



ABEL MORANGA ONGWACHOPLAINTIFF

- VERSUS -

JAMES PHILIP MAINA NDEGWA.....1ST DEFENDANT

EASTERN PRODUCE KENYA LIMITED.....2ND DEFENDANT

THE REGISTRAR OF TITLES.....3RD DEFENDANT

HON. ATTORNEY GENERAL4TH DEFENDANT

RULING

1. This is the 1st defendant's notice of motion dated 23rd April 2012. The 1st defendant seeks security of costs in the sum of Kshs 5, 843, 500. He prays that those funds be placed in a joint interest earning account of his and the plaintiff's advocates within 30 days of a favourable order. The motion is brought under order 26 of the Civil Procedure Rules 2010 and supported by a deposition of the applicant.

2. In a nutshell, the 1st defendant avers that he is the registered owner of LR 1160/238/1 (IR 40818) having purchased it on 3rd March 1998. The plaintiff's claim on the other hand is that he is the registered owner of a property known as LR 1160/148 (original 1160/34/2 (IR 10008) under a transfer dated 25th July 1990. The 1st defendant says the plaintiff is a stranger. He does not know his abode or means and that the process leading to acquisition of the plaintiff's property is riddled with irregularities or fraud. The 1st defendant has filed a counterclaim. He avers it has a high chance of success. He contests his joinder in this suit. From his draft bill of costs, he has estimated his costs to be Kshs 5, 843, 500. He is apprehensive that the plaintiff may not meet those costs or damages.

3. The motion is contested. The plaintiff has filed a replying affidavit sworn on 23rd May 2012. He has also filed grounds of opposition dated 22nd May 2012. In a synopsis, the plaintiff avers that the suit raises salient, pertinent and serious issues over contested ownership of the suit land. The circumstances under which conflicting titles were issued are germane and should be interrogated at the hearing. The plaintiff's case is that it is only upon judgment that liability for costs should be made. It would be unfair, the plaintiff says, to apportion liability at this stage considering the number of parties in the case. The present motion is attacked as a fetter on the plaintiff's right to a fair trial and that it would give undue advantage to the 1st defendant. It was submitted that the motion contravenes the constitution of Kenya 2010 and order 26 of the Civil Procedure Rules 2010. Lastly the plaintiff avers that he is a "reputable businessman" in Kisii in the business of petroleum products as a shareholder and director. He submitted that he has means to meet any decree on costs. I was implored to find the motion has no merit.

4. The 3rd and 4th defendants also oppose the motion. There are filed grounds of opposition dated 31st May 2012. The gist of the objection is that the application is in bad faith, incompetent and would prejudice the plaintiff's rights to a fair trial by placing unwarranted financial hurdles on his path.

5. The 2nd defendant submitted that it is not affected by the orders sought. It left the matter to the court's judgment.

6. 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".

7. 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 plaintiff from pursuing his 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 plaintiff to satisfy the court that his claim will be defeated by the order for security for costs. As a corollary, the plaintiff must show he has the means to meet the costs. The court however has discretion to order lesser costs than those sought or to refuse them entirely. Keary Development Ltd case (supra).

8. The guiding beacon is that the matter is entirely at the discretion of the court. See 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 4th 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.

9. The plaintiff seeks a declaration that the amalgamation of LR No 1160/148 (original number 1160/34/2) IR 10008 with LR No 1160/149 (original number 1160/34/3) and the creation of LR No 1160/238/1 was fraudulent and illegal. His case is that the subsequent subdivision of LR No 1160/427 into LR 1160/148 was fraudulent, illegal, null and void. The 1st defendant's case on the other hand as pleaded in the defence and counterclaim is that the two properties are different and cannot have a common title. The 1st defendant contends he has been in continuous, open and uninterrupted occupation of LR 1160/427 since 3rd March 1998. He thus seeks a declaration that he is the owner and for a permanent injunction and damages.

10. The 1st defendant now prays for security for costs. He is apprehensive that the plaintiff may not meet his costs. From the statement of defence and counterclaim, it is pleaded at paragraph 15 that the 1st defendant bought the suit land from Brooke Bond Mombasa Limited for Kshs 18, 500, 000. I have noted that those matters are also deponed to at paragraph 14 of the supporting affidavit. I have then looked at exhibit "JPMN 1", a draft party and party bill of costs, in the sum of Kshs 5, 843, 500. It is based on an instruction fee pegged to the value of property at Kshs 275, 000, 000. The purchase price, like I stated, was disclosed at Kshs 18, 500, 000, 000 in 1998. I cannot thus say that there is a clear basis for the value of Kshs 275, 000, 000. Certainly, the property was bought nearly 14 years ago and must have appreciated. The claimed costs may be high but the respondent has not challenged them. In matters of this nature, the court is not bound to grant the costs demanded by the 1st defendant. If the court is satisfied that

the plaintiff should furnish security, it has discretion to set the margins.

11. Faced with an application to furnish security, the plaintiff needed to demonstrate that he can meet the costs. The plaintiff depones at paragraphs 22 and 23 as follows:

“22. THAT nevertheless, I know of my own knowledge that I am a reputable businessman, based in Kisii and engaged in sales and distribution of petrol and petroleum products, both within the county of Kisii and its environs vide Belcom Agencies Limited, wherein I am a Shareholder and Director. Annexed hereto and marked “AMO 4 (a), (b) & (c)” are copies of the petroleum Dealers License, Certificate of Incorporation and Memorandum of Association to that effect.

23. THAT at any rate, the suit land has a substantial value and on its own shows, that I am seized of capacity and ability to meet and/or finance the instant suit and bear the costs, arising therefrom”.

12. The plaintiff has then attached a single business permit for the above company, its certificate of Incorporation and Memorandum and Articles. There is nothing there to show its financial standing. In any event, the company is not the plaintiff. The plaintiff may be a shareholder or director, but the company remains an independent and distinct legal entity. *Salomon Vs Salomon* [1897] AC 22. There is thus a paucity of evidence that the plaintiff can meet the costs of the 1st defendant. True, the suit land under contest is a valuable asset. But it remains under contest in the suit. It cannot be the answer for capacity to meet the costs. I am not saying the 1st defendant’s counterclaim will succeed. And I am not saying the plaintiff’s suit will prevail. That will be for the trial court on tested evidence.

13. There is however another important matter. In the amended plaint, it is pleaded at paragraph 23 that the plaintiff had brought other proceedings in Nairobi High Court ELC 676 of 2011. It was between the same parties. It has been withdrawn. The plaintiff’s counsel freely conceded before the court that the 1st defendant’s costs were not paid. He however submitted that the 1st defendant should move the court for costs under order 25 of the Civil Procedure Rules 2010. That is escapist. It fortifies the 1st defendant’s case that he is at the peril of loss of his costs.

14. I have stated that it will be for the trial court to disentangle the truth of the *bona fide* owner of the suit land. But my attention has been drawn to the averments at paragraph 13 (b) (c) of the supporting affidavit. It is deponed there as follows;

“13 (b). Mr. J.M Rioba who is alleged to have drawn the said Transfer was not an Advocate at the time it is purported to have been drawn as shown by the letter from the Law Society of Kenya dated 9th December, 2011 (appearing at page 51 of the First Defendant’s List of Documents).

(c). The said Advocate, Mr. J.M. Rioba whose name appears on the purported transfer has expressly denounced ever being involved in its preparation and/or registration (as shown at page 55 of the First Defendant List of Documents).

15. Those are serious allegations going to the root of the suit. So that the 1st defendant’s defence and counterclaim cannot be said to be frivolous. It is a *bona fide* defence. The present application to furnish security for costs is thus well founded in view of failure by the plaintiff to demonstrate capacity to meet any eventual decree. True, articles 22, 50 and 159 of the Constitution and section 1 A and 1 B of the Civil Procedure Act enjoin the court to carry out a fair trial and to do substantial justice. But it does not mean that a person pursuing costs under order 26 of the Civil Procedure Rules is acting in an unconstitutional manner. So long as there is due process, one cannot say that there is no equality of arms merely by being ordered to furnish security.

16. Having said that, the level of costs proposed by the applicant is on the higher side. There are other parties in this suit. The merits of the suit have not been ventilated. Based on the admitted purchase price of the suit land in 1998 and granted it has appreciated in value, I would say that a figure of Kshs 2, 000, 000 is a more reasonable projection of possible party and party costs.

17. In the result, I allow the 1st defendant's notice of motion dated 23rd April 2012. I order that the plaintiff shall furnish security for the 1st defendant's costs in the sum of Kshs 2, 000, 000. The amount shall be paid within 60 days into a joint interest earning account in the names of the advocates for the plaintiff and for the 1st defendant in a reputable bank. In default, the plaintiff's suit against the 1st defendant shall be struck out with costs. The costs of the motion shall be in the suit.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 7th day of August. 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Rachuonyo for Oguttu for the Plaintiff/Respondent

Mr. Ochieng Oduol for the 1st Defendant/Applicant

No appearance for the 2nd Defendant

No appearance for the 3rd and 4th Defendants.