



REPUBLIC OF KENYA



KENYA LAW
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**Wambua v Ngilai (Environmental and Land Originating Summons
E002 of 2023) [2023] KEELC 21487 (KLR) (14 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21487 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023
CA OCHIENG, J
NOVEMBER 14, 2023**

BETWEEN

ANTONY MWAU WAMBUA PLAINTIFF

AND

WYCLIFF MUSYOKA NGILAI DEFENDANT

RULING

1. What is before Court for determination is the Defendant's Notice of Motion Application dated the 1st March, 2023 where he seeks the following Orders:-
 1. That the Plaintiff (Antony Mwau Wambua) be directed to deposit into court the sum of Kshs. 300,000 as security for costs to the Defendant (Wycliff Musyoka Ngilai) within thirty (30) days.
 2. That in the alternative the amount of security for costs to the Defendant and the time for payment by the Plaintiff be determined by this Honourable Court.
 3. That the costs of this Application be awarded to the Defendant.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Wycliff Musyoka Ngilai where he deposes that the Plaintiff is not personally known to him. He explains that the Plaintiff was the previous owner of land parcel number Wamunyu/ Kilembwa/84 hereinafter referred to 'suit land' which was registered in his name on 21st March, 1974. He states that the Plaintiff used the suit land to secure a loan of Kshs. 350,000 advanced by Kenya Commercial Bank vide a Charge dated the 16th March, 1989. He states that the Plaintiff defaulted in the repayment of the said loan culminating in the suit land being sold by public auction on 19th October, 2005. Further, that he participated in the auction and was declared the highest bidder after purchasing the suit land for Kshs. 210,000. He avers that subsequent to the Sale, he was registered as owner of the suit land on 12th September, 2007. He avers that he has no knowledge of the Plaintiff's whereabouts or his place of residence/home. He is further not aware of the Plaintiff's financial ability for payment of costs of



this suit in the event the said costs are awarded to him. He reiterates that the Plaintiff who is acting in person has failed to disclose his physical address. Further, that the suit land can fetch Kshs. 5,000,000 in the open market today.

3. The Plaintiff Antony Mwau Wambua opposed the instant Application by filing a Replying Affidavit where he deposes that it is made in bad faith and is intended to diminish or stifle him from enjoying his right to access justice. He contends that the Applicant lacks a credible Defence to his claim and is engaging in side shows. Further, that he is a Kenyan not a foreigner. He avers that the Applicant has made a general statement that he pays security for costs without any proof thereof or failed to meet the required threshold. He argues that the allegation that he is not known to the Applicant is not a legal requirement to deposit costs. He insists he is a person of means with various assets. He reiterates that the Applicant has not demonstrated his inability to pay costs.
4. The Application was canvassed by way of written submissions although it is only the Defendant that filed his.

Analysis and Determination

5. I have considered the instant Notice of Motion Application including the respective Affidavits as well as the Defendant's submissions and the only issue for determination is whether the Plaintiff should be directed to deposit into court the sum of Kshs. 300,000 as security for costs to the Defendant within thirty (30) days from the date hereof.
6. The Defendant in his submissions reiterated his averments as per the Supporting Affidavit and insisted that he will have a great challenge in recovering costs from the Plaintiff in the event the Plaintiff's suit does not succeed. He argues that he does not know the Plaintiff nor his source of income. To buttress his averments, he relied on the following decisions: *Mutethya Ali v Gregory Mathew Kyalo* (2022) eKLR and *Kihiumwiri Farmers Company Limited v Breeze Investments Company Ltd & 3 Others* (2019) eKLR.
7. The Defendant has sought security for costs from the Plaintiff amounting to Kshs. 300,000 claiming he does not know his physical address nor his source of income.
8. On 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.”
9. On providing security for costs, the Court of Appeal in the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR, held that:-

“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.”
10. While in *Thomas Opiyo & 123 others v Teleposta Pension Scheme Registered Trustees* [2017] eKLR, it was held that:-

“In my view the determinant factor for consideration in an application for security for costs is whether the defendants recovery of its costs, if it is successful in litigation would be difficult and costly. I am not satisfied that the defendant has laid a proper basis for this relief. There



is no evidence that the defendant's costs in ELC No. 1348 of 2013 have been taxed and the plaintiffs called upon to settle the same and they have been unable to do so. The defendant has not demonstrated that it would be difficult and costly for them to recover their costs from the plaintiffs if it is successful in its defence.”

11. In this instance, the Applicant has alleged the Respondent will not be able to pay costs as he does not know his physical address nor source of income. The Respondent insisted that he is a man of means and is able to pay costs. I note the dispute herein revolves around claim for land through adverse possession and currently the Respondent is being represented by an Advocate. Except for the allegations of not knowing the Respondent's residence and his source of income, the Applicant has not demonstrated that the Respondent would be unable to pay for costs of the suit in the event he is not successful.
12. Based on the facts as presented while associating myself with the decisions cited, I find that the Applicant's averments in seeking security of costs are mere allegations with no proof.
13. In the circumstances, I find the instant Notice of Motion Application dated the 1st March, 2023 unmerited and will dismiss it.
14. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 14TH DAY OF NOVEMBER, 2023

CHRISTINE OCHIENG

JUDGE

