



Kimuhu v Wahinya (In her Capacity as Administrator of Richard Moses Ngobi - Deceased) & another (Environment & Land Case E294 of 2022) [2023] KEELC 17899 (KLR) (7 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17899 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E294 OF 2022**

JA MOGENI, J

JUNE 7, 2023

BETWEEN

MARY WAMBUI KIMUHU PLAINTIFF

AND

RUTH THEDDESIA WAHINYA (IN HER CAPACITY AS ADMINISTRATOR OF RICHARD MOSES NGOBI - DECEASED) 1ST DEFENDANT

KIRAGU MUTOROKI KING'ORI 2ND DEFENDANT

RULING

1. Before this Court for determination is a Notice of Motion Application dated November 23, 2022 brought under Article 159 (2) (c) of the Constitution of Kenya, Section 1A, 1B and 3A of the Civil Procedure Act, Order 25 Rule 4 and Order 26 Rule 1 of the Civil Procedure Rules 2010. The Defendants/Applicants are seeking for the following orders: -
 1. That this Honourable Court be pleased to stay the suit herein pending the payment of costs in High Court Civil Suit No 9 of 2011, Mary Wambui Kimuhu vs Gabriel Kimuhu Wahinya & 2 Others.
 2. That in the alternative of prayer 2, this Honourable Court do Order the Plaintiff herein to furnish security for costs in the sum of Kshs 5,542,317.22 pending the taxation of the Defendants' Bill of Costs dated November 22, 2022 and filed in High Court Civil Suit No 9 of 2011, Mary Wambui Kimuhu vs Gabriel Kimuhu Wahinya & 2 Others.
 3. That this Honourable Court do Order the Plaintiff herein to furnish security for costs in this matter in the sum of Kshs 5,542,317.22 to be paid within 14 days of the Order to a joint account in the names of both Counsel for the Plaintiff and the Defendants herein.



4. That in default of compliance with Order Nos 1 or 2 and 3, the Plaintiff's suit be struck out with costs payable to the Defendants herein on a full indemnity basis.
5. That the costs of this application be provided for.
2. The Application is supported on the grounds as stated in paragraph (a) – (f) on the face of the Application, the annexed Affidavit sworn by Ruth T Ngobi on November 23, 2022. I do not need to reproduce them.
3. The Application was opposed by the Plaintiff by way of Replying Affidavit sworn on February 10, 2023 and filed on March 2, 2023.
4. Directions were given on March 7, 2023 that the application be canvassed by way of written submissions. The Defendants/Applicants filed their submissions dated March 15, 2023 on the even date. By the time of writing this ruling the Plaintiff/Respondent had not filed her submissions.
5. The Court has considered the Applicants' Application as filed, the Respondent's Replying Affidavit thereto as well as the applicant's submissions. The Court is of the opinion that the issue for determination is whether the current suit should be stayed pending payment of costs in High Court Civil Suit No 9 of 2011 Mary Wambui Kimuhu vs Gabriel Kimuhu Wahinya & 2 Others.
6. Order 25 Rule 4 of the Civil Procedure Rules provides as follows:

“If any subsequent suit shall be brought before payment of costs of a discontinued suit upon the same or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs are paid.”
7. It is clear from the provisions of Order 25 Rule 4 of the Civil Procedure Rules that the Court has a discretion whether or not to order a stay of any subsequent suit before the payment of costs in a previous suit. It is therefore not mandatory that any subsequent suit be stayed. That is clear from the use of word “may”. In exercising such discretion, the Court will take into account several factors including whether indeed the costs have been taxed or agreed and the conduct of the parties.
8. It is common terrain that the plaintiff had before the institution of this suit filed High Court Civil Suit No 9 of 2011, Mary Wambui Kimuhu vs Gabriel Kimuhu Wahinya & 2 Others in the High Court of Kenya at Nairobi (Family Division) via an Originating Summons dated 9/03/2011 challenging the sale of L R No 330/681, Nairobi to the late Richard Moses Ngobi (now deceased) where the present Defendants were sued as the 2nd and 3rd Respondents. The Applicants deponed that on July 27, 2018, the High Court (Honourable Justice W. Musyoka) delivered a Judgment the said suit dismissing the Plaintiff's claim in its entirety and awarded costs to the Defendants herein. Further, that the present suit herein has been instituted without settlement of the costs awarded in said suit, civil Suit No 9 of 2011. The Defendants/Applicants are apprehensive that they may also defend the present proceedings without being paid costs of the previous suit to their great prejudice and they are further apprehensive that the Plaintiff is not capable of meeting the costs of the present suit hence the need to provide security.
9. Conversely, the Plaintiff/Respondent does not dispute the orders given in High Court Civil Suit No. 9 of 2011. It is however her contention that she had been advised by her Advocates on record that the instant suit emanates from a different cause of action, that is, validity of the Title to the Deceased while the original cause of action in HCCC No 4413 of 1991 (OS) and High Court Civil Suit No. 9 of 2011 was division of matrimonial property. That High Court Civil Suit No. 9 of 2011 was adjudicated and



- determined by a different court and on different issues which cannot therefore be transferred to this Honourable court.
10. Order 25 of the [Civil Procedure Act](#) is clear that if such costs are not paid, the court has a discretion to order that the subsequent suit be stayed. In the case of *IMNVP MK Murang'a HCCC No 38 of 2015 (O S) Waweru J* held as follows:

“The court has an unfettered discretion under Order 25 Rule 4 of the Civil Procedure Rules, 2010. The court may order a stay of any subsequent suit brought upon the same or substantially the same cause of action in a previous suit before payment of costs of the discontinued suit, but exercise of such discretion must accord with the dictates of justice and will depend upon the particular circumstances of the case.”
 11. See also the case of [John Kibet Kibor V Daniel Kiplangat Chepkwony](#) (2017) eKLR.
 12. I note that the Defendants/Applicants deponed that on November 22, 2022, their Advocates filed a Bill of Costs in the High Court Civil Suit No 9 of 2011, Mary Wambui Kimuhu vs Gabriel Kimuhu Wahinya & 2 Others for the sum of Kshs 5,542,317.22. They have adduced this evidence before the Court. There is no evidence indicating that the same was served upon the Plaintiff in that matter. It is not however in dispute that the plaintiff has failed to pay the costs in High Court Civil Suit No 9 of 2011. There is no evidence that there was a taxation notice filed or served upon the Plaintiff in the said suit, but the Applicants have alleged that the costs are being taxed on March 22, 2023.
 13. Nevertheless, I note that both suits are anchored on the same suit property described as L R No 330/681 and it is my finding that the said costs are due and payable.
 14. The defendants' counsel in relying on the case of [Davis Mwatela Dzuva & another v Salim Anjarwalla \(the legal representative of the Estate of Hussein Karimbhai Anjarwalla\)](#) [2021] eKLR submitted that this case fits the bill as it is substantially between the same parties and touch on the same suit property with the same cause of action as HCCC No 9 of 2011 (OS). The Plaintiff has sought to distinguish the cause of action claiming that HCCC No 9 of 2011 (OS) was for the division of matrimonial property while this suit is challenging the validity of the Defendant's title. They invited the Court to look at prayers 1 and 3 which are a replica of the prayers sought in the OS. That in fact, the Plaintiff seeks to have the suit property L 330/681, Lavington declared as matrimonial property and the Defendants' title be declared null and void.
 15. That the Plaintiff also does not dispute that costs were awarded in HCCC No. 9 of 2011 (OS) and are being taxed on 22/03/2023. This is the reason the Defendants have sought the alternative prayer for security pending ascertainment of the costs by the Deputy Registrar on 22/03/2023. The said Bill of Costs was served upon the Plaintiff herein and the Plaintiff herein as not opposed the said Bill of Costs.
 16. Regarding provision for security for costs, Order 26 Rule 1 of the Civil Procedure Rules provides that:

“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.”
 17. In an application for security for costs the court must balance the competing rights of the parties, that is the right to access justice enshrined in the [Constitution](#) of Kenya and the right to security for costs.
 18. In the instant case, the Plaintiff's case is that High Court Civil Suit No 9 of 2011 was adjudicated and determined by a different court and on different issues which cannot therefore be transferred to this Court. That her pleadings are properly filed and there is no legal basis to strike out the Plaintiff in



the instant suit. On the other hand, the Applicants are apprehensive that they will defend the present proceedings without being paid costs of the previous suit to their prejudice and to the prejudice of the beneficiaries of the Estate of Richard Moses Ngobi which is being denied of its proprietary rights in respect of the suit property. They are also apprehensive that the Plaintiff is not capable of meeting the costs of the present suit hence the need to provide security for costs. It is their case that this Court has the jurisdiction to order stay of proceedings sought in their application until payment of the costs in HCCC No 9 of 2011 (OS) or make an order for payment of security for the whole of their costs in defending the present proceedings.

19. Even though the Defendants/Applicants have pointed out that the Plaintiff is not capable of meeting the costs of the present suit, no evidence has been adduced to demonstrate the same. The defendants' have not sufficiently established that the Plaintiff's conduct demonstrates that she cannot meet the costs of the present suit. Furthermore, their apprehension that they have sought the alternative prayer for security pending ascertainment of costs by the Deputy Registrar on March 22, 2023 has been overtaken by events and are not well founded. They have also not demonstrated that the Plaintiff has refused to settle the costs from HCC Suit No. 9 of 2011.
20. All in all, it is not in dispute that Judgment was delivered in HCC Suit No 9 of 2011 dismissing the Plaintiff's claim in its entirety and awarded costs to the Defendants herein. The said costs are due and payable. It is not denied that costs are yet to be settled in HCC Suit No 9 of 2011. Taxation in HCC Suit No 9 of 2011 was scheduled for March 22, 2023 as was deponed by the Defendants. The Plaintiff did not deny this. She is only under the misconception that she can pursue the current suit without settling the issue of costs in HCC Suit No 9 of 2011. This would be a violation of the clear provisions of Order 25 rule 4 of the Civil Procedure Rules. The Plaintiff/Respondent has not come to court with clean hands, and she cannot therefore benefit from her breach of the law.
21. From the reading of Order 25 Rule 4, a court may stay the second action until costs of the first action have been paid. In the circumstances, I am inclined to stay this suit pending the payment of the said costs.
22. The upshot of the foregoing is that the application succeeds in part and accordingly, the Court makes the following orders for disposal of the application:
 - a. The suit herein be and is hereby stayed pending the payment of costs in High Court Civil Suit No 9 of 2011, Mary Wambui Kimuhu vs Gabriel Kimuhu Wahinya & 2 Others.
 - b. In default of compliance with order (a), the Plaintiff's suit be struck out with costs payable to the Defendants herein on a full indemnity basis.
 - c. I award the costs of the application to the Defendants/Applicants.
- 23 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 7TH DAY OF JUNE, 2023.

MOGENI J

JUDGE

In the virtual presence of: -

Mr Ouma for the Plaintiff

Ms Kiunga holding brief for Mr Theuri for Plaintiff/Respondent

C. Sagina: Court Assistant

