



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

CIVIL APPEAL NO. E011 OF 2021

YUSTER NYAMWITHA KIMANI (suing as personal

Representative of SAMUEL KIMANI NG'ANG'A (Deseased).....APPELLANT

-VERSUS-

JOHN KISEMBEI alias JOHN MBUGUA NDICHU.....RESPONDENT

(being an appeal from the Ruling and Order

of the Senior Principal Magistrate's at Ngong in ELC Case No.

130 of 2018 delivered by Honourable P. Achieng and dated 18th March, 2021)

YUSTER NYAMWITHA KIMANI (suing as personal representative of

SAMUEL KIMANI NG'ANG'A (deceased).....PLAINTIFF

-VERSUS-

JOHN KISEMBEI NDICHU alias JOHN MBUGUA NDICHU.....DEFENDANT

RULING

(1) This ruling is on the Appeal by Yuster Nyamwitha Kimani, the Appellant, against the ruling by the Senior Principal Magistrate Ngong delivered on 18th March, 2021.

(2) In the said Ruling, the learned Magistrate ordered the Appellant to deposit Kshs, 1,000,000/= as security for the Defendant's costs.

(3) Dissatisfied with the order, the Appellant filed a Memorandum of Appeal dated 12th April, 2021 raising six (6) grounds of Appeal namely;

(i) The Magistrate disregarded the inordinate delay of 15 years in bringing the application for security for costs

(ii) The Court erred in finding that the application had merit without proof of hardships that the Respondent would suffer if the main suit was decided in his favour.

(iii) The Court erred in shifting the burden of proof to the Appellant instead of where it lay, with the Respondent.

(iv) The Court erred in placing the burden of proof of assets on the Plaintiff instead of the estate that she represents

(v) The Court erred in failing to consider the Appellant's comprehensive submissions.

(vi) The Court erred in imposing a punitive order for deposit of Kshs. 1, 000,000/- without any cogent legal and factual basis.

(4) For the above reasons, the Appellant sought that her Appeal be allowed, the entire Ruling of 18th March, 2021 be set aside, the Application dated 18th November, 2020 to be dismissed with costs to the Appellant and costs of this Appeal be provided for.

(5) On 30th September, 2021, the Appellant's Counsel filed written submissions dated 10th August, 2021 which support the grounds of Appeal. Counsel for the Respondent filed his submissions on 18th October, 2021 supporting the decision of the learned trial Magistrate.

(6) I have carefully considered the entire Appeal including the memorandum, the record, the submissions by both sides and the case law in the submissions.

The following things are certain;

Firstly, the Appellant is unwilling to commit herself on costs. Yet she stands in the place of the Plaintiff. A party taking another to Court must be ready to pay costs in the event that the suit turns cold.

Secondly, the security the Appellant has been asked to deposit in Court is not for the benefit of the Respondent but an assurance that in case that the suit is not successful, the Respondent will be paid some minimum costs.

Thirdly, the best way to have responded to the Application for security for costs was to simply show that the Appellant had unencumbered immovable property within the jurisdiction of the Court.

Finally, the Appellant does not reside in Kenya and therefore execution against her would be extremely expensive and cumbersome, if not impossible.

(7) I make the following findings;

Firstly, I find no problem with the application being filed 15 years after the filing of the action. I also find no fault in allowing the application. The longer a case lasts, the higher the costs become.

Under **Order 26 Rule (1) Civil Procedure Rules**, there is no time limit set.

Secondly, the hardships that the Respondent would suffer are obvious. If the suit were dismissed and costs ordered, executing against a party resident outside our borders is not easy.

Thirdly, **Section 112 of the Evidence Act** provides as follows;

“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”.

Applying that provision to this case, it is the Appellant who knows what she and the estate of the deceased own. It is not the Respondent. It was therefore incumbent upon the Appellant to prove that she had property within the borders of Kenya.

Fourthly, the learned Magistrate did not have to respond to the submissions by the Appellant's Counsel point by point. All she needed to do was to identify the issues and hit the nail on the head without beating about the bush.

Finally, I find that the order of deposit of Ksh. 1, 000,000/= is not punitive. As I said earlier, this money is not meant for the Defendant. It is first an assurance that the Plaintiff believes in her case and is ready to compensate the Defendant for his costs of defending the case in the case the suit is dismissed.

(8) For the above stated reasons, I dismiss the Appellant's Appeal with costs to the Respondent.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 6TH DAY OF DECEMBER, 2021.

M.N. GICHERU

JUDGE