



REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT MOMBASA

Civil Case 470 of 2011

AHMED MOHAMED AHMED PLAINTIFF

VERSUS

AHMED MOHIDEEN 1ST DEFENDANT

KENYA UNITED STEEL COMPANY LIMITED(2006) LIMITED 2ND DEFENDANT

RULING

Before court is the 2nd Defendant’s Notice of Motion for orders that:

- “1. The Plaintiff do furnish security for costs of the 2nd Defendant for the sum of Kshs.12,131,973.75 within 14 days of the Order of the Court and the same be deposited in an interesting [sic] earning joint account as directed by the court in the joint names of both the Plaintiff and 2nd Defendant’s advocates.***
- 2. Pending provision of such security all further proceedings by itself be stayed.***
- 3. The costs of this Application be provided for”***

The application was opposed by the Plaintiff. Parties did agree by consent to dispose of the application by way of written submissions and both parties did duly file their written submissions. I have carefully perused the submissions filed by both parties.

It must be made clear at this early stage that this court is not required to delve into the merits or otherwise of the Plaintiff’s case. That exercise will be undertaken at a different forum. For now all this court is required to do is to determine:

- (1) Whether the 2nd Defendant has established a case warranting the court to make an order compelling the Plaintiff to furnish security for costs and
- (2) If yes, then what amount of security would be appropriate.

To answer the first question I will refer to Order 26 rule 1 of the Civil Procedure Rules 2010 which provide:

“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”

Both counsel from their submissions are in agreement that the test to be applied was set out in the case of **SHAH –VS- SHAH [1982] KLR 95** where it was held

“The general rule is that security is normally required from Plaintiffs resident outside the jurisdiction; however, a court has a discretion to be exercised reasonably and judicially, to refuse to order that security be given The test on an application for security of costs is not whether the Plaintiff has established a prima facie case but whether the Defendant has shown a bona fide defence” [my own emphasis]

This test was further expounded upon by Hon. Justice Khamoni in **RE ESTATE OF KARANJA [2002]2 KLR 34** where he held as follows:

“At paragraph 304 of Halsbury’s Laws of England (ibid), the following guidelines have been laid down as to the circumstances which the court ought to consider on granting or refusing security for costs:

- (1) Whether the Plaintiffs claim is made in good faith and is not a sham.***
- (2) Whether the Plaintiff has a reasonably good prospect of success.***
- (3) Whether there is an admission by the Defendant on the pleadings or otherwise that money is due.***
- (4) Whether there is substantial payment into court or an open offer of substantial amounts.***
- (5) Whether the application for security was being used oppressively for example so as to stifle a genuine claim.***
- (6) Whether the Plaintiffs want 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; and***
- (7) Whether the application for security is made at a late stage of the proceedings”***

This court may proceed to make an order for security of costs in any case where having regard to the circumstances of the case it considers it just to do so. The court has the absolute discretion on whether or not to order that security for costs be given. The only rider is that such discretion must be exercised reasonably and judiciously.

In his plaint filed in court on 24th August 2011 the Plaintiff prayed for the following:

- a) A declaration that the Wakf created over the land known as Plot No. 884 (Original 780/1 of Section VI MN is null and void ab initio
- b) An order to vest the land in the name of the deceased settler Asila binti Mwijabu.
- c) An order to nullify all the subsequent transactions over the subject land.
- d) Costs of the suit.

The 2nd Defendant did respond to the plaint by way of a Defence filed in court on 2nd November 2011. In that defence the 2nd Defendant raised inter alia the following Grounds of Objection:

- (a) That the suit is time barred on the face of it as the Wakf dated 19th August 1943 was registered at the Lands Titles Registry on 23rd August 1943. Any claim to challenge the validity of the Wakf became time barred on 19th August 1949 by virtue of Section 20 of the Limitation of Actions act.

(b) Any action to recover land is time barred.

(c) The Plaintiff has no locus standi to bring this suit as he is not the legal representative of the estate of the late Asila binti Mwijabu. He is not registered as the representative of the deceased in accordance with Section 54 of the Registration of Titles Act Cap 281 of the Laws of Kenya.

(d) The suit is fatally defective for not enjoining the Wakf commissioners of Kenya as Defendants.

As stated earlier it is not the mandate of this court to make any determination on these matters as this remains the preserve of the trial court. However it is essential that this court do bear these matters in mind whilst coming to a decision of this application. Two crucial factors arising from the pleadings on record must be borne in mind:

(1) It would appear that the subject matter of the plaint is a Wakf which was created way back in 1943 – almost sixty (60) years ago. None of the original beneficiaries ever sought to challenge its validity. It is only the Plaintiff who may be described as a second generation beneficiary who now raises a challenge to the creation of that Wakf.

(2) There is clearly a challenge to the legal capacity of the Plaintiff to file suit – in other words there exists a prima facie question regarding the **‘locus standi’** of the Plaintiff. **‘locus standi’** touches on the very core of any suit because a party with no locus has no business appearing in court.

Finally on this point I note that nowhere in his submissions has the Plaintiff countered the 2nd Defendant’s submissions by tendering proof that he is in position to meet the anticipated costs. The decision on whether or not to allow an application of this nature will revolve around whether a party has given proof of sufficient means to meet any anticipated costs resultant from the suit. In the absence of evidence by the Plaintiff that he can pay costs Hon. Justice Luka Kimaru held in the case of **JOEL KIBIWOTT & 4 OTHERS –VS- THE REGISTERED TRUSTEES OF OUR LADY OF VICTORY HCCC 146 of 2004** that where the Plaintiff has failed to provide proof by way of an affidavit that they would be in a position to pay costs, then an application filed by the Defendant seeking security for costs must succeed. Similarly in the case of **RELIANCE BANK (in liquidation) –VS- SWAN INDUSTRIES HCCC 203 of 2001** it was found that where no evidence had been adduced to show that the Plaintiff was in a position to pay the Defendant’s costs the application for security for costs was allowed. Similarly in this case the Defendant has not placed any material before this court to persuade me that he would be in a position to pay the 2nd Defendant’s costs in the event that his suit is dismissed.

Based on the above two considerations I have formed the opinion that this is indeed a case that warrants the exercise of the court’s discretion to order the Plaintiff to furnish security for the 2nd Defendant’s costs.

Having so decided the question of the amount of security to be furnished automatically arises. The 2nd Defendant asks for security in the sum of Kshs.12,131,973.75. The basis for this is the value of the subject property which is a building valued at over Kshs.940,397,900/=. In the case of **MENNO TRAVEL SERVICES LTD –VS- CO-OPERATIVE BANK OF KENYA LIMITED [2006] e KLR** my learned brother Hon. Justice Fred Ochieng held that:

“Access to justice must not be pegged to the size of the Plaintiffs wallet. If that were allowed to happen, the corridors of justice would be closed to people who had genuine claims but did not have sufficient assets to provide security for the costs of the defendants. That must never be allowed to happen”

I am in agreement with this holding. The requested security of kshs.12 million is a colossal sum by any standards. Further I am not persuaded by the argument that the amount of the security ought to be pegged on the value of the subject property. The subject matter of a suit is best ascertained from the pleadings. The Plaintiff has not made a liquidated claim. What the Plaintiff seeks are declaratory orders

the core of which is that the Wakf created over the subject property is null and void. As such it would be erroneous to peg costs on the value of the subject matter. The court should be mindful of the fact that an order for security ought not be so excessive as to deny the Plaintiff his right to pursue justice in a court of law. As such this court must strike a careful balance between the Defendant's right to recover his costs in case the Plaintiff's suit is dismissed with costs and the Plaintiff's right to access the court without heavy financial fetters. Taking all factors into consideration and considering that the Plaintiff's suit is for declaratory orders and not for the value of the subject property I am of the view that kshs.1,000,000/- should be adequate to cover the 2nd Defendant's costs. I will therefore make orders as follows:

(1) That the Plaintiff do deposit the sum of Kshs.1,000,000/- [read One Million Only] in an interest earning account in the joint names of the counsel for the Plaintiff and the counsel for the 2nd Defendant within thirty (30) days of today's date as security for the 2nd Defendant's costs.

(2) That the proceedings in this suit be and are hereby stayed pending compliance or this order of the court.

(3) That in the event that the Plaintiff shall fail to furnish the said security for costs as ordered by this court the 2nd Defendant shall be at liberty to apply for further appropriate orders.

(4) Costs in the cause.

Dated and Delivered in Mombasa this 14th day of September 2012.

M. ODERO

JUDGE

In the presence of:

Ms. Hannabhai holding brief for Mr. Kontos for Applicant

Mr. Shimaka holding brief for Mr. Khatib for Respondent