



Milele Homes Limited v Mambomoto Homes Limited (Environment and Land Appeal 6 of 2023) [2024] KEELC 5406 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5406 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 6 OF 2023
LC KOMINGOI, J
JULY 11, 2024**

BETWEEN

MILELE HOMES LIMITED APPELLANT

AND

MAMBOMOTO HOMES LIMITED RESPONDENT

RULING

1. This is Notice of Motion dated 12th October 2023 brought under: Section 1A, 3A and 63(e) of the [Civil Procedure Act](#), Order 26 Rule 1, Order 51 Rule 1 of the [Civil Procedure Rules](#) and all other enabling provisions of Law seeks:
2. It seeks orders;
 - i. That the Respondent be ordered to give security for costs of Kshs. 1,348,900 or any other sum the court deems fit into a joint interest earning account to be opened by the Advocates herein as security for the Costs to the Appellant within 30 days.
 - ii. That the costs of this application be provided for.
3. The grounds are on the face of the application. It is also supported by the sworn Affidavit of Evance Otieno, who states that the Respondent owes the Applicant Kshs. 1,348,9000 in rent arrears as it had been issuing bouncing cheques. The Respondent might not be in a position to pay this, coupled with legal costs and all incidental costs arising from these suits. In addition, the Respondent's physical residence is unknown having vacated the suit premises and that he plans to leave the jurisdiction of this court which would ultimately defeat the Applicant's claim. Therefore, the security of costs would cushion the Applicant from any eventuality.
4. The respondent through its Director Lucy Kamau contested the Applicant's claim stating that at the time this suit was filed at the Magistrate's Court, the Respondent had been evicted from the suit



premises with rental arrears was Kshs. 315,500 and no further rent had accrued. The Respondent acknowledged that there were cheques issued which had bounced but claimed that the same had been settled adding that at the time of eviction, the Applicant carried away Respondent's goods valued at Kshs. 1,300,000. Moreover, the Applicant has not demonstrated the Respondent's inability to pay costs and that all interlocutory applications claimed by the applicant had all been instituted by them and had all been dismissed. This application was thus an abuse of the court process and should be dismissed with costs.

5. This application was canvassed by way of written submissions.

The Appellant's submissions

6. On whether an order for security of costs against the Respondent should be granted, Counsel submitted that while order for security of costs is discretionary as per Order 26 Rule 1 and as held in Jayesh bsmukh Shah vs Narin Haira & another (2015) eKLR, regard should be taken on inability or lack of good faith of the Respondent to pay. In this case, the Respondent's neither has known physical location since they vacated the suit premises nor are they able to pay based on their past record of issuing bouncing cheques. Security of costs would therefore be necessary to protect the Applicant's interests citing Hall vs Snowden Hubbard & Co. (1), (1899) 1 Q.B 593 and Noormohamed Abdulla vs Ranchhodhbhal J. Patel & another (1962) EA 448.

The Respondent's submissions

7. On whether the Applicant's request for security of cost should be granted counsel making reliance to the Supreme Court's case of Westmont Holdings SDN BHD vs Central Bank of Kenya & 2 others [2023] KESC 11 (KLR), submitted that the Applicant had not demonstrated: the Respondent's inability to pay because the bounced cheques were later paid, the allegation that the respondent had no known physical address or that the Respondent was planning to flee the court's jurisdiction. Additionally, the alleged rental arrears of Kshs. 1,348,900 was unsubstantiated because the pending suit at the lower court was filed by the Respondent for the unlawful distress for rent. Reference was made to Gatirau peter Munya vs Dickson Mwenda Kithinji & 2 others (2014) eKLR, Shah vs Sheti Civil Appeal No. 34 of 1981IU and Shakalanga Jirongo vs The Board of National Security Fund High Court No. 957 of 2000.
8. The application should thus be dismissed with costs to the Respondent.

Analysis and determination

9. I have considered the application, the affidavit in support, the response thereto, the rival submissions, and authorities cited. The issues for determination are:
 - i. Whether the application for grant of security of costs order against the Respondent is merited;
 - ii. Who should bear the costs of this application?
10. Security of costs which is a discretionary entitlement from case to case is provided for under Order 26 Rule 1 of the Civil procedure Rules 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.
11. The Applicant claims that the Respondent owes them Ksh. 1,348,900 in rental arrears. He is thus apprehensive that the respondent will not be in a position to pay it together with costs of the suit. The Respondent contested this and claimed that the only amount owed to the Applicant was Kshs.



315,500 and that the suit at the Lower Court was filed due to the Applicant's unlawful carting away of their goods.

12. This Appeal consequently emanated from the Lower Courts order against the Applicant for the release of the Respondent's goods and fixtures they had taken away. It is clear that the suit pending at the Lower Court originates from rent and rental obligation which is yet to be determined. Therefore, the Applicant asking this court to grant orders for security of costs on rental arrears which is an issue pending determination at the lower court is an abuse of the court process. Additionally, the Applicant did not prove the Respondent's incapacity to pay the rental arrears; his flight risk or unknown physical location. This Court seeks guidance from the Court of Appeal's case in *Marco Tool & Explosives Ltd v Mamujee Brothers Ltd* [1988] eKLR where the Court held: "...As the cases show the Court has an unfettered though judicial discretion to order or refuse security.." And the Supreme Court of Kenya in *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others* [2023] KESC 11 (KLR):

In determining whether it was appropriate to make an order that a party gave security for costs, the court could have regard to the following matters and such other matters as it considered relevant in the peculiar circumstances of each case: –

- a. ...
 - b. the genuineness of the proceedings.
13. Lastly, this court in its ruling delivered on 27th April 2023, ordered for stay of execution of enforcement of the Lower Court's orders of 6th July 2022 pending the hearing and determination of this Appeal on condition that the Appellant/Applicant deposits Kshs. 200,000 as security for costs in a joint interest earning account in the names of their counsels within 30 days of this ruling and in default these orders shall automatically lapse. From the Court record, there is no evidence whether this was done or not.
14. The upshot of the matter is that;
- i. The application dated 12th October 2023 is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11TH DAY OF JULY 2024.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Gachie Mwanza for the Appellant.

Mr. Wanjala for the Respondent.

Court Assistant – Mutisya.

