



REPUBLIC OF KENYA



**KENYA LAW**  
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**Quinvest Limited v Gecaga (Environment and Land Case Civil Suit E015 of 2021) [2023] KEELC 16246 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16246 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND LAND CASE CIVIL SUIT E015 OF 2021**  
**LN MBUGUA, J**  
**MARCH 9, 2023**  
**IN THE MATTER OF LAND REFERENCE NUMBER 214/721,**  
**MUTHAIGA, NAIROBI**  
**AND**  
**IN THE MATTER OF SECTION 152E OF THE LAND ACT, 2012**

**BETWEEN**

**QUINVEST LIMITED ..... PLAINTIFF**

**AND**

**MARGARET GACIGI GECAGA ..... DEFENDANT**

**RULING**

1. Vide an application dated February 1, 2023, the plaintiff seeks orders of conditional attachment of the defendant's interest in the following properties;
  - a. Kabete/Kanyariri/613
  - b. Kabete/Kanyariri/2787
  - c. Kabete/Kanyariri/2788
  - d. Kabete/Kanyariri/2789
  - e. Kabete/Kanyariri/2790
  - f. Kabete/Kanyariri/2791
  - g. Kabete/Kanyariri/2792
  - h. Kabete/Kanyariri/2793



- i. Kabete/Kanyariri/2794
  - j. Kabete/Kanyariri/2795
  - k. Kabete/Kanyariri/2796
  - l. Kabete/Kanyariri/2797
  - m. Kabete/Kanyariri/2798
  - n. Nyeri/Municipality Block 8 (Mashina)20
  - o. Nyeri/Municipality/ Block 8 (Mashina)22
  - p. Nyeri Municipality /Block 1/871
  - q. Mavoko Town Block 3/522
2. The plaintiff further seeks an alternative order that the defendant be directed to furnish security for kshs 36,500,000/= being the amount the plaintiff claims as mesne profits at the rate of ksh 500,000/= per month from January 1, 2017 to date and an order to furnish security for costs in the sum of ksh 2.5 million before judgement.
  3. The application is based on grounds on its face and on the affidavit sworn on January 31, 2023 by Udi Mareka Gecaga, a director of the plaintiff. He deposes that the plaintiff is involved with the defendant in other multiple suits where the plaintiff and himself have been awarded costs but the defendant herein refused to pay alleging that she is too poor to pay. Some of those cases are HCC Comm Case 86 of 2018 and Civil Appeal Number 327 of 2018, adding that 4 other matters between them are pending determination.
  4. He deposes that he has learnt that the defendant intends to dispose off her properties listed herein and that he believes the intended sale is to obstruct the execution of the decree that may be passed against the defendant in this suit and other pending matters between the same parties. He points out that the amount claimed herein is a substantial sum and the party and party costs would be at least 2.5 million; he believes that the sums may only be recovered by sale of immovable property. He also believes that the defendant is also likely to dispose off her other properties in Nyeri and Machakos County.
  5. He avers that there was a meeting of the Land Control Board, Kabete Sub county scheduled on January 17, 2023 whose purpose was to give the defendant consent to transfer her property in Kabete Sub county. The plaintiff became apprehensive and instructed its Advocate to write to the Deputy County Commissioner Kabete Sub county who chairs the Land Control Board asking him not to give consent to the defendant to transfer her property.
  6. He also annexed 3 consent letters dated November 15, 2022 from Kabete Land Control Board issued to the defendant to transfer her property identified as Kanyariri /Kabete 2796, 2797 and 2798.
  7. The application is opposed by the defendant by way of her replying affidavit sworn on February 13, 2022. She denies that she is disposing off her properties with a view to obstructing any decree that may be passed. She also denies renting out the suit property. She accuses the plaintiff of making spurious allegations to the Land Registrar who has lodged restrictions against her titles on the strength of those allegations. She annexed 7 searches to various properties registered in her name which show the restrictions.
  8. She also deposes that on or about January 25, 2022, the plaintiff gave instructions to M/s Principal Auctioneers who proceeded to levy distress against her immovable properties, carried off the goods



and subsequently sold them and up to date, she has not been given any accounts of the sale and neither does she know how much was realized.

9. In response, the plaintiff filed a further affidavit sworn on February 14, 2023 by its director Udi Mareka Gecaga. He deposes that while 17 properties are listed in the notice of motion application, the defendant has only 7 searches which show that a restriction has been registered against those parcels of land. He also deposes that the auction referred to by the plaintiff relates to another matter between the parties herein being High Court Commercial Case No 86 of 2018 Margaret Gecaga v Gateway Insurance Company Limited and 2 others which is before the Commercial and Tax division Court.
10. The submissions of the plaintiff are dated February 17, 2023 where it relies on the cases of *Kuria Kanyoko t/a Amigos Bar and Restaurant V Nderu & 2 others* [1988] eKLR and *TNT Express Worldwide (Kenya) Limited v Timothy Graeme Steel* (Civil Appeal E365 of 2018) [2022] KECA 881(KLR) to state that the test for attachment of property before judgement is whether the plaintiff has demonstrated that the defendant has alienated her property with the sole object of defeating execution, and that the plaintiff has discharged this burden.
11. It is further submitted that since the defendant has not offered evidence on the status of her properties listed in the application, the affidavit of Udi Mareka Gechaga sworn on January 31, 2023 is unrebutted. To this end, the plaintiff has proffered the cases of *Mohamed & Another v Haidara* [1972] EA 166 and *Kimotho v Kenya Commercial Bank* [2003]1 EA 108.
12. Relying on the case of *Vincent E Mukoko v Abdirahman Abdinur & another* [2018] eKLR, the plaintiff submits that the court has power to order a party to provide security for mesne profits pending determination of the suit and that power to order security for costs is discretionary as held in *Salim Albamed Ali & Another v Emag Ag* [2012] eKLR.
13. The defendant did not file any written submissions as directed by the court on February 14, 2023.
14. I have considered all the issues raised herein as well as the submissions of the plaintiff. The provisions of order 39 rule 1 of the *Civil Procedure Rules* provides that the court can direct the defendant to either furnish security or appear and show cause why he should not furnish security upon being satisfied that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court.
15. In *Liu Ching Liang v Webwave Electric Manufacturing (K) Co Ltd & 2 others* [2016] eKLR, the court held that:-

“The basic principles of law that must be observed for the court to make orders of security deposit of attachment before judgment lie in the Civil Procedure Act under order 39. The burden is on the party claiming such an order to show that the Respondent party is in the process of disposing their business/property or moving that property from the jurisdiction of the court or is about to abscond in either case with the object of defeating any decree that may be passed against him.”
16. In *Kanyoko t/a Amigos Bar & Restaurant v Nderu & 2 others* [1988] eKLR the Court of Appeal held that;

“...In the result, if this case teaches anything, it is that courts should be extremely slow in ordering attachment of a defendant’s property before judgment not only because it is hardly consistent with justice to exact “punishment” but also because in view of the tendency and



time-consuming process of the courts, the rights and liabilities of the parties may not be determined for a long time, possibly years.”

17. Has the plaintiff established that the defendant is disposing off her property with a view to defeating the decree that may be issued herein? The plaintiff seeks mesne profits of over ksh 36 million. While the defendant denies disposing of her property, there is evidence that she had attempted to transfer some of the subject properties. Nevertheless, this court takes into account that the applicant has apparently lodged restrictions on some of the listed properties. It is also apparent that the parties appear to have myriad court cases at different points of trials and it is paramount that parties focus on the substantive issues geared towards the final determination of this case. To this end, it is noted that the matter already has a hearing date in June 2023. In the circumstances, this court takes the view that attachment of the properties would only convolute the disputes further.
18. Similarly, I am inclined to disallow the prayer to furnish security for costs for the reason that it would be oppressive to make such an order at this stage. I'm guided by the pronouncements of the Supreme Court in *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others* (Petition 16 (E023) of 2021) [2023] KESC 11 (KLR) (17 February 2023) where the court found that an order for security of costs must neither impede access to justice nor stifle genuine claims and most definitely must not be oppressive.
19. All in all, the application dated February 1, 2023 is dismissed. The costs thereof shall abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MARCH, 2023  
THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

