



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Suit 152 of 2011

STANLEY KAHORO MWANGI

TIMOTHY NJOROGE

**JOSEPH MWANGI (suing on their own behalf and on behalf of members of
TWENDANE COMPANY LIMITED APPLICANTS**

VERSUS

KANYAMWI TRADIN COMPANY LTD. RESPONDENTS

RULING

By a notice of motion dated 26/10/2011 the applicant seeks that the plaintiff be ordered to deposit security for costs in the sum of Kshs.400,000/=.

This is on grounds that, the plaintiffs are squatters on the land without sound financial standing. Further that they lack capacity to sue on behalf of Twendane Company Limited, and they have no known assets, so there is a danger that the defendant may not be able to enforce any decree that may be passed against the plaintiffs, especially because the defence has overwhelming chances of success.

In an affidavit sworn by BEN KANYI WAWERU, a director of the defendant, he deposes that the plaintiffs are not directors of TWENDANE CO. LTD., and therefore lack capacity to institute suit on behalf of the said company. Secondly, no company resolution has been annexed to the originating summons on the notice of motion, authorising the applicants to file the present proceedings, and the same ought to be struck off. The subject matter is 881 acres of prime land whose value is close to 1 billion shillings, so costs of the case will most likely be in the region of Kshs.1 million.

With regard to the authority to plead, which the Respondents rely on, it is the applicant's contention that identity cards quoted as belonging to some members are fraudulent, some identity card numbers are assigned to two or more different people, and some of the people listed as having given authority to plead are deceased.

In support of this position is an affidavit sworn by PETER KAMURUA MWANGI, who has challenged the credibility of the list of those who have signed the authority to plead and act, claiming that there are a lot of forged signatures.

The matter was disposed off by way of written submissions, and Mr.Karanja, on behalf of the Respondents submits that Order 26 Rule 1 of the Civil Procedure Rules provides that:

“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.”

He urges the court to be guided by the decision in Shah V Shah (1982) KLR which held that a court has discretion on whether to grant or refuse orders that security for costs be given as long as the discretion is exercised judicially and reasonably.

Mr.Njenga who acts for the applicants seeking security for costs maintains the position that due to the plaintiff's lack of a sound financial base, and taking into account the value of the property in question, then Kshs.400,000/= is a reasonable deposit considering the circumstances of the case, otherwise the defendants will be prejudiced as there is no known property owned by the plaintiffs which can be attached. Secondly he submits that the incompetence of the plaintiff's suit is borne out by the fact that they lack capacity to sue in this matter, taking into account the report by the document examiner dated 16/01/2012 which pokes holes at some of the documents plaintiffs seek to rely on and exposes the plaintiffs as dishonest and their team leaders are not known, so it may be difficult to trace them for execution of decree in the event that the defence case succeeds.

The reference to the document examiner's report is intended to demonstrate that this is a case where there is some doubt not only as to the merit of the plaintiff's case, but also that if the plaintiff's case fails, they will be unable to pay costs.

Mr.Karanja has listed down guidelines which the court ought to consider in granting or refusing security for costs, drawn from paragraph 304 of **Halsbury's Laws of England** as:

1. Whether the claim is made in good faith and not a sham.
2. Whether the case has good prospects of success.
3. Whether there is an admission by the defendant on the pleading or otherwise that money is due.
4. Whether there is a substantial payment into open court or an open offer of a substantial amount.
5. Whether the application for security was used oppressively, so as to stifle a genuine claim.
6. Whether the plaintiffs went of means especially in the case of a limited company has been brought about by any conduct by the defendant, such as delay in payment or in doing his part of the work.
7. Whether the application for security is made at a late stage of the proceedings.

It is argued on behalf of the plaintiffs (Respondents) that they have a reasonably good prospect of success as they claim title by virtue of adverse possession, and the sale agreement entered into between the defendants and Twendane Company Limited was between a legal person different from the plaintiffs, and in any case no consent was obtained from the Land Control Board.

Thirdly, that the Defendant (Applicant) in fact rescinded the contract and even obtained eviction orders against the plaintiffs (respondents) so all these factors taken together gives a good prospect of success in the plaintiff (Respondent's case).

If this last part of the argument is to hold water, then the same defeats the pleadings which indicate that the suit is brought by the plaintiffs on behalf of members of the Limited Company. The respondents are not and have not availed any evidence to show that they are directors of the company, and the documents they seek to rely on as authority to file the suit leave their credibility whittled by the document examiner's report, so the issue of lack of capacity to sue is a viable argument for the defendant/applicant. This would certainly impact on the prospects of the suit.

It is also argued on behalf of the plaintiff that the defendant had not shown a bona fide defence with

regard to their claim for adverse possession since the issue of consenting to their occupation of the land hasn't been demonstrated. This court is urged to consider the Respondent's case which is that they have been quietly using the land for the entire period that they have been in occupation. This issue is addressed by the Applicants in para 7 of the replying affidavit sworn by Ben Kanyi Waweru.

The other points for consideration are:

- (a) Whether the application is brought to defeat the Respondent's suit, and;
- (b) Whether it has been demonstrated that they are in such dire financial straits to the extent that in the event of losing the case they would not be able to pay the costs.

Certainly, he who alleges must prove, so far nothing has been presented to this court to prove that the respondents are financially challenged. I also note that although the Respondents deny financial impecuniosity, they remain tight lipped regarding any source of income or assets, although of course the burden rests on the applicants to prove this state of affairs. Certainly if the orders are granted and the costs are not deposited within the time frame set, the consequences would naturally be to defeat the entire suit before it even begins.

From the material presented, and the arguments advanced, it is apparent that the bona fides of the Respondent's claim is questionable, especially bearing in mind their locus in filing this suit on behalf of the members of Twendane Company Limited.

I have also considered the fact that if the Respondents fail to deposit the security for costs then their claim will be dismissed, and that this would stifle their claim. While this may be a genuine concern, I must weigh it against the injustice that applicants are likely to suffer if no security is deposited and at the end of the trial, the Respondent's claim fails. This would mean that the Applicant would be unable to recover from the Respondents costs incurred in defence of the claim. Indeed this position was clearly stated in the case of **KEARY DEVELOPMENTS V TARMAC CONSTRUCTION LTD** (1995) 3 ALL ER 534 to the effect that:

“The court will not be prevented from ordering security simply on the ground that it would deter the plaintiff from pursuing its claim.”

There is sufficient doubt demonstrated as regards the merits of the Respondent's case, beginning with the issue of locus, and the questioned authorising signatures.

Although there is nothing to demonstrate that the Respondents are impecunious, doubt has been cast as regards their financial ability, and they have not as a sign of good faith, offered anything to dispel these doubts. I think the applicants are justified on their apprehension. I direct that Respondents pay by way of security for costs, a sum of Kshs.100,000/= (one hundred thousand only) to be deposited in an interest earning account in the names of the respective parties, counsel, at a financial institution to be agreed between themselves. The sum be deposited within 30(thirty) days from today's date. Costs of this application shall be in cause.

Dated and delivered this 27th day of July, 2012 at Nakuru.

**H.A. OMONDI
JUDGE**