



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 83 OF 2011**

**JOYCE IRENE ATIENO AKEYO.....**  
**PLAINTIFF**

**VERSUS**

**MICHAEL GEORGE OKEYO.....1<sup>ST</sup>**  
**DEFENDANT**

**THOMAS JOSEPH OKEYO.....2<sup>ND</sup>**  
**DEFENDANT**

**MARGARET AWUOR ORIARO.....3<sup>RD</sup>**  
**DEFENDANT**

**CHIEF LANDS REGISTRAR.....4<sup>TH</sup>**  
**DEFENDANT**

**ATTORNEY GENERAL.....5<sup>TH</sup>**  
**DEFENDANT**

**RULING**

The 3<sup>rd</sup> Defendant herein seeks the orders in prayers 6 and 7 of her Notice of Motion dated 6<sup>th</sup> July 2012 which are as follows:

6. That the Plaintiff do pay Kenya Shillings Nine Hundred and Seventy Two Thousand (Kshs 972,000.00) being rent arrears accruing from January 2011 to June 2012 at the rate of Kenya Shillings Sixty Thousand (Kshs 45,000.00) (*sic*) and Kenya Shillings Nine Thousand (Kshs 9,000.00) per month and interest thereon and thereafter pay rent of Kshs Forty Five Thousand (Kshs 45,000.00) and Kenya Shillings Nine Thousand (Kshs 9,000.00) from July 2012 per month until the main suit is heard and determined.

In the alternative to (6) above

6(a) That the Plaintiff provides security for costs amounting to Kenya Shillings Eight Million Five Hundred Thousand (Kshs 8,500,000.00) the purchase price of the said property to be deposited in an interest earning account held by the Advocates for the Plaintiff and 3<sup>rd</sup> Defendant pending the hearing and determination of the suit.

7. That the Plaintiff/Respondent do account for the rental income earned from the Servant Quarters

erected on Nairobi/Block 72/400 also known as Onyonka, Lang'ata House No. A122 (hereinafter referred to as "the suit property"), and refund the total income to the 3<sup>rd</sup> Defendant/Applicant.

It is not in dispute that the 3<sup>rd</sup> Defendant is the registered owner of the suit property and she attached evidence of her title to the same and of purchase and payment of the same. The Plaintiff on the other hand claims that the suit property is her matrimonial home since her marriage to the 1<sup>st</sup> Defendant in 1993. Further, that the 1<sup>st</sup> Defendant who is since deceased fraudulently transferred the property to the 2<sup>nd</sup> Defendant without her consent, and which 2<sup>nd</sup> Defendant transferred the property to the 3<sup>rd</sup> Defendant to conceal the fraud. She also alleges that the 1<sup>st</sup> Defendant inherited the 3<sup>rd</sup> Defendant as his wife under Luo traditions, and that the 2<sup>nd</sup> Defendant is their son.

These allegations were denied by the 3<sup>rd</sup> Defendant who brought evidence of a marriage certificate to show that she is married to one Joseph Oriaro Okumu, and put the Plaintiff to strict proof to show that the 2<sup>nd</sup> Defendant was her son. The foregoing averments are set out in the supporting affidavit and supplementary affidavit sworn by the 3<sup>rd</sup> Defendant on 6<sup>th</sup> July 2012 and 30<sup>th</sup> July respectively, and in the Plaintiff's replying affidavit sworn on 16<sup>th</sup> July 2012.

The parties were directed to file written submissions in court. The 3<sup>rd</sup> Defendant's counsel filed submissions dated 4<sup>th</sup> June 2013 and argued the 3<sup>rd</sup> Defendant had proved her ownership of the suit property and that she was a certificate of Lease in her name dated 19<sup>th</sup> January 2011. Further, that the transfer of the suit property from the 1<sup>st</sup> to 2<sup>nd</sup> Defendant was effected on 21<sup>st</sup> July 2010, and the transfer from the 2<sup>nd</sup> to 3<sup>rd</sup> Defendant effected on 19<sup>th</sup> January 2011, before the demise of the 1<sup>st</sup> Defendant on 25<sup>th</sup> September 2011. The counsel also submitted that the 3<sup>rd</sup> Defendant was entitled to protection of and enjoyment of her proprietary rights under Article 40 of the Constitution, and sections 46(1) of the Land Act of 2012. Further, that the Plaintiff had not brought any evidence of ownership of the suit property, and that she was a trespasser thereon.

On the issue of security of costs the counsel for the 3<sup>rd</sup> Defendant submitted that her client continues to service a loan facility used to purchase the suit property, despite not realizing rental income therefrom. She relied on Order 26 Rule 1 of the Civil Procedure Rules and on various decisions including those of **G.M Combined (U) Ltd vs A.K Detergents (U) Ltd (1999) E.A. 94**, and **Shah vs Shah (1982) KLR 94**, for the position that the power to order security for costs is discretionary depending on the circumstances of a case, and on whether a Defendant has shown a *bona fide* defence.

It was submitted that the 3<sup>rd</sup> Defendant had in this respect shown that she is the registered owner of the suit property, and that the Plaintiff had not demonstrated her ability to reimburse the 3<sup>rd</sup> Defendant the rent or income due from the suit property since January 2011, or to pay the costs of the suit. Further, that the 3<sup>rd</sup> Defendant will experience hardship and injustice by being unable to recover the rent and costs due, and there exists reasonable and sufficient circumstances for the court to exercise in her favour.

The Plaintiff's counsel filed submissions dated 7<sup>th</sup> June 2013. He argued therein that the transfer of the suit property to the 3<sup>rd</sup> Defendant was part of a fraudulent transaction to put the suit property out of the reach of the Plaintiff, and that she was not an innocent purchaser. Further, that the loan application the 3<sup>rd</sup> Defendant attached as evidence of the loan she took out to purchase the suit property is advanced on Flat No 8 on L.R No 209/12789/1 Ndemi Court.

It was also submitted by the counsel that as the 3<sup>rd</sup> Defendant has no real legal interest in the suit property, she is not entitled to security for costs, which should in any event be pegged on the costs of litigation and not on the purchase price of the house. Lastly, it was submitted that the Plaintiff is the equitable owner of the suit property and not a tenant, and therefore has no obligation to pay the 3<sup>rd</sup> Defendant any rental income.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. The first issue before the court for determination is whether the 3<sup>rd</sup> Defendant is entitled to any rental payments from the Plaintiff. It is the position in law that rent is the consideration that is payable in a tenancy or lease agreement. However, the 3<sup>rd</sup> Defendant, although being registered owner of the suit property, did not bring any evidence of any lease or tenancy agreement entered into with the Plaintiff in which the rent claimed of Kshs 45,000/= per month was payable.

In addition, the 3<sup>rd</sup> Defendant did not bring any evidence that she permitted the Plaintiff exclusive occupation of the suit property at an agreed rent, for the Plaintiff's occupancy to be deemed to constitute a periodic tenancy under section 46 (b) of the Registered Land Act, which was the applicable law at the time the suit herein was filed. On the contrary, both the 3<sup>rd</sup> Defendant and Plaintiff dispute that the Plaintiff's occupation of the suit property was permissive and/or consensual. It is thus the finding of this court that the 3<sup>rd</sup> Defendant has at this stage not laid any legal basis for the payment of rent and/or rent arrears from the Plaintiff, and prayers 6 and 7 of the subject Notice of Motion are therefore denied.

The second issue for consideration is whether the Plaintiff should provide security for costs of the suit of the amount of Kshs 8,500,000/=. Security for costs is discretionary and largely determined by the circumstances of each case, as was held in **Gulf Engineering (East Africa) vs Amrik Singh Khalsi (1976-80) 1 KLR 348** and as provided for in Order 26 Rule 1 of the Civil Procedure Rules which states 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.”**

The 3<sup>rd</sup> Defendant has brought evidence to show that she is the registered owner of the suit property. The Plaintiff's claim to the said property is based on the said property being her matrimonial home and that the suit property was fraudulently transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant to defeat her claim. She has not brought evidence of any court orders declaring the said property to be her matrimonial home or property, or of any suit she has filed for orders in this respect. I also note in this regard that the 3<sup>rd</sup> Defendant filed a Defence and Counterclaim dated 6<sup>th</sup> July 2012 in which she is seeking special damages including of the rental income due to her from the suit property.

I find that in the circumstances of this case I must exercise the court's discretion in favour of the 3<sup>rd</sup> Defendant as it is evident that she has both a *bona fide* defence and claim against the Plaintiff. I hereby accordingly order as follows:

1. The Plaintiff shall deposit with the court the sum of Kenya Shillings 1,000,000/= within 30 days of the date of this ruling as security for costs. In default the 3<sup>rd</sup> Defendant shall be at liberty to apply for eviction of the Plaintiff from the suit property.
2. Parties shall be at liberty to apply.
3. The costs of the 3<sup>rd</sup> Defendant's Notice of Motion dated 6<sup>th</sup> July 2012 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this 23<sup>rd</sup> day of October, 2013.

**P. NYAMWEYA**

**JUDGE**