

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.96 (O.S.) OF 2003

IN THE MATTER OF: PARCEL NO.828(ORIG.372/2 SEC.II M.N. MSA)

A N D

IN THE MATTER OF: APPLICATION FOR DECLARATION THAT THE APPLICANTS/PLAINTIFFS HAVE OBTAINED OWNERSHIP OF 341 ACRES (THREE HUNDRED FORTY-ONE ACRES) OF THE SAID LAND BY WAY OF ADVERSE POSSESSION

B E T W E E N

1. KAZUNGU KALAMA

2. JUSTICE CHIGIRI

3. CHUMA RANDU

**4. MGANI KARANI (suing for & on behalf of
166**

others).....PLAINTIFFS/APPLICANTS

A N D

MAINLAND PROPERTIES

LTD.....DEFENDANT/RESPONDENT

R U L I N G

The Defendant a limited liability company filed this chamber Summons under Order XXV Civil Procedure Code seeking orders for security for costs in the sum of Kshs.5,000,000/- within 30 days of the order and that in default the Plaintiffs' suit be struck off.

The supporting affidavit shows that the land in dispute measures 341 acres in total area, that the Plaintiffs are unknown to the Defendant and are not persons of substantial means. The land in dispute has market value of Kshs.289,850,000/= and that expected fee amounts to Kshs.5 Million to the Advocates and that the Plaintiffs' suit has no chance of success.It is also sham, that only a few Plaintiffs occupy a portion of land about 5% of the total area.

I have perused the affidavits and submissions of counsel. It appears the Defendant has adopted the stand that is oppressive to the Plaintiffs. First of all the sum of costs is not supported with evidence; the market value is not also supported.

A party cannot be kept out of court because he has no substantial income. The Plaintiffs herein claim to be residents in Kenya and therefore they can be traced. In the case of HOMBE SAWMILLS LTD vs M.W. INVESTMENTS LTD & ANOR., Hon. Justice R.S.C. Omollo, as he then was, said:

“Only in exceptional circumstances will a Plaintiff be ordered to provide security for costs where Plaintiff is resident in Kenya”

The provisions of Order 25(1) which is invoked herein gives court discretion to order security for the whole or any of the costs of any Defendant.

Rule 2 thereof implies that the court shall consider the defence and the grounds set out in the affidavit.

I have considered all the issues raised by the Defendant in an effort to show that this case is a non-starter. My observation is that the dispute is such that the courts have to rise up to the occasion and make a decisive decision here. These disputes are growing and a final decision should be made to enlighten the parties on their rights. The suit raises important issues which affect several claimants. They cannot be kept out of court on technicalities and are entitled to be heard.

For these reasons I do not make any order on costs. Application is dismissed with costs.

Dated this 30th day of July, 2004.

JOYCE KHAMINWA

J U D G E

30/7/04

Khaminwa, J.

Mr. Chege – Court Clerk

Mr. Okongo – for Defendants

Mr. Maboza – for Plaintiffs

Ruling read in their presence.