Njue & another v Gulflink Enterprises Limited (Environment & Land Case E271 of 2022) [2023] KEELC 18623 (KLR) (3 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18623 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E271 OF 2022

JO MBOYA, J

JULY 3, 2023

BETWEEN

SAMUEL PATRICK NJUE ..... 1ST PLAINTIFF

ELIUD K CHEPKWONY ..... 2ND PLAINTIFF

AND

GULFLINK ENTERPRISES LIMITED ..... DEFENDANT

RULING

Introduction And Background

1. Vide Notice of Motion Application dated the 15th day of November 2022; the Defendant/Applicant herein has approached the Honorable Court seeking for the following Reliefs;

    i. That the Plaintiffs be ordered to deposit Kshs 40,000,000 Only; or any other amount the Court deems adequate as security for the Defendant's costs in this case within 30 days from the date of the order, pending hearing and determination of this case and in default, the Plaintiff's suit do stand dismissed.

    ii. That the said Kshs 40,000,000 Only be deposited in an Interest Earning Bank Account in the Joint names of the Plaintiffs' and the Defendant's Advocates pending the hearing and determination of this case.

    iii. That costs of this Application be provided for.

2. The instant Application is premised and anchored on various grounds which have been enumerated in the body thereof. Further, the Application is supported by the affidavit of one Arafat Abdulla Said sworn the 1st December 2022; and in respect of which the Deponent has annexed two documents.

3. Upon being served with the Application under reference, the 1st Plaintiff/Respondent filed Grounds of opposition dated the 6th March 2023; and a Replying affidavit sworn on the 14th March 2023; and in respect of which same has controverted an Application beforehand.

4. Nevertheless, despite being served with the current Application, the 2nd Plaintiff/Respondent has neither filed any Grounds of Opposition or any Replying affidavit thereto. Invariably and for good measure, the instant Application has not been opposed by the 2nd Plaintiff/Respondent.

5. Be that as it may, the Application came up for hearing on the 28th March 2023; when the advocates for the respective Parties covenanted to canvass and ventilate the Application by way of written submissions, to be filed and exchanged within set timelines.

6. Pursuant to and in line with the agreement by the advocates for the Parties, the Honourable court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions. For good measure, both the Defendant/Applicant and the 1st Plaintiff/Respondent duly complied.

Submissions By The Parties

a. Applicant's Submissions:

7. The Defendant/Applicant has filed submissions dated the 28th March 2023; and in respect of which same has raised, highlighted and canvassed two salient issued for due consideration and determination by the Honourable court.

8. Firstly, Learned counsel for the Applicant has submitted that despite the claim by and/or on behalf of the Plaintiffs' to be the registered and lawful owners of the suit property, it has been contended that the Plaintiffs' herein have never been in possession and occupation of the suit property for more than 22 years prior to and/or before the commencement of the instant suit.

9. Further and in addition, Learned counsel for the Applicant has submitted that on the other hand, the Applicant herein bought and acquired the suit property from the previous and legitimate owner who had been in occupation of the suit property prior to the sale and transfer thereof to and in favor of the Defendant/Applicant.

10. Nevertheless, Learned counsel for the Applicant has submitted that the Plaintiffs/Respondents herein have proceeded to and generated fake and fictitious Title documents over and in respect of the suit property; and are now attempting to use the impugned Certificate of title to lay a claim to the suit property which lawfully and legally belongs to the Defendant/Applicant.

11. Premised on the foregoing, Learned counsel for the Applicant has thus submitted that the title document belonging to and bearing the name of the Defendant/Applicant are lawful and Legitimate ones; hence the Applicant herein has a strong and incontrovertible defense to the claim by and on behalf of the Plaintiffs/Respondents.

12. Secondly, Learned counsel for the Applicant has submitted that despite being served with the subject Application seeking for Security for costs, the Respondents herein have not found it appropriate and/or expedient to file an Affidavit of Means with a view to controverting the Applicant's contention that the Respondents are persons of no known means and will be therefore be unable to settle the costs, if any, decreed by the Honourable Court.

13. Lastly, Learned counsel for the Applicant has submitted that the subject proceedings which have been mounted by the Plaintiff/Respondents are sham and same are merely calculated to subject the

Defendant/Applicant to incur unnecessary costs, which the Plaintiffs/Respondents shall not be able to repay.

14. In support of the foregoing submissions, Learned counsel for the Applicant has cited and relied on inter-alia *Abel Moranga Ongwacho v James Philip Maina Ndegwa & 3 others* (2012) eKLR, *Keyston Bank Ltd & 4 others v I & M Holdings Ltd & another* (2017) eKLR and *Shah & 2 others v Shah & 2 others* (1982) eKLR, respectively.

15. Premised on the foregoing submissions, Learned counsel for the Applicant has therefore implored the Honourable court to find and hold that the instant Application is meritorious and thus ought to be granted.

b. 1st Respondent's Submissions:

16. The 1st Respondent has filed written submissions dated the 13th May 2023; and in respect of which same has raised, highlighted and amplified Three (3) issues for consideration by the Honourable court.

17. First and foremost, Learned counsel for the 1st Respondent has submitted that the Defendant/Applicant herein has neither established nor demonstrated that the instant matter meets the legal threshold for purposes of issuance of an order for Security for costs or at all.

18. Further and in any event, Learned counsel has submitted that the decision as to whether to grant an order for Security for costs is a discretionary Jurisdiction, which must be exercised depending on the obtaining circumstances arising from each and every case.

19. In support of the foregoing submissions, Learned Counsel has cited and relied on the case *Alpha Fine Foods Ltd v Horeca (K) Ltd & 4 others* (2021) eKLR; where the court underscored the discretionary nature of the Jurisdiction and the factors to be considered prior to and before ordering the provision of security for costs.

20. Secondly, Learned counsel for the 1st Respondent has submitted that the Applicant herein has not demonstrated that same has a Bona fide Statement of Defense, which is critical in determining whether or not to grant an order of security for costs.

21. In particular, Learned counsel for the 1st Respondent has contended that it is not enough for the Applicant, to establish or demonstrate that same has a bona fide statement of defense. For good measure, Learned counsel for the Respondent has submitted that it was incumbent upon the Applicant to go an extra mile and demonstrate the ingredients that underpin the stated bona fide Statement of Defense.

22. In this respect, Learned counsel for the 1st Respondent has cited and relied on various decisions inter-alia *Jayesh Hasmukh Shah v Narin Haira & another* (2015) eKLR, *Aggrey Shivona v Standard Group PLC* (2020) eKLR and *Auto Fine Ltd v Eco Bank Kenya Ltd & another* (Civil Suit No E177 of 2021) (2022) KEHC (KLR), respectively.

23. Thirdly, Learned counsel for the Respondent has submitted that the 1st Respondent herein has a Right to Fair Hearing as espoused and entrenched in Article 50(1) of the *Constitution* 2010.

24. Furthermore, Learned counsel for the 1st Respondent has submitted that the order for security for costs has a likely impact and consequence of hindering and/or restricting the Respondent's Right to Fair Hearing and Access to Justice, in terms of Article 48 of the *Constitution*, 2010.

25. Further and in addition, Learned counsel for the 1st Respondent has submitted that each and every citizen is entitled to a Right to Fair Hearing; and that the poverty or otherwise, ought not to impact

on the Right of any person to Access Justice and to have any issue in dispute to be determined in a fair and impartial manner.

26. In view of the foregoing, Learned counsel for the Respondent has thus submitted that the alleged inability of the 1st Respondent to pay and/or settle the Applicant's costs, if any, to be awarded at the tail end of the Hearing, ought not to defeat the 1st Respondent's Rights to Fair Hearing as entrenched in the *Constitution*.

27. In support of the foregoing submissions, Learned counsel for the 1st Respondent has cited and relied on the case of *Kenya Human Rights Commission v Non -Governmental Organizations Coordination Board* (2016) eKLR, *Cyrus Shakalanga Jirongo v The Board of National Social Security Fund* Nairobi HCC 957 of 2000 (UR), *Aggrey Shivona v Standard Group PLC* (2020) eKLR and *Keyston Bank Ltd & 4 others v I&M Holdings Ltd & another* (2017) eKLR, respectively.

28. Based on the foregoing, Learned counsel for the 1st Respondent has therefore invited the Honourable court to find and hold that the instant Application by and at the instance of the Applicant is devoid of merits and hence ought to be Dismissed with costs.

Issues For Determination

29. Having reviewed the instant Application and the Responses filed thereto; and upon considering the written submissions filed by the Parties the following issues do arise and are thus worthy of consideration and determination by the Honourable court;

    i. Whether the Applicant herein has established and demonstrated the requisite grounds to warrant the grant of an order of Security for costs.

    ii. What is the reasonable Quantum of costs; if any, to be granted by the court.

Analysis And Determination

Issue Number 1

Whether the Applicant herein has established and demonstrated the requisite grounds to warrant the grant of an order of Security for costs.

30. The instant suit was filed and/or lodged by the Plaintiffs/Respondents herein and wherein same contended that the Defendant/Applicant has created and generated fake and fictitious Certificate of titles over the Respondent's parcel of land, namely; LR No 209/12040.

31. On the other hand, the Defendant/Applicant contends that the disputed property belongs to and is registered in her name and that further more; the Defendant/Applicant contends that same acquired the suit property from the previous and legitimate owner thereof, who had hitherto been in possession of the suit property for more than 20 years.

32. Further and in addition, the Defendant/Applicant has also contended that despite the claims by the Plaintiffs/Respondents to own the disputed property, same has never been in possession thereof or at all, assuming that the Plaintiffs/Respondents had any lawful and legitimate title to the disputed land.

33. Premised on the foregoing contention, the Defendant/Applicant has therefore submitted that same has established and demonstrated the existence of a bona fide Statement of Defense, which is one of the legitimate requirements prior to and before a favorable order for security for costs, can issue and/or be granred.

34. Secondly, the Applicant herein has submitted that the suit by and on behalf of the Plaintiffs/ Respondents has been filed merely to vex and harass the Defendant/Applicant and that ultimately, the Plaintiffs/Respondents shall not be in a position to pay and/or settle the costs, if any, that may be awarded by the court or otherwise.

35. Thirdly, the Applicant has also averred that upon being served with the pleadings in respect of the instant matter and following the lodgment of the statement of defense and counterclaim; same wrote to the Plaintiffs herein to establish and authenticate whether the Plaintiff would have the means and or capacity to settle costs, if any, that my be issued and/or granted by the Honourable court.

36. Nevertheless, Learned counsel for the Applicant has contended that despite writing to counsel for the Respondents, same failed and/or neglected to respond to the various correspondence, which were seeking to establish the Respondent's means and capacity, if at all, to liquidate the Costs, that maybe awarded.

37. Furthermore, the Applicant has also submitted that despite having filed the instant Application , the 1st Respondent herein has deliberately skirted the question of means and capability and in particular, same has failed to file an affidavit of means to controvert the averments on behalf of the Applicant.

38. Having enumerated the forgoing factors, it is now imperative to revert back and to discern whether the circumstance obtaining in respect of the instant matter befits an order of security for costs, either as sought by the Applicant or otherwise.

39. To start with, it is imperative to state and underscore that the grant of an order of security for costs does not by itself constitute a fetter or hindrance to the Respondent's Right to Fair Hearing and Access to Justice as espoused and entrenched in Articles 48 and 50 of the *Constitution* 2010.

40. Further and in any event, the question as to whether an order for security for costs would constitute a violation or infringement of the right to fair hearing and access to justice was addressed and canvassed in the case of *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 others* [2013] eKLR, where the court held thus;

> " 17. "In the case of Hon Johnson Muthama v Minister of Justice and Constitutional Affairs & others (Supra) the court was asked to declare section 78 of the Act unconstitutional on the basis that it violated Article 48 which guarantees the right of access to justice. The court declining to strike down the provision stated, "[69] Provision of payment of costs by a party coming before the court does not in my view, violate any provision for the *Constitution*. It is a common practice in civil proceedings intended to safeguard the interests of the party against who a claim is brought and to prevent abuse of the court process. Given the nature of elections, it serves a useful and rational purpose of ensuring that only those who have a serious interest in challenging the outcome of an election do so."

41. Furthermore the circumstances and factors to be considered prior to and before making the order for security for costs were highlighted and underscored by the Court of Appeal in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, where the supreme court stated and held as hereunder;

> " In an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not

enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven. See *Hall v Snowdon Hubbard & Co. (I)*, (1899) 1 QB 593, the learned Judge at page 594 stated:-

> "The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made."

In *Marco Tool & Explosives Ltd v Mamujee Brothers Ltd.* (supra), this Court expressed itself thus:-

> "The onus is on the applicant to prove such inability or lack of good faith that would make an order for security reasonable."

See also *Kenya Educational Trust Ltd. v Katherine S.M Whitton* (supra).

In the instant application, it is not in dispute that the 1st respondent is a man of limited means and in the event that he is unsuccessful, he may not be in a position to pay the costs incurred by the Applicant."

42. For good measure, a Respondent who is served with an Application for security for costs is called upon to file an affidavit of means and thus to controvert the averments by the Applicant that such a Respondent; would not be able to meet and/or satisfy costs, if any, that may ultimately be awarded.

43. Instructively, it is worthy to note that the Applicant may not be knowledgeable of the intricate details, inter-alia, the means of the Respondents. However, once an Applicant avers under oath that the Respondents may not be possessed of the requisite means, then it behooves the Respondents to file an Affidavit of Means.

44. Clearly, the intricate details pertaining to and concerning the means of the Respondents are issues that are within the Special and peculiar knowledge of the Respondents. Consequently, once an allegation is made on oath, the Evidential burden of proof shifts to the Respondent to controvert the averment.

45. To underscore the foregoing position, it suffices to invoke and apply the Provisions of Section 112 of the *Evidence Act*, chapter 80 Laws of Kenya which stipulates and provides as hereunder;

> 112. Proof of special knowledge in civil proceedings.
>
> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

46. Finally and as concerns the importance/significance of an Affidavit of means, I beg to adopt and reiterate the holding of the Court in the case of *Kibiwot & 4 others v Registered Trustees of Monastry Our Lady of Victory* (2004) eKLR, where the court stated and held as hereunder;

> " When the Plaintiffs were served with the Application seeking that they provide security for costs, the Plaintiffs ought to have, as a matter of course, provided an affidavit of means stating that they were capable of paying the costs, if they were unsuccessful in their case."

47. Having considered the foregoing circumstances and upon taking into account the relevant factors, I come to the conclusion that the Defendant/Applicant herein has established and demonstrated the requisite ingredients to warrant an order for provision of security for costs.

48. Clearly and to my mind, it would be inappropriate and a grave injustice to allow the Defendant to be dragged through the course of proceedings, which are undoubtebly expensive; and yet at the tail end, same would be left with no recourse as pertains to the costs incurred.

Issue Number 2:

What is the reasonable quantum of costs; if any, to be granted by the court.

49. Towards and in an endeavor to assist the Honourable on the Question of Quantum of costs, the Applicant herein has filed and lodged with the court a valuation report pertaining to and concerning the Monetary Value suit property.

50. From the valuation report, which has been availed before the Honourable court; it is indicated that the suit property has a value of Kshs 1, 450, 000, 000/= only. For good measure, it is imperative that the suit property is indeed valuable and perhaps forms the basis of why same is being disputed before the Honourable court.

51. Nevertheless, despite having been served with the affidavit together with the valuation report, the Respondents herein and in particular; the 1st Respondent has neither disputed nor controverted the value alluded to at the foot of the valuation report filed with the court.

52. In the absence of any contrary valuation report, the Honourable court is at liberty to assume that indeed the valuation report beforehand captures and reflects the correct value attendant to the suit property.

53. Having come to the conclusion that the valuation report beforehand has not been controverted and challenged in any manner whatsoever, it would therefore be appropriate to adopt the value at the foot thereof and use same as the requisite benchmark/yardstick for computation and ascertainment of the Instructions fees that may be due and payable to the Defendant, if ultimately the Plaintiff's suit is dismissed.

54. Further and in addition, the *Advocate Remuneration Order 2014*, provides a scheme for ascertainment of Party and Party costs. In this regard, such costs are reckoned and ascertained on the basis of the Monetary value appearing on the face of Pleadings, Settlement and/or Judgment, whichever is appropriate.

55. In this respect, it is instructive to adopt and reiterate the ratio decidendi that was elaborated upon by the Court of Appeal in the case of *Peter Muthoka & another v Ochieng & 3 others* (2019) eKLR, where the court succinctly observed and held as hereunder;

> "It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.
>
> Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.

> It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive."

56. Having ascertained that the value of the suit property is worth Kshs 1, 450, 000, 000/= only, or thereabouts; and taking into account the provisions of The *Advocate Remuneration Order*, I come to the conclusion that the sum of Kshs 20, 000, 000/= only, is a reasonable measure of the instruction fees that may be due and payable to the Defendant, if at all, the Plaintiff's suit is dismissed whilst the counterclaim is upheld.

57. Premised and based on the foregoing, I am obliged and obligated to find and hold that the Plaintiffs/Respondents herein, either Jointly and/or severally, shall be called upon to deposit the sum of Kshs 20, 000, 000/= Only, in an Escrow Account in the names of the advocates for the respective Parties, within a set timeline.

Final Disposition:

58. Arising from the discourse, (which has been ventilated in the preceding paragraphs), there is no gainsaying that the Applicant herein has duly established and demonstrated that the case beforehand merits an order for provision for security for costs by the Plaintiffs/Respondents.

59. Consequently and in the premises, the Application dated the 15th November 2022; be and is allowed on the following terms;

    i. The Plaintiffs/Respondents be and are hereby ordered and/or directed to deposit the sum of Kshs 20, 000, 000/= only as security for costs that may accrue and/or arise in respect of the instant matter.

    ii. The security for costs in the sum of Kshs 20, 000, 000/= only shall be deposited in an Escrow accounts in the Joint name of the Advocates for the respective Parties and same shall be so held pending the hearing and determination of the instant suit; or further directions of the Honourable court.

    iii. For good measure, the security for costs shall be deposited in the Escrow account with a Reputable Financial Institution/Banking Institution, agreed upon by the advocates for the Parties and the deposit to be made and/or undertaken within sixty (60) days from the date hereof.

    iv. In default to comply with the terms of the order herein, the Plaintiffs' suit shall automatically stand Dismissed.

    v. Costs of the Application be and are hereby awarded to the Defendant/Applicant.

60. It is ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3 RDDAY OF JULY 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson Court Assistant.

Ms. Gathoni h/b for Taib Ali Taib SC for the Defendant/Applicant

Ms. Waweru h/b for Mr. Katwa Kigen for the 1st Plaintiff/Respondent

N/A for the 2nd Plaintiff/Respondent