



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KITUI

ELC APPEAL NO. 32 OF 2021

(FORMERLY ELC CIVIL APPEAL NO. 5 OF 2021 AT MACHAKOS)

MUTETHYA ALLI.....APPELLANT

VERSUS

GREGORY MATHEW KYALO.....RESPONDENT

RULING

1. The application before the court is a Notice of Motion dated 3rd May 2021 filed by the Respondent in the appeal herein. The same is brought under Order 26 Rule 1, 5 and 6 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act and it seeks the following orders;

1. *THAT the Appellant be ordered to deposit security for costs within 7 days;*

2. *THAT security for costs be assessed at Kshs.10 Million since the approximate value of the works being undertaken on land parcel No. Nzambani/Kyanika/2322 is Kshs.150 Million.*

3. *THAT the said sum be deposited into a joint interest earning account to be opened by the Advocates hereto.*

4. *THAT the appeal be struck out with costs in default of the provision for security within the prescribed period.*

2. The Applicant relies on the supporting affidavit sworn on 3rd May 2021 and the submissions filed in court and he states that he is the proprietor of Land Parcel No. Nzambani/Kyanika/2322. That while in the process of establishing a Petrol Station business the boundary dispute between him and the Respondent arose. He claims that whereas the Respondent has every right to seek legal redress before the Court the Applicant believes that the only motivation for the Respondent in seeking orders to stay his construction while it is midway is malice. That the said project is likely to suffer loss and be wasted away leading to great financial loss.

3. The Applicant claims that apart from the adjacent parcels of land the Respondent does not have any other known assets and she is unlikely to raise and pay his expenses and accruing losses should her appeal fail.

4. The Appellant who is the Respondent in the current application filed a replying affidavit and submissions and stated that the application herein has neither legal nor moral basis for making this application as the Applicant appears to be distorting the facts of the case to the court and already taking a diversionary tactic to defeat justice. The Respondent confirms that there is no dispute that the Applicants development works are ongoing on land parcel Nzambani/Kyanika/2322 which he owns.

5. The Respondent confirms that the dispute with the Applicant is in relation to the boundary between land parcel number Nzambani/Kyanika/2322 owned by the Applicant and land title numbers Nzambani/Kyanika/3204 and 2314 which belong to the her and which she claims the Respondent has destroyed in order to create more space for his project.

6. The Respondent further claims that she has established that the two reports done by one Francis Kithyululu Mwendwa on behalf of the Land Registrar, Kitui, and used in the trial court were actually done by an unqualified person without the authority of the District Land Registrar and the said reports were thus illegal reports. That the orders given by the court are not for staying the Applicants project, but for preserving the disputed titles until the determination of the appeal.

Determination

7. 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”

The power to order security for costs is discretionary as can be seen from the use of the word “may” above. In the case of ***Kibiwott & 4 others v The Registered Trustees of Monastery of Victory Nakuru, HCCC No 146 of 2004*** the court observed that for a party to succeed in an application for security of costs he has to prove that the opposing party will not be able to pay the costs to be awarded in the event of the suit filed by such a party being dismissed. It is not enough to allege that a Respondent will be unable to pay costs in the event that she is unsuccessful. The same must be proven. Further, in ***Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others, CA No. 38 of 2013 [2014] eKLR***, the Supreme Court emphasized that:

“In an application for further 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. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable.”

8. In the present case the Applicant has only stated that the Respondent will not be able to pay the costs of the appeal if she is unsuccessful in the appeal. He has further stated that apart from the suit parcels of land the Respondent does not have any other known income. In my view the assertion by the applicant does not amount to proof of inability by the Respondent to pay costs in the event that she is unsuccessful. The Applicant has not shown the value of the land owned by the Respondent that would not be enough to cover any costs that may be found due.

9. Further, there are other factors that the court considers in exercising discretion such as **whether the Respondents claim is bona fide and not a sham and whether the Respondent has reasonably good prospects of success. In the Courts view there is nothing in the Memorandum of Appeal or in any of the documents filed by the parties herein that would suggest that the appeal herein is a sham, that it lacks bona fides or that it has no prospects of success. This view is supported by the court in Guff Engineering (East Africa) Ltd V Amrik Singh Kalgi**, at page 281 quoting the dictum of Lord Denning MR in *Sir Lindsay Parkinson & Co. Ltd (1973) 2WLR 632* and at page 284 quoting Maughan L J in *Gill All Weather Bodies Ltd Vs All Weather Motor Bodies Ltd*.

“...if there is reason to believe that the company cannot pay the costs, then, security may be ordered, but not must be ordered... Some of the matter which the court might take into account, such as whether the company’s claim is bona fide and not a sham and whether the company has reasonably good prospects of success. Again, it will consider whether there is an admission by the Defendant on the pleadings or elsewhere that money is due.

...the court might also consider whether the application for security was being used oppressively – so as to stifle a genuine claim. It would also consider whether the company’s wand of means has been brought about by any conduct by the Defendants, such as delay in payment or delay in doing their part of the work.

10. Indeed, the Applicants assertion that the Respondent has failed and/or refused to accept the findings and report of the Surveyor presented before the trial court is rather strange considering that he is the one who filed the suit in the first place against the Appellant and on her part she filed a defence and counterclaim. The Respondent herein is exercising her right of appeal occasioned by a suit filed by the Applicant and such a right ought not to be stifled.

11. Further, the court is required to consider if the application for security for costs is being used oppressively. The Applicant in seeking security of costs in the sum of Kshs.10 Million for the reason that he has been prevented from constructing a petrol station valued at Kshs.150 Million. My finding is that the subject matter of this appeal is not the proposed development on the Applicants land. My understanding is that the subject of dispute is a small portion of land either of the parties to the suit herein claim the other party has encroached on. I do find that the quantum of costs proposed to be given as security is unrealistic and oppressive on the Respondent.

12. The rationale for security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except upon terms and conditions that offer protection to the other party. This position was taken and held in the case of **Noormohamed Abdulla -vs-Ranchhodbhal J. Patel & Another (1962) E.A. 448**,

13. It is imperative in consideration of an application for security of costs, for the court to balance the competing rights of the parties, that is the right to access to justice and the right to security for costs. **Article 24 (1) (d) of the Constitution**, provides: -

“24 (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-.....

d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;”

14. It has also been held that an application for security for costs is an exception to the rule. In the persuasive authority of **Farrell v. Bank of Ireland {2012} IESC 42, Clarke J.** Explained this position and stated: -

“... the jurisprudence in relation to all of the areas where security for costs is considered ... starts from a default position that, in the absence of some significant countervailing factor, the balance of justice will require that no security be given. The reasoning

behind that view is that, if it were otherwise, all impecunious parties might, in substance, be shut out from bringing cases or pursuing appeals. Such a balance would be untenable and disproportionate. It is for that reason that there must be some additional factor at play before an order for security for costs can be made.”

15. The court considers an order for provision of security for costs in the circumstances of this case would not be fair or equitable, that it has not been shown that the Respondents financial status is such that she may not be able to pay costs of any of the proceedings herein in the event that she is unsuccessful. I further find that requirement for security for costs maybe oppressive and effectively preclude the Appellant from pursuing the appeal and become a barrier to access to justice.

I therefore find that the application dated 3rd May 2021 lacks merit and the same is dismissed with costs to the Appellant/Respondent.

Delivered, Dated and Signed at Kitui This 9thDay of March, 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court and online in the presence of-

C. Nzioka.....Court Assistant

Musyoki Advocate.....for the Applicant

Kariuki Advocate.....for the Respondent

Mutethya Ali Appellant present