



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. E119 OF 2021 (O.S)

OMAR HASSAN..... PLAINTIFF/RESPONDENT

VERSUS

WATSON MOGERE.....1ST DEFENDANT/APPLICANT

BENJAMIN OMANWA.....2ND DEFENDANT/APPLICANT

FRANCIS KIBORE3RD DEFENDANT/APPLICANT

RULING

1. This ruling is in respect of the Defendant's Notice of Motion application dated 29th April 2021. The application seeks the following orders:

- i) *THAT the plaintiff/Respondent do provide security for the whole of the Defendants' costs in the sum of Ksh One Million Five Hundred Thousand (Ksh 1,500,000)*
- ii) *THAT the Plaintiff/Respondent do deposit the aforesaid amount jointly in the name of his Advocates M/S Ochieng & Nyamai Advocates M/S Charles Gomba & Company Advocates within thirty (30) days of the above order.*
- iii) *THAT in default of the Plaintiff furnishing security the suit as against the Defendants be dismissed with costs.*
- iv) *THAT costs of this Application be provided for.*

2. The application is supported by the following grounds: -

- a) *THAT the Plaintiff's suit filed herein is scandalous, frivolous and vexatious.*
- b) *THAT the Plaintiff has no known assets which could satisfy an order for costs if such order is ultimately made in favour of the Defendants.*
- c) *THAT in the event the Defendants/Applicants are successful, they will experience extreme difficulties recovering the costs of the proceedings herein.*
- d) *THAT it is in the interest of justice that the Orders sought herein be granted.*

3. The Application is further supported by an affidavit sworn by **Benjamin Omanwa Moku** the 2nd Defendant herein on the 29th April 2021. In his affidavit, the 2nd Defendant reiterates the grounds in support of the Application and further states that the Defendants are not aware of any assets permanent or otherwise in possession of the Plaintiff which would satisfy an order for costs if such an order is ultimately made in their favour.

4. The Application is opposed vide a Replying Affidavit sworn on 16th September 2021 by **Omar Hassan** the Plaintiff herein. The Plaintiff contends that the Application is brought in bad faith as it merely seeks to pre-empt the outcome of the suit. The Plaintiff further contends that the Defendants have not laid a basis for requesting the sum of Ksh 1,500,000/- as security of costs and they have also not demonstrated and verified how he is unable to meet the costs of the suit should he be condemned to pay for the same. The Plaintiff further states that he is a Kenyan citizen and the Application has been made to merely deny him his right to access to justice. He further states that the issue for costs is subject to assessment under the provisions of the Advocates Remuneration Order and as such the prayers sought cannot be granted.

5. The Application was canvassed through written submissions. The Applicant's submissions were filed on 7th October 2021 while the Respondent's submissions were filed on 14th October 2021.

6. The gist of the Applicants' argument as derived from their submission is that they have reasonable apprehension that their legal costs will not be paid by the Plaintiff if they are successful because the Plaintiff has no known assets or rather they would experience tremendous challenges in recovering such costs.

7. The Applicants also referred to **Order 26 rule 1 of the Civil Procedure Rules** and relied on the following authorities in support of their case, **Shah & others vs Manurama Limited & Others [2003] EA 294 (HCU)**, **Ahmed Kulimye bin vs Kenya Revenue Authority & Others [2012] eKLR**, **Kibiwott & 4 Others vs Registered Trustees of Monastery our Lady of Victory [2004] eKLR** and **Jayesh Hasmukh Shah vs Narin Haira & Another [2015] eKLR**.

8. The Respondent equally reiterated the contents of his affidavit in his submission and submitted that the application lacked merit and should be dismissed. It was the Respondent's submission that the orders sought could not be granted at this interlocutory stage since its effect will be to curtail his right to access justice and have his case heard in Court.

9. The Plaintiff further submitted that the law on such applications is well settled and that the grant and refusal of an order for security of costs is a discretionary one under **Order 26 rule 1** and further that the same is applicable on a case to case basis.

10. Additionally, the Plaintiff further submitted that he is a Kenyan citizen, residing in the country and that the allegations made by the Defendants that he will be unable to meet the costs of the suit in case they are awarded against him were totally unfounded.

11. The Plaintiff also requested the Court to be guided by the principles established in the following authorities in support of his case; **Noornamohammed Abdullah v Rachorbhai J. Patel (1962) EA 447**, **Jayesh Hasmukh Shah vs Narin Haira & Another [2015] eKLR**, **Aggrey Shivona v Standard Group Plc [2020] eKLR** and **Kenya Education Trust Katherine S.M. Whitton [2011] eKLR**.

12. I have considered the Application, the response and submissions by parties. I have also considered the authorities relied on by parties. The issue which in my opinion arise for determination is whether or not the Defendants have made out a case to warrant the court to direct the Plaintiff to provide security for the Defendants' costs pending the hearing and disposal of the suit.

13. **Order 26 Rule 1, 5 and 6 of the Civil Procedure Rules** stipulate as follows:

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.

Effect of failure to give security.

5. (1) If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit.

(2) If a suit is dismissed under subrule (1) and the plaintiff proves that he was prevented by sufficient cause from giving the required security for costs the court may set aside the order dismissing the suit and extend the time for giving the required security.

6. (1) Where security by payment has been ordered, the party ordered to pay may make payment to a bank or a reputable financial institution in the joint names of himself and the defendant or in the names of their respective advocates when advocates are acting.

14. The purpose of an order for security for costs is to protect the Defendant from situations in which he is dragged to Court and made to lose even the costs of litigation. It is also meant to prevent frivolous and useless litigation by parties. Courts are however required to ensure that parties with just claims are not prevented from accessing the seat of justice for their claims to be determined.

15. It is trite law that security for costs can be ordered by a trial Court in its discretionary power. In the case of **Marco Tools & Explosives Ltd v Mamujee Brothers Ltd, [1988] KLR 730** it was held:

"...the Court has unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance is that the final result must be reasonable and modest".

16. In an application for security of costs the Applicant must demonstrate that the Plaintiff will not be able to satisfy an order for costs made at the end of trial should he lose the case. In **Europa Holdings Limited v Circle Industries (UK) BCLC 320 CA**, it was held that it must be proved that the Plaintiff would not be able to pay the costs at the end of the case. Mere inability is however not enough, the Court must satisfy itself that it will be just to make the order for costs on the facts and circumstances of the case. Other factors that the Court would consider are the residence of the Plaintiff as well as the conduct of the parties.

17. In **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.

18. 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.”

19. In the present case, the Defendants alleged that the Plaintiff does not have any known property in Kenya, and that in the event that they are successful in their case, they will experience difficulties in recovering costs that may be awarded in the suit.

20. The Court must exercise this power judicially and particularly to ensure that it meets the end of justice as opposed to assisting a party act in the abuse of the Court process. In the case of **Peter Munya (supra)**, the Apex 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 merely allege without sufficient evidence 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.

21. When faced with such an application, the court should also balance the competing interest between the parties to ensure that the order for security for costs does not impede on the right to access to justice as enshrined under the Constitution. **Article 48** guarantees the right of access to justice while **Article 159(1)** requires the Court in exercising judicial authority to be guided with the principle that justice shall be done to all irrespective of status. The Respondent argued that the current application was tantamount to seeking this Court to deny him access to justice.

22. In considering whether or not to grant the application and in line with the principles set out in the authorities cited herein, I have perused the supporting affidavit sworn by the Plaintiff on 4th January 2021 when he filed the suit herein and I note that he has deposed that he is a Kenya citizen, resident of Eastleigh Estate in Nairobi Court and residing at Plot L.R No. 36/1/791, a place where according to him he has resided since the year 2005.

23. On this aspect, it is thus clear that the place of abode of the Plaintiff is well known and should the Defendants have had any doubts as to his financial soundness or otherwise nothing barred them from furnishing the court with such information.

24. I note that the in the instant case, the Defendants did not furnish this court with any cogent evidence to support their claim that the Plaintiff is financially unstable so as to justify their averments that they will experience difficulties in recovering costs from the Plaintiff should they be successful in the suit. In other words, no material was placed before this court to show that the Plaintiff is in dire straits such that he will be unable to meet their financial obligations for costs should he lose the case.

25. In view of the foregoing and further exercising my judicial discretion, I am unable to uphold the Defendants’ argument in support of their application. Consequently, the Application is declined and dismissed with orders that costs shall be in the cause.

26. I also direct the parties to take practical steps to progress the case to trial without further delay.

27. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF OCTOBER 2021

E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Nyamai for the Plaintiff/Respondent.

Ms. Owour for the Defendants/Applicants.

Court Assistant; Caroline.