



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
HC.COMM. SUIT NO. 29 OF 2016

ZULEKHA MOHAMED AWADH AGIL.....PLAINTIFF

VERSUS

1. YAHYA MOHAMED SULEIMAN

2. STEPHEN ODDIAGA T/A

STEPHEN ODDIAGA & CO. ADV.....DEFENDANTS

RULING

1. By a Notice of Motion dated 14.7.2016 filed in court on the same day, the defendant has prayed for orders that

(a) spent

(b) That the plaintiff be ordered to give security for the whole costs of both the defendants.

(c) That the security be in terms of cash deposit of Kenya Shillings Fifty(Kshs.50,000,000/= million or any such reasonable amount as the court direct in a joint interest earning account of the Defendant and the plaintiff.

(d) That alternatively, the plaintiff deposit the balance of purchase price which is Kenya Shillings One Hundred and Thirty Five(Kshs.135,000,000/) million only in a joint interest earning account in the names of the plaintiff's advocates and the defendants advocates pending hearing and determined? (determination) of this suit.

(e) That the court to be at liberty to issue any other order and or directions as would be convenient and fair in the circumstances including summoning the plaintiff. Zulekha Mohamed Awadh Agil for interrogation in regard to her position in this claim if need be.

(f) That costs of this application be provided for

2. That application is grounded on the fact that the plaintiff's suit is grounded *on the* baseless fear that the defendant *is unable* to complete the transaction; that the defendant is ready and willing to complete as all documents of completion are ready and title deposited into court; that the plaintiff has shown no elactrity

to complete the sale and that the defendants fear that the plaintiff may not be in a position to pay their costs in the event that the court awards the costs to the defendants.

3. That application was indeed served upon the plaintiffs on the 18.7.2016 and affidavit of the process server sworn on 12.8.2016 filed on 12.8.2016 was filed to show service. Come the date of hearing, despite such service and acknowledgement by the plaintiff advocate no responses had been filed and nobody appeared on behalf of the plaintiff.

4. Pursuant to the provisions of order 51 Rule 14 (4) the application was deemed unopposed and was ordered to proceed *ex parte*.

5. The court's duty under order 26 Rule is intended to secure the interest of the party seeking security while always noting that access to justice is now constitutionally underpinned and no order, even if it be in the nature of security for costs, should be seen to undermine, derogate from or indeed to seek to limit that right. The principles to be considered are well settled but the words of the Court of Appeal in *LYDIA MATHIA -VS- NAISULA LESOUDA & ANOTHER* [2013] eKLR are of great guidance the court said:-

“However it is to be remembered that the court has unfettered discretion that should be exercised judiciously. As was stated in the cause of MARCO TOOLS EXPLOSIVE LTD -VS- MAMUJEE BROTHERS LTD [1988] KLR, 370, much will depend on the circumstances of each case through the final result must be reasonable and modest.”

6. To this court modest and reasonable would refer to the whether or not there are reasons to order security and if it is ordered it ought to be modest and reasonable so as to accord with the plaintiff's right to have his dispute heard and determined by the court. In the circumstances of the case before me, it is common ground that the parties, plaintiff and the 1st defendant entered into an agreement for sale of the 1st defendant's property at a price and consideration of kshs.150,000,000 of which the plaintiff paid kshs.15,000,000 as deposit.

7. On when to order security, this court has chosen to follow the decision in **GUFF ENGINEERING (EAST AFRICA) LTD -VS- AMRIK SINGH KALAGI** in which the quoted with approval LORD DENNING, MR, in **SIR LINDSAY & PARKINSON & COMPANY LTD. (1973) 2 WLR 632** to the following effect:-

“If there is reason to believe that the company cannot pay the costs, then security may be ordered, not must be ordered. Some of the matter which the court might take into account, are such as whether the company claim is bonafide and not a sham and whether the company has reasonable good prospects of success. Again it will consider whether there is an admissions by a defendant on the pleadings or elsewhere that money is due.

The court might also consider whether the application for security was being used oppressively so as to stifle a genuine claim. It would also consider whether the company want of means has been brought about by a conduct by the defendant, such as delay in payment or delay in doing their part of the work.”

8. In the instant case, the agreement for sale was entered into on 26.2.2015. That agreement pegged the completion period at 120 days from the date of the agreement. In this courts computation, the completion was due on or before the 26.6.2016. The defendant did not complete his side of the agreement. Infact by the time this suit was filed on 1.4.2016, some 14 months later, the completion documents had not been availed. When the parties appeared in court on 25.4.2016 the parties confirmed that there was still a caveat registered against the titled. The court therefore made orders that eventually resulted in the caveat being removed and the sub-division being registered. These to me are the circumstances. I must take into account prior to making a determination or whether or not to order security for costs. I have asked myself whether the the plaintiff is such a litigant that would utterly fail to pay costs if her suit fails and I have answered that question in the negative. I have equally asked myself whether the request for the security

in the sum of kshs.50,000,000 for a dispute of Kenya Shillings 135,000,000 or indeed Kshs.150,000,000 is modest and reasonable and not intended to stifle the plaintiff's right to have her dispute adjudicated by the court and I am sorry I have found that the request is not only exorbitant but may only work to stifle the plaintiff's right to access to justice. I say not reasonable and modest because to this court the instruction fees for the claim if it were a fail, noting that a joint defence was filed, would be in the sum of kshs.1,774,500 or thereabouts. That sum as a guiding figure would hardly escalate to over 5,000,000 if the suit was to fail and the counter claim succeeds.

9. Most importantly, the defendant having said on the grounds of the application that the plaintiff may be unable to pay the costs has produced no evidence to support that fact. To this court, it was the duty of the defendant to prove that inability so that the plaintiff is called upon to rebut the same. There being no evidence there is nothing in that regard, upon which the court can lay its heads upon to exercise its discretion in favour of the defendant. To do otherwise, beyond declining the application, would be to act injudiciously and therefore whimsically and appriciously.

10. The upshot is the application even though unopposed is not merited and the same fails. It is dismissed with costs.

11. For case management purposes it is ordered that the parties appear in court on the 2.9.2016 for case conference.

12. It is so ordered.

Dated, signed and delivered at Mombasa this 15th day of August 2016.

Ruling delivered in the presence of:

Ms.Mwangi for Oddiaga for defendant.

Mr.Nabwana for the defendant.

P.J.O.OTIENO

JUDGE

15/8/2016