



Kimara v Ananas Holdings Limited & 4 others; Survey & 3 others (Interested Parties) (Environment and Land Case Civil Suit 37 of 2020) [2022] KEELC 3776 (KLR) (5 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3776 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND CASE CIVIL SUIT 37 OF 2020**

**JG KEMEL, J
MAY 5, 2022**

BETWEEN

KARIRA KIMARA PLAINTIFF

AND

ANANAS HOLDINGS LIMITED 1ST DEFENDANT

EXECUTIVE COMMITTEE MEMBER FOR LANDS 2ND DEFENDANT

**DIRECTOR OF PHYSICAL PLANNING COUNTY GOVERNMENT OF
KIAMBU 3RD DEFENDANT**

JAMES MAINA 4TH DEFENDANT

NICK WAWERU - 5TH DEFENDANT

AND

DIRECTOR OF SURVEY INTERESTED PARTY

**CABINE SECRETARY – LANDS & PHYSICAL PLANNING ... INTERESTED
PARTY**

NATIONAL LAND COMMISSION INTERESTED PARTY

DELMONTE (K) LIMITED INTERESTED PARTY

RULING

1. The Plaintiffs/Applicants filed the Notice of Motion Application dated June 9, 2020 for orders that;
 - a. Spent.
 - b. Spent.



- c. Spent.
 - d. Spent.
 - e. This Honorable Court be pleased to issue orders restraining the 1st Respondent by itself, its officers, servants, agents or anyone acting on its behalf from advertising, sub-dividing, selling, transferring or in any other way dealing with property known as LR Nos 13169 now called Block 14/102 pending the hearing and determination of this suit.
 - f. This Honorable Court be pleased to issue orders compelling the 1st Respondent to declare any proceeds received from any sales of the property known as LR Nos 13169 now called Block 14/102 or any portion thereof pending the hearing and determination of this suit.
 - g. This Honorable Court be pleased to issue orders restraining the 1st Respondent from utilizing and/or expending any funds/proceeds from sale of the property known as LR Nos 13169 now called Block 14/102 pending hearing and determination of this suit.
 - h. This Honorable Court be pleased to issue orders that any proceeds from the sale of the above properties be deposited in a joint interest earning account pending hearing and determination of this suit.
 - i. Costs be provided for.
2. The application is based on the grounds on the face of it and the Supporting Affidavit of Karira Kimara as the Chairman of the 1st Plaintiff. He further averred that he was duly authorized to swear that Affidavit on behalf of the 1st Applicant.
 3. Before delving into merits of the Application, the Respondents and 4th Interested Party herein had filed notices of Preliminary Objection challenging the suit on various fronts to wit; the Court's jurisdiction to hear the matter; matter being *sub judice* and 1st Plaintiff's *locus standi* to sue. On October 1, 2020, this Honorable found the Preliminary Objections unmerited save for the 4th Interested Party's Preliminary Objection dated 17/6/2020 that was upheld. The Court held that the 1st Plaintiff lacked the requisite locus standi and struck it off the suit.
 4. Effectively the 1st Plaintiff was removed from the suit leaving the 2nd Plaintiff as the sole party in the suit.
 5. The application is supported by the affidavit of the 2nd Plaintiff sworn on June 7, 2020 avowed as the Chairman and on behalf of the 1st Plaintiff/Applicant. Given that the substantive Plaintiff/Applicant, has been removed from the suit, it follows that the application was also spent. The affidavit in support of the Application is furthering an action of a party that no longer exists in the suit.
 6. For the above reason the application dated June 9, 2020 having been brought by a party that was struck out of the suit is therefore dismissed.
- The 1st Defendants' Notice of Motion dated June 22, 2020
7. The second application is dated June 22, 2020 filed by the 1st Defendant seeking Orders that;
 - a. The 1st and 2nd Plaintiffs be ordered to furnish security of Costs in the sum of Kshs 30,740,000/ =or any other sum this Court deems fit, within thirty (30) days from making such Order.
 - b. The security shall be either a cash deposit, for the same amount in Court, or a bank guarantee or insurance bond for the same amount made in favour of the 1st Defendant.



- c. The Court be pleased to order that unless the security for costs is deposited within the time set out in prayer one above or within such other time, as the Court may determine, the Plaintiff's suit be dismissed with costs.
 - d. Costs be provided for.
 - e. Any other Order that this Honorable Court deems fit.
8. The application is based on the grounds thereto and Supporting Affidavit of its director Ajaykumar S Patel of even date. The 1st Defendant contends that it is the registered proprietor of Title No. Thika Municipality Block 14/102 formerly L R No 1316 I R No 123341 (the suit land) having purchased it from the 4th Interested Party in 2009. That the costs of defending the Plaintiffs' Application and suit both dated June 9, 2020 is approximately Kshs 30,740,000/= and in the event the suit is dismissed, the 1st Defendant is apprehensive that it may not recover the said costs hence the Application.
 9. The Plaintiffs vigorously opposed the Application vide a Replying Affidavit sworn on October 29, 2020 by the 2nd Plaintiff, Karira Kimara as the Chairman of the 1st Plaintiff.
 10. He contended that the application lacks merit and is aimed at suppressing the suit. Relying on Order 26 rule 3 of the [CPR](#) the deponent stated that where the substantial issue is which of the two or more Defendants is liable or what proportion of liability two or more Defendants is liable, no order for security for costs may be made. That the 5 Defendants may be found liable in one way or another and therefore under the said order security of costs cannot be successfully invoked.
 11. Further he stated that Kandara Residence Association on whose behalf the suit is instituted is a well-established community membership association with a membership of 3500 residents of Kandara Constituency. That in any event the 1st Defendant has failed to prove that the association has no assets in the jurisdiction. That the association has a registered office in Kenya with known and identified officials including himself. And further that it has not been shown that the Plaintiff's conduct is such as to warrant provisions for security of costs.
 12. While reiterating the contents of the Plaintiff, he stated that the claim of the Plaintiff is bonafides, the same being agitated pursuant to Article 67 (e) of the [constitution](#) on historical land injustices and the resultant recommendations of the 3rd Interested Party as gazette in 2019.
 13. The 1st Defendant filed a rejoinder vide a supplementary affidavit sworn on November 10, 2020 by Ajaykumar Shanabhai Patel. In summary he stated that the Respondent has not established cogent evidence to show that he is the Chairman of the association; any party in the suit is at liberty to make an application for security for costs; the prayers sought in the plaint are against the 1st Defendant and hence the application for security for costs; the suit land is not public land; no evidence to show that the Plaintiff has any assets that can be applied to defray costs when needed; no evidence that the society is backed by a 3500 membership as alleged by the Plaintiff, nor have the 3500 members been identified and disclosed; the Plaintiff has not demonstrated any evidence that he can underwrite the costs of the proceedings.
 14. The 1st Defendant annexed an investigation report which discloses no assets under the Plaintiff.
 15. Although the record indicates that parties filed written submissions, I have sighted none on record. I shall however determine the application on its merits based on the pleadings placed on record by the parties.
 16. From the onset I must set the record straight that the 1st Plaintiff was removed from the suit. The 2nd Plaintiff has not found it necessary to amend the plaint to capture this development. It is trite that



Court orders are not made in vain. It will be pointless to issue orders against or for a party who is a stranger to a suit. See the case of *Sammy M Mawer, Commissioner of Insurance & Others vs Kiragu Holdings Limited*, Civil Suit No 67 of 2012 [2013] eKLR where the Court rendered that it is only after a party has been joined in a proceeding that it can purport to participate and seek relief in such a proceeding.

17. The application will therefore be considered as against the 2nd Plaintiff, currently the sole Plaintiff in this case. See the Ruling of this Court issued on October 1, 2020.
18. The requirement to lodge security for costs is determined by the Court on a case-by-case basis. The purpose of this order is to protect the Defendant from frivolous litigations by persons who are devoid of a serious or justiciable claim.
19. In determining an application of this nature, the Court will be called upon to take a balancing act that is that of the overarching objectives promoting the right to be heard as set out under Art 50 and 159 of the *Constitution* that Courts should aim to dispense substantive justice by allowing parties to access the Court and bring their disputes for determination by the Court
20. Articles 48 of the *Constitution* provides as thus;

“The state shall ensure access to justice for all persons and, if any fee is required it shall be reasonable and shall not impede access to justice”.
21. Likewise, Article 50 (1) provides that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”
22. An application for security for costs shall be made under Order 26 which states as follows;

“[Order 26, rule 1.] Security for costs. 1. 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. [Order 26, rule 2.] Application before 2. If an application for security for costs is made before a defence is filed, there shall be filed with the application an affidavit setting out defence the grounds of the defence together with a statement of the deponent’s belief in the truth of the facts alleged. [Order 26, rule 3.] Where two or more Defendants. 3. Where it appears to the Court that the substantial issue is which of two or more Defendants is liable or what proportion of liability two or more Defendants should bear no order for security for costs may be made. [Order 26, rule 4.] Claims by non-resident Plaintiff. 4. In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign Court, any order for security for costs shall be in the discretion of the Court.”
23. In determining this application, the Court will bear the import and the intent of the above provisions of the *Constitution* and the law.
24. Courts have set out guiding principles that must be taken into account in determining such an application. I shall examine a few.
25. It is trite that the Court has unfettered judicial discretion to order or refuse security of costs. Like all discretionary remedies, the same must be exercised in a judicial manner and guard against the whimsical



or senseless application of discretion. At the very least it should not be exercised with the outcome that a party is driven out of the seat of justice. I would draw a parallel analogy from the case of *Shampole Group Ranch & Others*, Civil Appeal No 73 of 2004(2007) 2 EA 353, where the Court held that:-

“The power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution and this comes from the realization that the Court must not drive away any litigant however his case may be from the seat of justice’

26. Reliance is placed in the case of *Sir Lindsay Parkinson & Company Limited Vs Triplan Ltd*, [1973] 2 WRR at p 684 where Lord Denning M R indicated the parameters that should guide the Court in determining whether to order security for costs as follows;-
- a. whether the claimant’s claim was *bona fide* and not a sham;
 - b. whether the claimant had a reasonably good prospect of success;
 - c. whether there was admission by the Defendant on the pleadings or elsewhere that money was due;
 - d. whether there was a substantial payment into Court or an "open offer" of a substantial amount;
 - e. whether the Applicant for security was being used oppressively, for example so as to stifle a genuine claim;
 - f. whether the claimant’s want of means had been brought about by the conduct of the Defendant’s such as delay in payment or in doing their part of the work;
 - g. Whether the application for security was made at a late stage in the proceedings.
27. Further in the case of *Keary Developments v Tarmac Construction*, [1995] 3 All ER 534 the Court set out the principles applicable in guiding the Court in exercising discretion on whether to order a Plaintiff which was a limited liability company, to provide security for costs to a Defendant in a suit. The said principles are:-
- a. The Court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.
 - b. The possibility or probability that the Plaintiff Company will be deterred from pursuing its claim by an order for security is not without a more sufficient reason for not ordering security. It is implicit that a company may have difficulty meeting an order.
 - c. The Court must balance the injustice to the Plaintiff prevented from pursuing a proper claim against the injustice to the Defendant if no security is ordered and at the trial the Plaintiff’s claim fails and the Defendant finds himself unable to recover his costs. The power must neither be used for oppression by stifling a claim particularly when the failure to meet that claim might in itself have been a material cause of the Plaintiff’s impecuniosity, nor as a weapon for the impecunious company to put pressure on a more prosperous company.
 - d. The Court will look to the prospects of success, but not go into the merits in detail.
 - e. In setting the amount it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount.



- f. Before refusing security the Court must be satisfied that, in all the circumstances, the claim would be stifled. This might be inferred without direct evidence, but the Court should also allow that external.
- g. The lateness of the application can properly be taken into account.
28. The reasons advanced by the 1st Defendant in seeking the orders is that the Plaintiff has no assets that can offset the costs in the event that he loses the case. The 1st Defendant has presented an investigation report dated the 6/11/2020 which indicates that a man namely Simon Karira Kimara owns no assets in this country. The Plaintiff herein is called Karira Kimara and it has not been explained whether the said names refer to the Plaintiff. It is trite that the impecuniosity of a Plaintiff is not the only factor that the Court should take into consideration. If indeed the investigation report was to be relied on, the more reason the Court would be slow in allowing the application on that account only.
29. It is the case of the Plaintiff that the NLC, the 3rd Interested Party, recommended that a resurvey should be undertaken by the Director of Survey to establish if there is any variance between land leased by Delmonte (K) Limited and the land the latter occupies. That any residue was to be given/surrendered to the 1st Plaintiff for resettlement of its members and the county Government for public purpose in the ratio of 70:30 respectively.
30. That the suit land is part of the lands that are contemplated to be affected by the above recommendation. With respect to the success or otherwise of the Plaintiff's claim, the Court is careful not to be drawn into the merits or otherwise of the case lest it prejudices the Court that will be seized of the matter.
31. Having said that, the background of the claim in this case stems from a constitutional cause grounded in Art 67 of the Constitution on historical land injustices and the recommendation of the 3rd Interested Party published in the Kenya Gazette in 2019 that recommended that if there be any excess land after resurvey of the 4th Interested Party's land then the same be shared between the association (comprising residents of Kandara Constituency) and the County Government of Kiambu in disclosed portions. From this background, it is clear that the case has a public interest underpinning.
32. It is also true the 1st Defendant's plea for security for costs is not an idle application given that like any other Defendant it is faced with costs in the likelihood that its defence succeeds against the Plaintiff.
33. Having looked at the background of the case and balanced the rights of the parties, it is also important to consider whether awarding security for costs would unjustly stifle a legitimate and material claim of a party. The guidelines above call upon the Court to guard against an application being used, consciously or otherwise, to unfairly or oppressively to unjustly prevent a party from pursuing a genuine and legitimate claim. The fact that requiring security will frustrate a party's ability to pursue its claim because of its financial situation on the other hand may not of itself lead to a refusal to grant security.
34. In my view I would take the circumstances of this case as providing such circumstances that call upon the Court to exercise discretion so as to allow the parties to ventilate their case without putting hurdles or stifling it.
35. In the upshot the application is dismissed. I make no orders as to costs.
36. Final orders and disposal;-
- a. The Plaintiff's application dated June 9, 2020 is hereby dismissed.
- b. The 1st Defendant's Notice of Motion dated June 22, 2020 is hereby dismissed.



c. Each party to meet their costs.

37. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 5TH DAY OF MAY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff 1 & 2 – Ms Amutabi holding brief for Okatch

Defendant 1 – Kamwami

Defendant 2, 3, 4 & 5 – Absent

Interested Party 1, 2 & 3 – absent

Defendant 4 – Thuo

Proposed Interested Parties 1 – 4 – absent

Court Assistant - Phyllis

