



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 666 OF 2015

DANIEL NJENGA NJUNGE.....PLAINTIFF

=VERSUS=

HOUSING FINANCE.....1ST DEFENDANT

EVANSON KAMAU WAITIKI.....2ND DEFENDANT

ANTONY NJOROGE JOHNSON.....3RD DEFENDANT

RULING

1. Before me for determination is the 2nd and 3rd defendants' notice of motion dated 3/11/2015 in which they seek orders relating to security of costs in the following terms:

- 1. That the plaintiff do provide security for costs for this suit in the sum of Kshs 300,000/- or such other sum as this Honourable Court may deem fit.***
- 2. That the security be deposited in an interest bearing account in the joint names of both advocates for 2nd and 3rd defendants and the advocates for the plaintiff within fourteen (14) days from the date of the order in (1) above.***
- 3. That the court do order a stay of proceedings until such costs owed to the 2nd & 3rd defendants have been paid.***
- 4. That in default of the security ordered being provided, the suit be dismissed with costs.***
- 5. That the costs of this application be borne by the plaintiff.***

2. The application was supported by two affidavits sworn by the 2nd and 3rd defendants respectively. The case of the applicants was that prior to initiation of this suit, the plaintiff initiated **Kikuyu SPMCC No 356 of 2007** against the defendants. The plaintiff subsequently withdrew the said suit and was ordered to pay costs to the 2nd and 3rd defendants amounting to Kshs 102,020. The plaintiff ignored the order of the Magistrate Court and proceeded to file the present suit without paying the decreed costs. The applicants contended that they had a justifiable apprehension that any costs awarded to them in the present suit would not be paid by the plaintiff. It was on account of the foregoing that the applicants sought above orders.

3. The plaintiff opposed the application through a replying affidavit sworn on 12/4/2017. He faulted the Magistrate Court for awarding the applicants costs. He contended that it was unjust for the Magistrate Court to order him to pay costs to "a party whose only success in the matter was his attempt to circumvent the process of justices". He further contended that the Magistrate Court failed to consider the circumstances of the case. He urged the court to set aside the Magistrate Court's order awarding costs to the applicants herein. Lastly, he urged the court to dismiss the application for security.

4. The application was orally canvassed in open court on 19/11/2019. Mr Masinde for the applicants submitted that there was justifiable apprehension that costs awarded in the present suit might not be paid by the plaintiff because the plaintiff had in the past engaged in litigation against the applicants and had failed to comply with the order requiring him to pay costs of the previous litigation. He added that the plaintiff had admitted that the said costs were indeed awarded to the applicants and he had failed to pay the costs.

5. Mr Onkangi, counsel for the plaintiff, submitted that under the Civil Procedure Rules, execution of a decree or an award of costs is to be done in the Court which granted the decree. He added that the applicant had not exhausted the redress avenue available to them. He contended that the applicants should execute the decree. He described the applicants as indolent persons who had failed to execute the decree. He added that it was the duty of the court to ensure access to justice by all. He urged the court to dismiss the application.

6. I have considered the application together with the rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudence. The single question to be answered in this application is whether the applicants have laid a proper basis for grant of an order requiring the plaintiff to provide security for costs in tandem with the requirements of Order 26 of the Civil Procedure Rules.

7. The jurisprudential criteria which guides this court's exercise of the discretionary jurisdiction to grant an order for security for costs was articulated by the Court of Appeal in the case of **Marco Tool & Explosives Ltd v Momujee Brothers Ltd (1988) KLR 730** in the following words:

“As the cases show, the court has unfettered though judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though guidance from Noormohamed's case is that the final result must be reasonable and modest”

8. It is not contested that the plaintiff litigated against the applicants in a previous suit and he was ordered to pay each of the applicants costs of the suit assessed at Kshs 51,010 to each applicant. The plaintiff has not put forth any plausible explanation why the costs have not been paid. He has instead chosen to condemn the Magistrate Court for exercising its discretion in the manner it did. He has similarly described the appellant as indolent yet it is him who was required to pay the costs without any coercion. Condemnation of the Magistrate Court in the present suit is completely misplaced. This is the wrong forum for challenging the decision of the Magistrate Court. If the plaintiff was aggrieved by the award of costs in the previous suit, he had the right of appeal. The jurisdiction which the plaintiff invites the court to exercise through an order setting aside the Magistrate Court's order awarding the applicants costs is not available to this court in the present suit.

9. The applicants have demonstrated, and it does similarly emerge from the plaintiff's replying affidavit and submissions, that the plaintiff has deliberately declined to comply with the order requiring him to pay costs to the applicants. He is unapologetic about that but expects the court to allow him to engage the applicants in another round of litigation without complying with the order requiring him to pay costs of the previous litigation. It is the view of this court that this is an abuse of the process of the court and total lack of respect for the court process. The court is therefore certified that the applicants have laid a proper basis for the orders sought in the notice of motion dated 3/11/2015.

10. Consequently, the notice of motion dated 3/11/2015 is disposed in the following terms:

a)The plaintiff shall deposit in court security for costs in the sum of Kshs 300,000 within sixty (60) days and in default, this suit should stand struck out with costs to the defendants.

b)Once the money is deposited in court, respective advocates of the plaintiff, the 2nd defendant and the 3rd defendant shall cause the money to be moved into a joint interest earning account.

c) The plaintiff shall bear costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF MARCH 2020

B M EBOSO

JUDGE

In the presence of:-

Mr Masinde holding brief for Mr Mungai for the 2nd and 3rd defendants

Mr Daniel Njenga Njunge – the plaintiff – present in person

June Nafula-Court clerk