



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL CASE 2 OF 2010**

**1. STEPHEN KING'OO MBUTI**

**2. JOSHUA MAWEU KILONZI**

**3. BENJAMIN KYALO MUTHOKA**

**4. RAJABU KITHUSI MOHAMED**

**5. SIMION MUIA MUINDI**

**6. MUTWIW'A MUTETEI.....PLAINTIFFS**

**V E R S U S**

**1. MALILI RANCH LIMITED**

**2. THE PERMANENT SECRETARY MINISTRY OF INFORMATION &  
COMMUNICATIONS**

**3. THE HONOURABLE ATTORNEY-  
GENERAL.....DEFENDANTS**

**R U L I N G**

**1.** This is an application by the 1<sup>st</sup> Defendant (**chamber summons dated 9<sup>th</sup> February 2010**) seeking two main orders-

(i) That the Plaintiffs do provide security for the 1<sup>st</sup> Defendant's costs of this suit in the sum of KShs 13 million.

(ii) That the Plaintiffs' parcels of land "identified under allotment letters and/or cards and/or plots numbers 860, 1429, 2515, 2144, 1837, 2140 and 2096" be attached and held by the 1<sup>st</sup> Defendant as security for costs in this suit, and that the Plaintiffs be prevented and/or stopped from selling or transferring the said parcels of land to any third party.

**2.** The application is stated to be brought under **Order XXV, rule 1** of the old **Civil Procedure Rules** (the **Rules**). **Sections 1A and 3A** of the **Civil Procedure Act** (the **Act**) are also cited.

**3.** The grounds for the application appearing on the face thereof have been stated thus -

- (a) That the Plaintiffs have brought a frivolous suit against the 1<sup>st</sup> Defendant.
- (b) That costs of the suit “will run to more than KShs 13,000/00, which expense the 1<sup>st</sup> Defendant is expected to pay to its advocates”.
- (c) That the Plaintiffs’ assets and places of work or residence are unknown to the 1<sup>st</sup> Defendant.
4. There is a supporting affidavit sworn by one DAVID NDOLO NGILAI who has described himself as director and chairman of the 1<sup>st</sup> Defendant.
5. Although the application was duly served, the Plaintiffs did not file any papers in response thereto, and there was no appearance for them at the hearing of the application despite the hearing date having been given in court in the presence of their counsel.
6. I have considered the submissions of the learned counsel for the 1<sup>st</sup> Defendant. I have also perused the plaint herein. No statement of defence appears to have been filed by the 1<sup>st</sup> Defendant or indeed by any of the other defendants.
7. The Plaintiffs’ case as pleaded in the plaint is that they are members and shareholders of the 1<sup>st</sup> Defendant and that they have been allotted portions of land by the 1<sup>st</sup> Defendant each measuring 7.8 acres by virtue of their shareholding within land parcel L.R. No. 9918/3 which is registered in the 1<sup>st</sup> Defendant’s name. They have identified in the plaint their respective portions of land by plot number and pleaded that they started developing their respective portions.
8. The Plaintiffs have further pleaded that the 1<sup>st</sup> Defendant, without consulting its shareholders (including the Plaintiffs) has entered into a sale agreement with the 2<sup>nd</sup> Defendant for sale of 5,000 acres out of land parcel L.R. No. 9918/3 for the sum of KShs 1 billion, which land had already been allotted to its shareholders (including the Plaintiffs). It is their case therefore that the aforesaid intended sale without their consent and without compensation to them will amount to a denial of their rights as shareholders.
9. The Plaintiffs therefore seek an appropriate declaration and various injunctive reliefs.
10. Order XXV, rule 1 of the old Rules provided as follows -

**“1. 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 party.”**

This is a wide discretion granted to, the court.

11. But **rule 2** of the same order provides -

**“If an application for security for costs is made before a defence is filed, there shall be filed with the application an affidavit setting out the grounds of the defence together with a statement of the deponent’s belief in the truth of the facts alleged.”**

12. As already pointed out, the 1<sup>st</sup> Defendant has not filed any statement of defence. Therefore the application for security for costs was made before a defence was filed. The 1<sup>st</sup> Defendant should thus have filed with the application an affidavit setting out the grounds of its intended defence together with the deponent’s belief in the truth of the facts alleged.

13. The supporting affidavit already referred to does not set out any grounds of the 1<sup>st</sup> Defendant’s intended defence to the suit, or the deponent’s belief of the truth of such facts. The application is thus grossly deficient in this respect.

14. Apart from that, my own appraisal of the plaint does not disclose a frivolous suit. The Plaintiffs have pleaded that they are shareholders of the 1<sup>st</sup> Defendant and that certain portions of land have been allocated to them by virtue of their shareholding. They have further pleaded that the 1<sup>st</sup> Defendant's intended sale of the parcel of land in which their respective portions are situated will have the effect of dispossessing them of property without compensation. No defence of any sort to this claim has been filed. What can be frivolous in their suit in these circumstances?

15. An order for security for costs such as is sought would have the effect of shutting out the Plaintiffs from court. That is always a course that the court would be most reluctant to take. No case has been made out by the 1<sup>st</sup> Defendant for such an order.

16. In the event the chamber summons dated 9<sup>th</sup> February 2010 is hereby dismissed with no order as to costs. It so ordered.

17. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But I thank God that I am much better now.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF AUGUST 2012**

**H.P.G. WAWERU**  
**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**  
.....  
**JUDGE**