



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Gatimu v Permanent Secretary, State Ministry of Lands & 12 others (Environment & Land Case 27 of 2019) [2023] KEELC 18600 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18600 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 27 OF 2019**

A NYUKURI, J

JULY 5, 2023

BETWEEN

CHARLES MUNENE GATIMU PLAINTIFF

AND

PERMANENT SECRETARY, STATE MINISTRY OF LANDS ... 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

PHILIP KIPTAA 4TH DEFENDANT

MACDONALD LIJOODI 5TH DEFENDANT

ROBINSON PETER NGIGEH 6TH DEFENDANT

LUKE METTO 7TH DEFENDANT

GHANSHYAM MANJI VEKARIYA 8TH DEFENDANT

CHANDRAKANT MANJI VEKARIYA 9TH DEFENDANT

KIPYATOR KIBET & ASSOCIATES ADVOCATES 10TH DEFENDANT

KIBET WISDOM 11TH DEFENDANT

NYAMBURA MUNYUA & ASSOCIATES ADVOCATES 12TH DEFENDANT

EDWIN WAFULA 13TH DEFENDANT



RULING

Introduction

1. Before court is a Notice of Motion dated April 4, 2022 filed by the 10th, 11th and 12th Defendants seeking the following orders;
 - a. That the Plaintiff/Respondent be ordered to pay security for costs for Kenya Shillings Five Million (Kshs. 5,000,000/-) or any other sum the court deems it fit into a joint interest earning account to be opened by the advocates of the Plaintiff/Respondent and the Advocates of the 10th, 11th and 12th Defendants/Applicants herein as security for costs of the Defendants/Applicants within 30 days of the order.
 - b. That the names of the 10th, 11th and 12th Defendants/Applicants be struck out from the suit with costs in default of payment of the said security within the prescribed period.
 - c. That the costs of the application be provided for.
2. The application is premised on the supporting affidavit sworn on April 4, 2022 by Kibet Wisdom the 11th Defendant. The Applicants' case is that the Plaintiff has no known assets which could satisfy an order for costs if such order is ultimately made in favour of the Applicants; that the Applicants have demonstrated a bona fide defence; that the Plaintiff has no bona fide claim against the Applicants; that the Plaintiff's suit is challenging the allotment and registration of Land Reference Number 2358/8 in favour of the 4th, 5th, 6th and 7th Defendants, which registration the Applicants had no role to play at all; that the Applicants involvement in LR. No. 2358/8 was the conveyancing process to transfer that property to the 8th and 9th Defendants respectively and that it is only fair that the application be allowed as the suit against the Applicants is frivolous, vexatious, scandalous and an abuse of the court process and does not disclose any cause of action. They attached a copy of the plaint and search certificate dated March 17, 2017 in respect of the suit property.
3. The application is opposed. Charles Munene Gatimu the Plaintiff herein filed a replying affidavit sworn on June 26, 2022. It was the Respondents case that the application was nothing but an attempt by the Applicants to intimidate and harass him into abandoning his case and ensuring that the same is frustrated or delayed; that there is no basis for the orders sought as the Applicants are guilty of collusion with the other Defendants with intention to defraud the Plaintiff of his land; that the plaintiff has disclosed multiple causes of action against the Applicants including collusion, fraud, negligence, misrepresentation and breach of trust among others; that granting the prayers would amount to usurpation of the powers of the trial judge by determining a matter on affidavits without testing the evidence by cross-examination; that he is not a man of straw; that he has assets and is a resident of Kenya and it is up to the Applicants to prove the contrary; that the application is an affront to the Constitutional right to a fair and expeditious hearing and its meant to stifle and restrain the Plaintiff from prosecuting his claim.
4. It was further the Respondents assertion that the case against the Applicants is not a frivolous one and deserves to be heard.
5. The application was canvassed by way of written submissions. On record are the Applicants' submissions dated September 21, 2022 and the Respondent's submissions dated December 14, 2022; all of which I have duly considered.



Analysis and determination

6. I have carefully considered the application, the response and the submissions filed by the parties. In my considered view, the issue that arise for determination is whether the Applicants have met the threshold for grant of an order for security for costs.
7. Order 26 Rule 1 of the [Civil Procedure Rules](#) provides for the power of the court order security for costs 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.
8. An order for security for costs is discretionary and can only be made in clear cases where the ends of justice demand grant of such order. The test to be applied in an application for security for costs is not whether or not the Plaintiff has demonstrated a prima facie case but whether the Defendant has demonstrated a bona fide defence.
9. In the case of [Jayesh Hasmukh Shah v. Navin Haira & Another](#) [2015] eKLR, the court held as follows;

It is now settled law that the order for security for costs is a discretionary one as long as that discretionary is exercised reasonably and having regard to the circumstances of each case. Such factors as absence of known assets in the county, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the Plaintiff; the bonafides of the Plaintiff's claim, or any other relevant circumstances or conduct of the Plaintiff or Defendant may be taken into account.
10. I have considered the plaint and the Plaintiff's claim is that he was allocated land Parcel No. 2358/8 in 1999 but that the Applicants and the 8th, 9th and 13th Defendants colluded, connived and by fraud procured registration of the suit property using forged documents so as to defeat the Plaintiff's interest. The Plaintiff specifically pleaded against the Applicants of receiving instructions to sell property knowing that the documents thereof were forged; failure to comply with professional and ethical standards of advocates and failure to disclose fraud during the intended sale despite having knowledge of the same.
11. On the other hand, the Applicants averred that they had no role to play in the registration of the suit property although they were involved in the conveyancing and transfer process to the 8th and 9th Defendants and that they exercised due diligence.
12. In view of the above, it is clear that the Plaintiff has pleaded fraud, collusion and professional misconduct against the Applicants while the Applicants deny those allegations and concede to taking part in conveyancing and transfer of the property to the 8th and 9th Defendants. The Applicants attached a copy of the plaint and a search certificate as evidence. Having considered the above allegations, it is my view that the issues raised by the Applicants can only be determined upon trial as the material placed before this court is not sufficient for the court to conclude that the Plaintiff must deposit security for costs before he is heard.
13. The right to be heard is sacrosanct as provided for in Article 50 of the [Constitution of Kenya 2010](#) and access to justice is a Constitutionally protected right under Article 48 of the Constitution and a person does not have to raise security for costs to enjoy that right. In my view, poverty cannot be the basis to limit the right to a fair hearing and access to justice because whether or not a person is poor, they ought to be allowed to have their dispute resolved fairly by a trial, unless the interests justice demands otherwise.



14. In the premises, the court is not satisfied that this is a proper case for grant of an order for security for costs. In the end, I find and hold that the application dated April 4, 2022 is unmeritorious and the same is hereby dismissed with costs to the Plaintiff.

15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Kibet for 4th, 5th, 6th, 7th, 10th, 11th and 12th Defendants

Ms Kimani holding brief for Mr. Okeyo for Plaintiff/Respondent

Mr. Ochwo for 8th and 9th Defendants

No appearance for Attorney General

No appearance for National Land Commission

Josephine – Court Assistant

