



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENT & LAND COURT**  
**ELC CASE NO. 10 OF 2015**

GRACE MWITHI M.MAUNDU.....APPELLANT/RESPONDENT

=VERSUS=

JAMES MUTISYA NGOVI.....RESPONDENT/APPLICANT

**RULING**

The matter coming up for determination is the *Notice of Motion* application dated *11th September 2015*, brought by the Respondent under *Order 26 Rule 1 Sections 3A and Section 63(e) of the Civil Procedure Act* and all enabling provisions of the law. The applicant has sought for the following prayers;-

1. *spent*
2. *That the Appellant /Respondent be ordered to deposit security for the costs in the sum of kshs.500,000/=.*
3. *That the costs of this Application be provided for.*

The application is anchored on the grounds stated on the face of the application and on the Supporting Affidavit of *James Mutisya Ngovi*, the Respondent/applicant herein. These grounds are;-

1. *That the Appeal by the Appellant has no merit but is an abuse of Court process.*
2. *That the Appellant is a daughter of the respondent and ought to be in fore front in providing care to the Respondent and his wife who are elderly and sickly but has not been doing so.*
3. *That the Respondent wanted to sell a portion of his land to meet medical costs for himself and his wife.*
4. *That his condition is precarious yet the interest of the two of her brothers that the appellant is purportedly fighting for is already catered for.*
5. *That the Appellant is the only child of the respondent who has obtained University Education but is not providing any care to her elderly and ailing parents.*
6. *That the reasons that the respondent is selling a portion of his properties is to cater for medical costs and upkeep which non of his children is able to meet.*

**7. That it is only fair that the Appellant pays security for the costs before appeal proceeds.**

**8. That it is the prayer of the respondent that the hearing of the Appeal be speeded up given his ailing condition.**

In his Supporting Affidavit, the applicant **James Mutisya Ngovi** averred that the appellant is his daughter who she expects to be at the fore front providing for the applicant's medical costs and upkeep but instead she is using the court process to frustrate the applicant. The applicant averred that he wanted to sell a portion of his land to pay for his medical costs and that of his wife. The deponent further deposed that his wife and himself have been ailing and need medical attention urgently and it was his prayer that the court orders the appellant to deposit security for costs in the tune of **Kshs.500,000.00** due to trouble of dragging the defendant through the Court System unfairly. The applicant further averred that the Appeal process be expedited due to his ailing condition and that of his wife as per annexure '**JMN 1**'

The application is opposed and **Grace Mwithi M.Maundu**, swore her Replying Affidavit and averred that she has all long been taking care of the Respondent/Applicant who is her father and her mother from **1980** when she was engaged in meaningful employment and that to date she provides them with basic needs and medical provisions. The appellant averred that she arranged for the respondent to be taken from **Kangundo District Hospital to Kenyatta National Hospital** for specialized treatment and all allegations of neglect are unfounded. The appellant further averred that security of costs before the Appeal is heard and determined is unfounded, lacks basis as no credible reason has been advanced to support the same and that the respondent has not shown that the appellant is unable to meet his costs should the Appeal fail.

The deponent averred that she placed a caution on the respondent's parcel of Land to the best interest of the extended family members because the respondent has been entering into various sale agreements with 3rd parties without involving other family members or keeping records of the said transactions due to his age and that it may lead to future legal tussles unless contained. The appellant averred that it is untrue that she is the one dragging this matter to court but it is the respondent who has been uncooperative with other family members.

The application was canvassed by way of written submissions. The Law Firm of **S..M.Kitonga & Co Advocates** for the Applicant filed their written submissions on **8th March 2016** and urged the court to consider security of costs positively. They relied on various decided cases among them the case of **Nzai&3 others versus Kilifi County Council & 2others Misc Application No.146 of 1992**. Where the court held that;

**'in exercising discretion, the Court will have to consider all the circumstances of the case'**

The Law Firm of **P.N Musila & Co. Advocates** for the Appellant filed their written submissions on **30th March 2016** and urged the Court to disallow the Notice of Motion dated **11th September 2015** to pave way for the hearing and final conclusion of the Appeal. They relied on the decided case of **Shah versus Shah 1982 KLR 85** where the Court held that;

**"security for costs are generally required for plaintiffs residing out of the Jurisdiction of the Court or where it is not known where the plaintiffs are resident"**.

It was submitted that in the instant case the Appellant/Respondent is residing in Kenya within the Jurisdiction of this Court and her place of aboard/residential dwelling are well known to the Respondent/Applicant.

This court has now carefully considered the instant Notice of Motion, the annexures thereto and the written submissions. The court has further considered the cited provisions of the law and authorities attached and makes the following findings;-

The application is brought under **Order 26(1) of the Civil Procedure Rules** which provides that;

***‘in any suit, the Court may order that security for the whole or part of the cost of the defendant or third subsequent party be given by any other party’.***

Further the application is anchored under **Section 63(e) of the Civil Procedure Act** which falls under the supplemental proceedings and donates to the court powers to make such other interlocutory orders as may appear to court to be just and convenient.

**Section 3A of the Civil Procedure Act** also grants the court the inherent power to make such orders as may be necessary for the ends of justice and/ or prevent abuse of the court process.

The applicant has urged the court to order the appellant herein to deposit security for the costs in the sum of **Kshs. 500,000/=**. There is no doubt that on **23rd July 2015**, the Principal Land Registrar Machakos tendered his Ruling in which he found no merit in the cautioner’s claim and the Caution filed by the appellant was ordered removed in accordance with **Section 73(3) and (4) of the Land Registration Act 2012**.

The appellant, **Grace Mwithi** was dissatisfied with the said Ruling and accordingly filed a Memorandum of Appeal on **5th August 2015**, against the said ruling of the Principal Land Registrar .The applicant herein **James Mutisya Ngovi** instead of filing his response to the Memorandum of Appeal filed the instant application.The said application is opposed by the respondent who is the appellant herein.The parties herein are father and daughter.The respondent is aged and ailing.Accordingly the Appeal lodged herein should be heard expeditiously.However the filing of the instant application has stalled the Appeal.

The issue for the determination is whether the applicant is deserving of the orders sought.The main reason for the application is that the Appeal by the appellant has no merit.That the respondent wanted to sell a portion of his land to meet medical costs for himself and his wife.However it is not clear how a deposit of **Kshs.500000/=** as the security for costs would aid the applicant in his intention of wanting to sell a portion of land to meet medical costs.Though the appellant filed the Memorandum of Appeal she did not file an application for stay of the execution of the decision of the Land Registrar.The Land Registrar made an order that the caution lodged by the appellant be removed in accordance with **Section 73(3) and (4) of the Land Registration Act 2012**.There is no evidence adduced by the applicant to show that the Appeal herein has prevented him from selling the portion of his land .The appellant has only appealed the decision of the Land Registrar, Machakos ordering that the caution lodged be removed.There is no evidence on record that the appellant has barred or prevented the applicant from carrying on with the sell of any portion of his land.

Under **Order 26(1)** the Court has discretion to order for the Security of Costs but such discretion must be exercised judicially.In the case of **Bank of Baroda versus Nahendra Kumal Joshban Patel,Civil Appeal No.322 of 2000**,the Court held that;

***“the power to order security for cost is discretionary and may be exercised at any time according to the circumstances existing at the time of the application and can be exercised any time if the circumstances materially change”.***

Further in the case of **Mama Ngina Kenyatta and Another versus Mahira Housing Co. Civil Appeal No. 256 of 2003**, the court held that;

***“matters that the court should consider in exercising its discretion in an application for the security of costs include whether the Company’s claim is bonafide and whether the company has reasonable prospects of success”.***

Taking into account the above position,the court has to considered whether the appellant claim is bonafide with reasonable good prospects of success.In deciding the matter the court will also consider the findings in the case of **Marco Tool and Explosives Ltd versus Mamujee Brothers Ltd (1986)-1989 EA 337** where the Court of Appeal held that;

**“the court has unfettered discretion though judicial to order or refuse security and much which depend upon the circumstances of each case ,though the final result must be reasonable and moderate.Further the onus is on the applicant t prove inability or lack of good faith that would make an order on security reasonable”**

As the court had stated earlier, there is no doubt that the Principal Land Registrar rendered his ruling on **23rd July 2015**.The appellant filed his Memorandum of Appeal challenging the said ruling.The court has considered the said Memorandum of Appeal and finds it arguable and therefore the appellants is justified in filling the Appeal as she is as an aggrieved party. The court finds no bad faith on her part.The courts has also considered the circumstances of this case and the parties being family members , finds that it is not a suitable case for ordering deposit of security.What the applicant herein should have done was to file his response to the Memorandum of Appeal in order to fast track the hearing of the Appeal lodged.The court also finds that the filing of this kind of application only has the effect of stifling the Appeal instead of fast tracking the same.The court finds that the order for security of costs being an exercise of discretion,then it declines to exercise the discretion in favour of the applicant herein as the circumstances of this case do not warrant issuance of such orders.No reasonable grounds exist to commend the issuance of an order for deposit of security of costs as prayed by the applicant herein.

From the above reasons, the Court finds the Notice of Motion dated **11th September 2015** is not merited.The same is dismissed entirely with costs being in the cause.

Further the court notes that this is a **Machakos ELC** matter.The court directs that the file be transfered to **Machakos ELC Court** immediately so that the Respondent/ Applicant herein can file his Response to the Appeal within the next **30 days** from the date of this Ruling.The Appellant to ensure that the Appeal has been set down for hearing within the next **3 months** from the date of this Ruling so that the issues raised in the appeal can be resolved expeditiously.

It is so ordered.

Dated, Signed and Delivered at **Nairobi** this **24<sup>th</sup>** day of **February 2017**.

**L.GACHERU**

**JUDGE**

In the presence of;

None attendance for the Respondent/Applicant

M/s Busima holding brief Mr Musila for the Appellant/Respondent

Hilda : Court Clerk

**Court:**

Ruling read in open Court in the presence of the above stated advocate. Notice of entry of Ruling to be served to the Respondent by counsel for the Appellant/Respondent.

**L.GACHERU**

**JUDGE**