



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**

**ENVIRONMENTAL & LAND CASE 198 OF 2012**

**VERONICA WANJIRU NGIBUINI.....1<sup>ST</sup> PLAINTIFF**

**IRENE N. KAGENI .....2<sup>ND</sup> PLAINTIFF**

**AMY KUMICINSKI .....3<sup>RD</sup> PLAINTIFF**

**JOHN KUMICINSKI .....4<sup>TH</sup> PLAINTIFF**

**- VERSUS -**

**REAH MARIE GITHAIGA .....1<sup>ST</sup> DEFENDANT**

**JOHN MWENJA NGUMBA .....2<sup>ND</sup> DEFENDANT**

**FRANCIS NDERITU NDIRANGU .....3<sup>RD</sup> DEFENDANT**

**SILA ANGUCHE OTIATO .....4<sup>TH</sup> DEFENDANT**

**DOUGLAS MUCHOMBA .....5<sup>TH</sup> DEFENDANT**

SHADRACK KIMANI .....6<sup>TH</sup> DEFENDANT

DUNCAN MWANGI .....7<sup>TH</sup> DEFENDANT

RONALD MUTISO MUBUA

T/A R.M. MUTISO & CO. ADVOCATES .....8<sup>TH</sup> DEFENDANT

### RULING

1. This ruling relates to the notice of motion by the 8<sup>th</sup> defendant dated 30th April 2012. The applicant prays for security for costs in the sum of Kshs 350,000 from the plaintiffs. The application is premised on the grounds that the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs reside outside the jurisdiction of the court and have no assets in Kenya. The applicant also states that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs have no means or property to meet his costs if he is successful in the suit. All those matters are buttressed further in the affidavit of R.M. Mutiso filed in support of the motion. The motion is expressed to be brought under order 26 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act.

2. The motion is contested by the plaintiffs. There is filed a replying affidavit sworn by Veronicah Ngibuini on 8<sup>th</sup> May 2012. In a synopsis, the deponent avers that there is no evidence before the court to prove the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs do not own property in Kenya. It was submitted that the 8<sup>th</sup> defendant has poor chances of success in this suit and that in any event, the sum of Kshs 350,000 sought is unmerited. I was implored not to exercise my discretion in favour of the applicant. Lastly, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs averred that they are not persons of doubtful means. Accordingly, there is no legal or factual basis for an order for security for costs.

3. I have heard the rival arguments. I take the following view of the matter. Order 26 rule 1 provides 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”.*

4. The cardinal principles applicable in an application to furnish security for costs were well laid out in Shah Vs Shah [1982] KLR 95. At page 98, Law, J.A delivered himself thus;

*“The general rule is that security is normally required from plaintiffs resident outside the jurisdiction, but as was agreed in the court below, a court has a discretion, to be exercised reasonably and judicially, to refuse to order that security be given; see Korecha Vs Bank of Baroda (CA Civil Application No 43 of 1978, unreported)”.*

The other test on an application of this nature “is not whether the plaintiff has established a *prima facie* case, but whether the defendant has shown a *bona fide* defence” Shah Vs Shah(supra)at 99. Again, the court should not stifle the right of the plaintiff purely because of impecuniosity. See Timothy Manyara & 144 others Vs Pyrethrum Board of Kenya [2005] e KLR. But there is no fetter on the court to order for security of costs merely because it will deter the plaintiffs from pursuing their claims. There must then be a balancing act that also considers the injustice the defendant would suffer by being unable to recover his costs. See Keary Developments Ltd Vs Tarmac Construction Ltd and another [1995] ALL ER 534. Consequently it is for the plaintiffs to satisfy the court that their claim will be defeated by the order for security for costs. As a corollary, the plaintiffs must show they have means to meet the costs. The court however has discretion to order lesser costs than those sought or to refuse it entirely. Keary Development Ltd case (supra).

5. Again, the mere fact that the plaintiffs or some of them reside out of jurisdiction is not sufficient in all cases to ground an order to furnish security for costs. See *Jismaji Vs Saheb and another* [1990] e KLR 732, *Kenya Education Trust Limited Vs Katherine S.M. Whittan* Civil Appeal (application) No 301 of 2009 (unreported). The bottom line is that it is entirely in the discretion of the court. See again the decision in *Procon Ltd Vs Provincial Building Company* [1984] 2 ALL ER 368. Lastly, an application of this nature must be brought with expedition. See *Halsbury's Laws of England* 4<sup>th</sup> Edition Vol 37 paragraph 305, *Mama Ngina Kenyatta and another Vs Mahira Housing Company* [2005] e KLR, *Sir Lindsay Parkinson & Company Ltd Vs Triplan Ltd* [1973] 2 ALL ER 273, *Cancer Investments Limited Vs Sayani Investments Ltd* [2010] e KLR.

6. This suit was filed in April 2012. I find the application has been brought without undue delay. It is admitted that the 3<sup>rd</sup> and 4<sup>th</sup> defendants are residing in the United States. The defendants have not controverted the 8<sup>th</sup> defendant's evidence that they have no properties in Kenya. No evidence of their means to meet the costs of the 8<sup>th</sup> defendant have been tabled. True, the suit property in Kenya may have been purchased from their funds. But the suit property is not registered in the name of either defendant. I am not in a position to say at this stage whether the 8<sup>th</sup> defendant's defence will succeed. But *prima facie* it is not frivolous. The 3<sup>rd</sup> and 4<sup>th</sup> defendants were not his instructing clients. He says he only dealt with the 1<sup>st</sup> and 2<sup>nd</sup> defendants, as trustees for the purchaser, Stars for Jesus.

7. Applying those facts to the law and authorities I am of the firm view that the 8<sup>th</sup> defendant runs the risk of loss of his costs. This is a suitable case for furnishing of security for costs by the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs. With regard to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, they dealt with the 8<sup>th</sup> defendant as trustees for the purchaser. They are local residents and citizens of Kenya. But faced with a motion to furnish security, they responded by attacking the merits of the defence. True the claims by the 1<sup>st</sup> and 2<sup>nd</sup> defendant should not be stifled by their pecuniary standing. But they needed to respond to the allegation that they are impecunious and have no attachable assets. The 1<sup>st</sup> plaintiff concedes at paragraph 8 of the further affidavit sworn on 8<sup>th</sup> May 2012 that Stars for Jesus was wound up by the government due to allegations of abuse of minors at its suit premises. In the replying affidavit of the same deponent sworn on the same date, she depones at paragraph 13 and 14 as follows;

*“13. THAT the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs are resident in Kenya and Kenyan citizens and would be liable for costs severally and jointly with the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs and there is no possibility of the 8<sup>th</sup> defendant being unable to recover his costs in the unlikely event he succeeded in the suit against the plaintiffs.*

*14. THAT myself, the 2<sup>nd</sup> plaintiff and all other plaintiffs in this suit are not persons of doubtful means for security for costs to be ordered”.*

8. Granted those facts, I am unable to say that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have demonstrated capacity to meet any costs to the 8<sup>th</sup> defendant under any eventual decree. I have thus reached the conclusion that the 8<sup>th</sup> defendant is at the peril of losing his anticipated costs and is entitled to an order for security for costs against all the plaintiffs.

9. Having said so, I am of the considered opinion that the amount of Kshs 350,000 sought is on the higher side. There are only two prayers in the plaint directed specifically at the 8<sup>th</sup> defendant: a permanent injunction to restrain dealing with the suit land; and, an order directing him to release the title to the property to the plaintiffs. I am alive to the fact that the other prayers are crafted in a very general manner as to affect the 8<sup>th</sup> defendant. Prayer (g) for example requires the defendants to refund US \$ 70,000/-. At the current exchange rates, that is a substantial amount in Kenya shillings. The conveyance over the property itself was for Kshs 5,250,000.

10. If the 8<sup>th</sup> defendant were to prevail, the level of costs, at this stage, under schedule 6 of the Advocates (Remuneration) Order would not reach the sum sought. Doing the best that I can, I would peg those costs for now at Kshs 200,000. It is a reasonable sum. I thus order that the plaintiffs shall jointly deposit the

sum of Kshs 200,000 into a joint interest earning account of both lawyers for the 8<sup>th</sup> defendant and the plaintiffs in a reputable bank. The sum shall be deposited within the next 30 days of todays date in default of which the plaintiffs' suit against the 8<sup>th</sup> defendant shall be struck out with costs.

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 31<sup>st</sup> day of May 2012.

**G.K. KIMONDO**  
**JUDGE**

**Ruling read in open court in the presence of**

Mr. Kivuva for Mbala for the Plaintiffs/Respondents  
Mr. Kariuki for Nyairo for the Defendant/Applicant