has considered the 1<sup>ST</sup> Defendant's said application, the Plaintiff's replying affidavit in opposition thereto as well as the submissions on record. It is evident from the material on record that the main question for determination is whether the 1<sup>ST</sup> Defendant has made out a case for the Plaintiff to be ordered to furnish security for costs.

6. In the case of **Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 Others (2014) eKLR** the Court of Appeal at Nyeri considered 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 disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party.”*

7. In the said case the Court of Appeal cited with approval the following passage from the case of **Noormohamed Abdulla V Ranchhodbhal J Patel & Another (1962) E.A.448:**

*“The order for security for costs in such a case is not directed towards enforcing payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties”*

8. The relevant provisions on security for costs are to be found in **Order 26 of the Civil Procedure Rules. Order 26 Rule 1** of the Rules stipulates 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.”**

9. The court’s power to make an order for security for costs is essentially discretionary. In the case of **Marco Tool & Explosives Ltd V Mamujee Brothers Ltd [1988] KLR 730** at page 733 it was held, *inter alia* that:-

*“As the cases show the court has unfettered though judicial discretion to order or refuse security. Much will depend on the circumstances of each case, though the guidance from Noormahamed’s case is that the final result must be reasonable and modest”.*

10. The court is further of the opinion that the burden of demonstrating that an order for security for costs should be made lies upon the applicant. In the instant case, the applicant is the 1<sup>st</sup> Defendant. He is the one who has made the application and alleged that the Plaintiff would be unable to meet an award of the costs against him.

11. In the **Gatirau Peter Munya case** the court the following pronouncement on the issue of burden of proof:-

*“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’*

12. So, what is the 1<sup>st</sup> Defendant’s evidence that the Plaintiff would be unable to meet an award of costs against him? The 1<sup>st</sup> Defendant’s only evidence is contained in paragraph 12 of his supporting affidavit which states as follows:-

*“That the circumstances of this case are such that security is necessary so that if the Plaintiff loses the case, I can be assured of getting my costs since as earlier stated I do not know the Plaintiff and I would therefore not know where to get him if I wanted to recover my costs”.*

13. The court is of the view that the mere fact that the 1<sup>st</sup> Defendant does not know the Plaintiff or his residence is not sufficient to satisfy the legal requirement for provision of security for costs. The mere fact that the 1<sup>st</sup> Defendant does not know what assets, if any, are owned by the Plaintiff is not necessarily evidence of poverty on the part of the Plaintiff. The court is thus far from satisfied that the 1<sup>st</sup> Defendant has demonstrated that the Plaintiff would be unable to meet any possible award of costs against him due to poverty or lack of good faith on his part.

14. The 1<sup>st</sup> Defendant’s contention that the Plaintiff’s suit might be statute barred is not a matter which can be conclusively determined at this stage. This issue can only be the subject of trial or a separate application bearing in mind that it is undesirable for a court to conduct a trial on affidavits only and without the benefit of cross-examination where some facts in issue may be in dispute.

15. The upshot of the foregoing is that the court is not satisfied that the 1<sup>st</sup> Defendant has demonstrated that the Plaintiff would be unable to meet any award of costs which might ultimately be made against him. Consequently, the court finds no merit in the 1<sup>st</sup> Defendant’s notice of motion dated 21.06.2019 and the same is hereby dismissed with costs to the Plaintiff.

16. It is so ordered.

**Ruling dated, signed and delivered in open court at Embu this 19<sup>th</sup> day of December 2019.**

In the presence of:

Mr. Njuguna holding brief for Mr. Mugendi for Plaintiff, Mr. Okwaro for the 1<sup>st</sup> Defendant and in absence of 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

Court Assistant – Mr. Muinde.

**Y.M. ANGIMA**

**JUDGE. – 19.12.19**