



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC NO.58 OF 2011

GRACE AKINYI AJWANG

RICHARD OGENDO.....PLAINTIFF

VERSUS

ROSEMARY ATIENO ABUTO & OTHERS.....DEFENDANTS

R U L I N G

1. The 3rd defendant in this matter – **SASAH GENERAL MERCHANTS LIMITED** – desires that the plaintiffs – **GRACE AKINYI AJWANG** and **RICHARD OGENDO** – be ordered to furnish security for costs in the sum of Kshs.4,518,309 or such sum as the court may deem just.

2. Towards that end, the 3rd defendant filed a Notice of Motion dated 14/8/2014 which was heard here on 20/2/2014. The motion was brought under Order 51 Rules 1 & 4, Order 26 Rules 1 & 5 of Civil Procedure Rules, 2010, Sections 1A, 1B, 3A and 63 (e) of Civil Procedure Act (Cap 21) Sections 24,25 and 26 OF Land Registration Act, No.3 of 2012, articles 47 and 159(2) of the Constitution, 2010 and other enabling provisions of law.

3. At this stage, the prayers for consideration are as follows:

Prayer 2: That the Court be pleased to order that the plaintiff do offer or provide security for costs in the sum of Kshs.4,518,309 or such sum as the court may deem appropriate, just and expedient on account of costs already incurred or to be incurred by 3rd defendant in this suit.

Prayer 3: Consequent to prayer 2, the court do order such security to be deposited in a joint interests earning account in the names of the advocates for the plaintiffs and 3rd defendant within 30 days of the order.

Prayer 4: The court be pleased to issue or grant such further directions towards expeditious hearing of the suit to protect the interests of the parties, especially the 3rd defendant.

Prayer 5: The plaintiffs to bear costs of this application.

Prayer 6: Such further order as are just and expedient.

4. The grounds advanced stipulate, inter alia, that the 3rd defendant had the suit property – **L.R. NO.KISUMU MUNICIPALITY/BLOCK 7/319** – sold to him by 1st and 2nd defendants. That due

diligence was exercised before such sale; that the 3rd defendant became the registered owner after following the requisite procedure; and that the plaintiffs later emerged to challenge the 3rd defendant's ownership.

5. According to 3rd defendant, the plaintiffs are not keen to prosecute the suit. The 3rd defendant said it has incurred and continues to incur costs and is therefore incurring substantial losses. Such losses, 3rd defendant averred, may not be recoverable from the plaintiffs as they have no known assets or means of income. The 3rd defendant thus stands exposed to possible extreme prejudice or disadvantage.

6. The 3rd defendant said its defence is good and its counterclaim has overwhelming chances of success. It would therefore be necessary to cushion the 3rd defendant from costs that have accrued and are likely to accrue.

7. The supporting affidavit accompanying the application narrates some history, reiterates the grounds advanced, and seeks to justify why the orders sought are necessary.

8. The plaintiffs opposed the application vide a replying affidavit filed here on 29/1/2014. According to plaintiffs, the application is misconceived, frivolous and lacking in merit.

9. The plaintiffs attempted to explicate the applicable law. For the applicant or defendant to benefit, the plaintiff would have to be a resident outside of court's jurisdiction; the plaintiff should be one who is not nominal or suing in a representative capacity and he should be one unable to pay costs if ordered to do so; the address given by the plaintiff in the pleadings would have to be wrong or incorrect or even not at all stated. Such security for costs would be ordered to if the plaintiff deliberately changes address intending to evade costs related consequences.

10. The plaintiffs in this case were said to have their abode in Kisumu within the court's jurisdiction; they are not nominal; and their address is correctly stated and has not been changed.

11. The suit property belongs to the estate of the late Ogenjo Bodo whose estate was subjected to the necessary legal process for succession in Succession Cause No.213/1991. But the 1st and 2nd defendant fraudulently instituted another succession cause – which was No.700/09 – and procured a grant which they used to effect the process of selling the land to 3rd defendant. Subsequent investigations led to criminal indictment of the two defendants in criminal case No.441/2010.

12. According to the plaintiff, the 3rd defendant was duped by 1st and 2nd defendants and he should have recourse to the two to recover back his money. According to the plaintiffs, it is fallacious for 3rd defendant to think he is a legitimate holder of title to the land. The 3rd defendant's case will crumble, plaintiffs said, when evidence begins to show during hearing. By this application, the 3rd defendant is said to be trying to avoid the day of reckoning.

13. The plaintiffs denied that they are delaying the case. They asserted that it is the 3rd defendant who is indeed trying to do so. And the allegation of loss by the 3rd defendant was dismissed as untrue as the rent collected from properties in the suit land is deposited in a joint account as ordered by court. The 3rd defendant is said to have taken an uncalculated risk of using a temporary grant to have the property transferred to him; something he knew was illegal. And all this happened despite a clear restriction placed on the suit property.

14. The plaintiffs asserted that they can pay costs; the estate they represent being worth more than 50 million shillings comprising of town properties. The plaintiffs said also they still hold the original title to the land. The 1st and 2nd defendant's title was therefore a forgery which was used to defraud the 3rd defendant.

15. The court heard oral arguments from both sides on 20/2/2014. The arguments were largely amplified representations of what the application and replying affidavit contain. It is a superfluous exercise to attempt a repeat here.

16. The 3rd defendant availed various decided authorities to buttress his arguments. The authorities are:-

(i) **SHAH VS SHAR (1982) KLR Pages 95-103**

(ii) **KEARY DEVELOPMENT LTD VS TARMAC CONSTRUCTION LIMITED & Another (1995) 3 ALL E.R Pages 534-544.**

(iii) **PROCON (GB) LIMITED VS PROVINCIAL BUILDING CO. LIMITED & Others: (1984) 2 ALL E.R, Pages 368-380.**

(iv) **SIR LINDSAY PARKINSON & CO LIMITED VS TRIPLAW LIMITED (1973) 2 ALL ER, Pages 272 – 287**

(v) **ABEL MORANGA ONGWACHO VS JAMES PHILIP MAINA & 3 others: NAIROBI HCC cfc CASE NO.39/2012 (MILIMANI Unreported).**

(vi) **HALSBURY LAWS OF ENGLAND, 4th Edition, Volume 37, Para 305.**

(vii) **The Civil Procedure Act (Cap 21).**

I need to point out here that the availed bound copy of all these authorities does not contain the Halsbury report and the Civil Procedure Act. These two are merely stated in the list of authorities but were not availed.

17. To even things out, or probably not to be outdone, the plaintiffs availed an extract of Halsbury's Laws of England, third Edition Volume 21. (Page numbers are not clear). The extract contains a number of considerations to make when deciding whether to grant an application for security for costs.

18. I have considered the material availed by both sides. I have had a look at what each side has filed concerning the main suit. A synopsis is necessary. The suit land was sold to 3rd defendant by 1st and 2nd defendants. The two had a grant in respect of the estate of the late **MANASON OGENDO BODO**. The grant looked genuine. They represented to 3rd defendant that they wanted to sell the suit land. The 3rd defendant after conducting all due diligence, bought the land.

19. Problems then arose later. The two plaintiffs seem to have obtained an earlier grant. They realized what 1st and 2nd defendants had done and swung to action. This suit was filed and criminal proceedings were also instituted against 1st and 2nd defendants after investigations.

20. The 3rd defendant poses as innocent buyer for value without notice. The plaintiffs do not see him as such. In this application, the plaintiffs are accused of not fixing the matter for hearing. They are said to be comfortable with the Status Quo. Their suit is said not to have high chances of success. According to 3rd defendant, the claim against him is vexatious. The 3rd defendant said he has a bonafide defence. He is the current registered owner of the land yet he is not benefiting from it. Finally, the 3rd defendant urged the court to consider that the costs involved are big. The plaintiffs have not demonstrated their ability to pay such costs. An order for security for costs would therefore cushion the 3rd defendant.

21. The plaintiffs on the other hand, pointed out the considerations necessary in granting an order for security for costs. The 3rd defendant, they said, had not met any of them. According to the plaintiffs, security for costs is granted where the plaintiff is ordinarily resident outside the court's jurisdiction; where the plaintiff is thought to be unable to pay the costs to the defendant if ordered to do so; and where the plaintiff has changed his address in the course of proceedings with a view to evading the consequences of litigation.

22. The court itself is enjoined to consider whether the plaintiff's claim is bonafide or a sham; whether the plaintiff has reasonably good chances of success; whether the defendant has made any admission in the pleadings or elsewhere; whether there has been some payment into court or an open offer of settlement;

whether the application is being used oppressively to stifle a valid claim; or whether the plaintiffs inability to pay is caused by some action of the defendant.

23. In the local context, security for costs comes up for consideration where the defendant reasonably fears that his legal costs will not be paid by the plaintiff. The aim here is to ensure that a defendant who is needlessly dragged to court is protected and does not lose the costs of litigation. In a word, the objective is to prevent frivolous litigation.

24. But the court has to do a balancing act. It has to be borne in mind that ordering the plaintiff to pay security for costs merely because he is unable to pay them later may cause a plaintiff with a good suit to be unable to pursue his case. This could arise particularly where the plaintiff is in financial straits when filing the suit. To order such a plaintiff to post security for costs first is tantamount to impeding his right to sue. The position therefore emerges in our local jurisprudence that even though frivolous litigation has to be discouraged by ordering the plaintiff to post security for costs, this must not result in a situation where a plaintiff with just claim is disabled from pursuing it.

25. Generally, Order 26 of Civil Procedure Rules, 2010, which is the one dealing with security for costs, applies where the plaintiffs inability to pay is demonstrated. The defendant has the duty to demonstrate this. But this is not enough, the court itself must conclude that it is fair to make the order on the facts of a given case. Also necessary to consider is where the plaintiff lives; whether outside courts jurisdiction or not. Overall, the court has to consider all the circumstances of the case and decide whether it is right and fair to issue the order.

26. It is now necessary to consider the circumstances of this case. The plaintiffs were accused of showing disinterest in pursuing the case. An allegation was made that they are comfortable with the status Quo. I have looked at the case. This is a matter with the plaintiffs and six other parties as defendants. A look at the record shows that it is wrong to blame the plaintiffs only for the adjournments in the case. The records show that other defendants have caused adjournments either because they had not filed the necessary pleadings, or documents or because of absence of counsel.

27. And the 3rd defendant himself has had occasion to file applications – like the one dated 27/9/2012 and filed on 27/9/2012 – and all this has not helped to advance the main suit for hearing. It is unfair therefore to single out the plaintiffs for blame. In fact all parties, including the 3rd defendant, must take responsibility for this state of affairs. I therefore don't agree with the 3rd defendant on this issue.

28. What about the issue of plaintiffs inability to pay costs? The 3rd defendant's counsel alleged that the plaintiffs may not be able to pay. He then asserted that such inability to pay was a fact within the plaintiffs special knowledge. He asked the court to invoke Section 112 of Evidence Act (Cap 80) and shift the burden of proof to the plaintiffs. In the case of **ABEL MORANGA ONGWACHO VS JAMES PHILIP MAINA & 3 others** (supra) which the 3rd defendant availed, the judge seemed to emphasize that the plaintiff should demonstrate ability to pay once such ability is alleged to be lacking.

29. But is that the legal position? In the case of **SIR LINDSAY PARKINSON & CO. LTD (SUPRA)**, again availed by the 3rd defendant, the defendant's company took it upon itself to demonstrate that the plaintiff's company, Triplan Ltd, was in a precarious financial position and would be unable to pay if the defendant were successful. The burden of proof didn't shift to the plaintiff; nor was the plaintiff put to task to demonstrate ability to pay.

30. Closer home, Steve Ouma in his book **“A COMMENTARY ON CIVIL PROCEDURE ACT CAP 21” 2nd EDITION: at Page 356**, observes as follows when commenting on Order 26 of Civil Procedure Rules:

“In an application for security for costs, the applicant has first to show that the plaintiff will not be able to satisfy an order for costs made at the end of the trial to bring the case under this order. It must, therefore, be proved that the plaintiff would not be able to pay the costs at the end of proceedings...”

31. It is clear then from the foregoing that the plaintiff has no duty to demonstrate his ability to pay. On the contrary, it is the defendant's duty to demonstrate well that the plaintiff would be unable to pay. The burden of proof does not shift. It remains on the defendant to prove the plaintiffs inability to pay and I think such proof should be on balance.

32. It was therefore wrong for the 3rd defendant's counsel to allege the plaintiff's inability to pay and leave it at that. He needed to go further and offer proof. In any case, this allegation was denied by the plaintiffs and I presume that counsel for 3rd defendant knows that when a fact is asserted by one side and denied by the other, that fact is not in law proved. I therefore make a finding that the fact of the plaintiffs inability to pay is not proved.

33. I now need to consider whether the plaintiff's case is frivolous and whether the 3rd defendant's case has bonafides. The answer to these two issues is **YES**. I will explain: From the records, it seems clear that plaintiffs were the first to be issued with a grant of letters of administration. And while that grant still subsisted, the 1st and 2nd defendant procured another one which they used to register the suit and in their names before selling it to 3rd defendant. The plaintiffs said they still hold the original title. When this is the situation obtaining, it cannot be said that the plaintiff's case is frivolous; it is a serious case.

34. But contrary to what the plaintiff's allege, and unless concrete evidence is availed later, the 3rd defendant does not seem to have been acting in cahoots with 1st and 2nd defendants. In all likelihood, the representations made to 3rd defendant by 1st and 2nd defendant looked genuine. The 3rd defendant even seemed to have conducted due diligence. When he therefore asserts that he is an innocent purchaser for value without notice, it is necessary to sit up and listen. In short therefore, the 3rd defendant's defence has bonafides. The plaintiff's case is also not frivolous. When this is the situation, the case should be allowed to run the usual way, meaning that costs should come at the end. For now therefore, I don't agree with the 3rd defendant's counsel's assessment of the plaintiff's case.

35. I have stated the applicable law in general but as counsel for 3rd defendant seemed to see our local jurisprudence as different, I have also endeavoured to state the law in our local context. And so far, my analysis of the circumstances obtaining in this case clearly show that this is not a case in which I should order for security for costs. I therefore make a finding that the application herein has no merits and I dismiss the same with costs.

A.K. KANIARU – JUDGE

19/3/2015

19/3/2015

Before A.K. Kaniaru – Judge

Diang'a G. - Court clerk

No party present

Interpretation: English/Kiswahili

Indumuli for Olel for Plaintiff/Respondent

Anyul; for 2nd defendant – absent

Mboya O (Absent) for 3rd defendant

Omayo (Absent) for 4th defendant

M/s Aliongo (AG's office) for 5th and 6th defendants

COURT: Ruling on Notice of Motion dated 14/8/2013 read and delivered in open **COURT**.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

19/3/2015