



Nzioka & 2 others (Suing on Their Behalf and as the Officials of Ngelani Pioneer Society) v Ziba Trustees Limited & another (Environment & Land Case 37 of 2018) [2025] KEELC 3431 (KLR) (29 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3431 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 37 OF 2018
NA MATHEKA, J
APRIL 29, 2025**

BETWEEN

**DOMINIC KATUA NZIOKA 1ST PLAINTIFF
ANASTATSIO NJUE NJIRU 2ND PLAINTIFF
SOLOMON KIMANI KAIRU 3RD PLAINTIFF
SUING ON THEIR BEHALF AND AS THE OFFICIALS OF NGELANI PIONEER SOCIETY**

AND

**ZIBA TRUSTEES LIMITED 1ST DEFENDANT
NATIONAL MEDIA GROUP STAFF RETIREMENT BENEFIT SCHEME 2ND DEFENDANT**

RULING

1. The first application is dated 2nd September 2024 and is brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 26 Rule 1 and Order 51 Rule 3 of the Civil Procedure Rules, 2010 seeking the following orders;
 1. That this Honourable Court be pleased to order the Plaintiffs/1st Respondent to give security for costs for Kshs. 12,000,000.00 or any other sum the court deems fit into a joint interest-earning account to be opened by the Advocates herein, as security for the costs of the 2nd Defendant/Applicant within 30 days of the order.
 2. That the suit be struck out with costs in default of the provision of the said security within the prescribed period.



3. That this suit be fixed for hearing of the main suit on a priority basis.
 4. That appropriate direction be issued by the court as it may deem fit to facilitate the full hearing and expeditious disposal of this suit.
 5. That costs of this Application be provided for.
2. It is supported by the facts set out in the annexed Affidavit of SEKOU OWINO, the following grounds that the 2nd Respondent/Applicant is the registered proprietor of all that property known as Land Reference No. 24605/2 (original Number 225330) Mavoko Municipality, Machakos County. That the Applicant purchased the suit property from the 2nd Respondent for a consideration of Kshs. 440,000,000.00, vide a Sale Agreement dated 2nd November, 2012, after confirming that the property was vacant and there were no occupants on the property. That the Applicant has consistently enjoyed quiet possession of the suit property, which has remained vacant without any occupants, a status confirmed by valuation reports prepared at the Applicant's instruction by M/S Knight Frank Valuers Limited on 12th February, 2014 and by M/S Highlands Valuers Limited on 12th December, 2016. In 2018, the court conducted a site visit of the suit property, during which a report was prepared confirming that there was no occupation of the property by the 1st Respondent. In a Ruling delivered on 12th July, 2019, this Honourable Court found, among other things that the 1st Respondent did not produce photographs of their respective houses, either individually or as a family. The court then proceeded to dismiss the 1st Respondent's Application for an injunction with costs. Following the aforesaid Ruling, the 1st Respondent filed an Application dated 8th August, 2019 seeking a stay of execution of Ruling delivered on 12th July, 2019 which Application was again dismissed with costs by this Honourable Court.
3. Subsequently, in 2021 some unknown individuals, likely members of the 1st Respondent, filed ELC. No E074 of 2021: Francis Kimuyu & Others vs. Ziba Trustee Ltd & Another in the Chief Magistrate's Court in Mavoko seeking injunctive orders to restrain the Applicant from evicting them. By a Ruling delivered on 25th November, 2021, the court dismissed the suit on the grounds that it lacked jurisdiction to hear and determine the matter.
 4. The Applicant has demonstrated that it has credible defense with a high chance of success. The suit property, being the subject matter of the suit, was valued at Kshs. 1,100,000,000.00 as of 2016, and therefore, if this suit is dismissed with costs, the party-and-party costs under the Advocates Remuneration Order would exceed Kshs. 22,000,000.00. The 1st Respondent/Plaintiffs have no known assets within the jurisdiction of this Honourable Court and the Applicant is reasonably and genuinely apprehensive that it may be unable to recover any costs awarded against the 1st Respondent by this court. The 1st Respondent nor members associated with them have previously engaged in vexatious litigation, filing numerous Applications with little or no merit, which have been dismissed by the court with costs to the Applicant. The Applicant has already incurred substantial costs in defending this suit. If the 1st Respondent is not ordered to provide security for costs, the Applicant will suffer prejudice as it may be unable to recover the costs from the 1st Respondent if its claim is disallowed. This suit was filed in 2018 and has been pending in court for the last six years and that the Plaintiffs had not been keen in prosecuting their case. The members of the Applicant are retired individuals who are advanced in age, and it is in the interest of justice that their rights and benefits be protected without delay, given their limited ability to engage in prolonged litigation. The Applicant has been compelled to incur substantial costs in employing guards to secure the suit property from further unauthorized access and encroachments by members of the 1st Respondent and the ongoing expenses are financially burdensome to the Applicant, diverting resources that should be utilized for the benefit of its members.



Due to the pendency of this suit, the Applicant is unable to proceed with planned developed projects on the suit property including selling part of the property and this has deprived the members of the Applicant of enjoying the benefits of their retirement, including investment returns from the said developments. It is in the interest of justice that the Application be allowed.

5. The application was canvassed by way of written submissions which the court has duly considered. The applicable law in an application for security for costs is order 26 Rule 1 of the Civil Procedure Rules which provides as follows;

“(1) 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”.

6. As rightly submitted by the Defendant/applicant, grant for orders sought herein is a matter of judicial discretion as the court held in the case of Shah and others vs Manurama Limited and others (2003) E.A 294 Cited with approval in the case of Ahmed Kulimye Bin & 2 others vs Kenya Revenue authority & another (2012) eKLR. The same position was taken by the court in the case of Cancer Investments Limited vs Sayani Investments Limited (2010) eKLR.
7. The test in an application for security for costs is not whether the Plaintiff has established a prima facie case but whether the Defendant has shown a bonafide defence. This was the holding in the case of Shah vs Sheti Civil Appeal No.34 of 1981.
8. 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 bonafides of the plaintiff’s claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account”.

9. In an application for 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. 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 proven. This was the holding in the case of Kenya Education Trust vs Katherine S.M. Whitton Civil Appeal No 310 of 2009.
10. It should, however, be noted that much will depend on the circumstances of each case though the final result must be reasonable and modest. In the case of Marco Trols & Explosive Limited vs Mamunje Brothers Limited (1988) Eklr 730 this point was enunciated by the court in the following terms;

“The exercise of the court’s power is discretionary. However, the onus is on the applicant to prove such inability or lack of good faith that would make the order for security reasonable”.
11. Being guided by those legal principles, the only issue for determination is whether or not an order for security for costs can issue against the Plaintiffs. As discussed above, one of the principles to consider



is the ability of the Plaintiffs to pay the costs in the event that they are not successful and that, is one of the grounds relied upon by the Defendant. Article 50 of *the Constitution* provides that;

“Every person has the right to have his dispute that can be resolved by the application of the Law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body”.

12. In the case of *Shakalanga Jirongo vs the Board of National Social Security Fund HCC No 957 of 2000* in which the court held that;

“Poverty is not sufficient ground for an order for security for costs”.

13. In the case of *Noornamohammed Abdullah vs Ranchorbhai J. Patel (1962) EA 447* wherein the court held that;

“It is right that a litigant, however poor should be permitted to bring his proceedings without hindrances and have the case decided”.

14. In the case of *Keystone Bank Limited & 4 others vs I&M Holdings Limited & another (2017) Eklr* where the court held;

“In an application for security of costs, the applicant ought to establish that the Respondent, if unsuccessful 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 proven”.

15. The court notes that the Applicant has just made a general statement that the Respondent may not be able to settle the costs in the event that they do not succeed in their suit because they have no known assets. To that extent, it did not discharge its evidential burden.

16. On the issue of whether the Defendant has a bonafide defence, the court has perused the defence as filed. As was held in the case of *Shah vs Shah (supra)*, the test in an application for security for costs is whether the Defendant has a bonafide defence. In view of the fact that at this stage, the court should not consider the merits of the case or the Defendant’s defence as that is the mandate of the court that will hear the matter. The only way the court can establish the veracity of those assertions is by taking evidence at the main trial. It would be unfair in the circumstances of this case, to order the Plaintiff to deposit the sought for, security for costs.

17. In view of the foregoing, I am of the considered view that the application is not merited and the same is hereby dismissed. The costs shall abide the outcome of the suit.

18. The second application is dated 22nd November 2024 and is brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 8 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;

1. That the Honourable Court be pleased to grant the Applicant leave to amend their Originating Summons dated 1st March, 2018.
2. That costs of this Application be in the cause.

19. It is supported by the grounds that the Applicants seek to supplement the information contained in the Boundary and Details Survey of L.R. No. 24605/2 in the Originating Summons dated 1st March, 2018. That the Applicants seek to furnish information developments on the suit property and regarding the



- details on the possession of each occupant. That pursuant to the said report, specific aspects of the subject matter of the suit that were not adequately captured in the original Originating Summons will be addressed. That as such, the inclusion of this information will serve to clarify and substantiate the Applicant's claims, ensuring that the Court is fully informed and able to render a just and fair decision.
20. This court has considered the application and the submissions therein. Order 8 Rule 3 of the Civil Procedure Rules provides for amendment of pleadings with leave of court as follows;
- (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
21. Further, Order 8, rule 5 gives the court the general power to amend.
- 5.
- (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
22. Section 1A of the Civil Procedure Act provides for the overriding objective of the Civil Procedure Act and the rules made thereunder and provides as follows:
- 1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
 - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.
23. Section 1B of the same Act, on the other hand provides for the duty of court and states:
- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.
24. The 1st Respondent strongly opposed the application and pointed out that there existed interim orders issued by this court in 2018 restraining the Plaintiffs from interfering with the suit property and maintain the status quo by then. The Plaintiffs have not taken any steps to fix the matter for hearing until this application annexing boundary and detail survey report of LR No. 24605/2 dated 28th July 2024 which show they have subdivided the suit property into 518 plots and constructed 138



permanent structures despite the court orders. That any developments thereafter cannot be relied upon as change in facts. That there is no draft amended originating summons annexed.

25. In the proposed amendment the Plaintiff states that they seeks the inclusion of this information to clarify and substantiate the Applicant's claims, ensuring that the Court is fully informed and able to render a just and fair decision.

265. In the case of Central Kenya Ltd vs Trust Bank & 4 Others, CA No. 222 of 1998, the court stated that, the guiding principle in amendment of pleadings and joinder of parties is that:

all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."

27. On the issue of amendment of pleadings in the case of AAT Holdings Limited vs Diamond Shields International Ltd (2014) eKLR, the court cited the principles as set out by the Court of Appeal in Central Kenya Ltd Case No. 222 of 1998 as shown below;

- (i) That are necessary for determining the real question in controversy.
- (ii) To avoid multiplicity of suits provided there has been no undue delay.
- (iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.
- (iv) That no vested interest or accrued legal rights is affected; and
- (v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

28. It is quite clear from decided cases that the discretion of a trial court to allow amendments of a Plaintiff is wide and unfettered except it should be exercised judicially upon the foregoing defined principles. In the case of Isaac Awuondo vs Surgipharm Ltd & Another (2011) eKLR the Court of Appeal had the following to say:

In *Moi University Vs Vishva Builders Limited - Civil Appeal No. 296 of 2004* (unreported) this Court said:-

The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaintiff the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see *H.D Hasmani v. Banque Du Congo Belge* (1938) 5 E.A.C.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel vs. E.A. Cargo Handling Services Ltd.* [1974] E.A. 75 at P. 76 Duffus P. said:-



“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN , J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

29. The Plaintiffs state that they seek to supplement the information contained in the Boundary and Details Survey of L.R. No. 24605/2 in the Originating Summons dated 1st March, 2018. That the Applicants seek to furnish information developments on the suit property and regarding the details on the possession of each occupant. That pursuant to the said report, specific aspects of the subject matter of the suit that were not adequately captured in the original Originating Summons will be addressed.
30. Be that as it may, there is no proposed Amended Originating summons to peruse. From the grounds given, the Plaintiffs seek to introduce a boundary and detail survey report of LR No. 24605/2 dated 28th July 2024. This suit was filed in 2018 and interim orders given. I find it introduces new facts into this matter. In these circumstances, I find that this contravenes order 8 of the Civil Procedure Rules. I find that this application is not merited and is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF APRIL 2025.

N.A. MATHEKA

JUDGE

