



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Case 57 of 2008

JOHN RIUNGU M'MUTEA 1ST PLAINTIFF

**MESHACK M'MUTUNGA & OTHERS 2ND
PLAINTIFF**

VERSUS

**DANIEL KIANGURA KAMAKIA
DEFENDANT**

RULING

This is an application brought by way of chamber summons pursuant to the provisions of Order 25 rules 1 and 6 of the Civil Procedure Rules seeking security for costs in the sum of Kshs. 150,000/=.

The relief is sought on the grounds that the respondents are vexatious litigants who have engaged in filing multiplicity of suits on behalf of an amorphous group – the clan. That they are persons of no fixed abode and should their suit herein be dismissed none among them would be able to pay the costs of the suit.

In reply to these allegations, the 1st respondent on behalf of himself and the rest of the respondents has averred that the application has no merit, premature and amounts to an abuse of the court process. That the respondents are known people with fixed known abodes.

The six respondents have instituted this suit on their own behalf and on behalf of 78 other members of Gampogo clan claiming from the applicant, who is the registered owner of L.R. Kiamuri “A” 611, the reversion of the said parcel of land to the clan. They seek the cancellation of the title of the suit land.

Order 25 rule 1 of the Civil Procedure Rules stipulates that:-

“(1). In any suit the court may order that security for the whole or any part of the costs of any defendant or subsequent party be given by any other party.”

The use of the word “*may*” implies discretion and discretion must always be exercised both judicially and reasonably. Halsbury’s Laws of England 4th Edn Vol. XXXVIII at paragraph 304 offers guidelines for consideration in granting or refusing to grant security for costs. They include, among others:-

- (a) Whether the plaintiff’s claim is made in good faith and is not a sham
- (b) Whether the plaintiffs has a reasonably good prospect of success

- (c) Whether the application for security was being used oppressively, eg to stifle a genuine claim
- (d) Whether the application for security is made at a later stage of the proceedings.

These principles have been restated somewhat in **Shah V. Shah** (1982) KLR 95 to which I was referred, in which the test on an application for security was said to be:- not whether the plaintiff has established a *prima facie* case, but whether the defendant has shown a *bona-fide* defence. The principles can be extended further to provide that mere poverty is no ground for requiring a plaintiff to give security for the costs of the suit. See Mulla's the Code of Civil Procedure, 9th Edn. Page 833.

The merits of the respondents' suit or the lack of the same cannot be decided at this stage. They must be given a chance to ventilate their grievance in court. The object of rule 1 of order 25 is to provide for the protection of the defendant where, in the event of success, he may have difficulty in realizing his costs from the plaintiff.

It should follow that where a defendant, as in this application, raises doubt as to the plaintiff's ability to meet his costs in the event, it becomes incumbent upon the plaintiff to discharge the onus by indicating his means. This does not contradict the principle that mere poverty is not a ground of ordering security for costs.

The respondents have not responded to the allegation that they will not be able to pay costs of the suit should it be dismissed.

I come to the conclusion that the applicant is entitled to security for costs in the sum of Kshs. 100,000/= to be furnished by the respondents within thirty (30) days from the date of this order. Costs will be in the cause.

Dated and delivered at Meru this 13th day of November 2008.

26th June 2009

W. OUKO

JUDGE