



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ENVIRONMENT AND LAND CASE No. 5 OF 2019**

**JOHN RAGIRA MOGAKA.....PLAINTIFF**

**VERSUS**

**PURITY WAITHAKA.....DEFENDANT**

**RULING**

1. The plaintiff commenced proceedings herein through plaint filed on 31<sup>st</sup> January 2019. He describes himself in the plaint as having a power of attorney dated 4<sup>th</sup> July 2017, donated to him by Elijah Ragira. The said power of attorney is however not annexed to the plaint. Equally, I have not found it anywhere on the record despite my perusal.

2. The plaintiff averred in the plaint that through a sale agreement dated 27<sup>th</sup> March 1985, the defendant sold to Elijah Ragira some 100.7 acres of land being her share of a parcel of land known as Plot No. 197/Miti-Mingi/Nakuru for a consideration of KShs 360,000 which sum Elijah Ragira paid fully. That despite such payment, the defendant refused to transfer the property to Elijah Ragira leading him to file a suit against her at the High Court in Nairobi but which suit was later dismissed for want of prosecution because he relocated to the United States of America. The plaintiff therefore prays for specific performance of the sale agreement and in the alternative refund of the purchase price at the current value of the property.

3. The defendant reacted to the suit by filing a statement of defence in which she denied the plaintiff's claims and averred among others that the suit is statute barred by virtue of **Limitation of Actions Act** and that the plaintiff has no *locus standi* to institute the suit. Additionally, the defendant filed Chamber Summons dated 16<sup>th</sup> July 2019, which is the subject of this ruling. The application is brought inter alia under **Order 26 Rule 1** of the **Civil Procedure Rules** and seeks the following orders:

*1. That the plaintiff/respondent and/or the principal/donor does within twenty one (21) days give security for the defendant's costs of defending this suit in the sum of Kshs 2,000,000/= or such other sum as the court may deem sufficient.*

*2. That there be stay of any proceedings in this suit pending the provision of the security of costs.*

*3. That the costs of this application be in the cause.*

4. The application is supported by an affidavit sworn by the defendant. She deposed that it is evident from the pleadings filed by the plaintiff that Elijah Ragira who is the donor of the power of attorney resides in the United States of America and that he will therefore be unwilling or unable to pay her costs since he has no assets in Kenya.

5. The plaintiff opposed the application through a replying affidavit in which he deposed that Elijah Ragira, the donor of the power of attorney, resides in the United States of America. He added that Elijah Ragira is a Kenyan citizen who comes to Kenya often and who "has a vast empire of assets in Kenya including his ancestral home where he plans to be buried one day".

6. The application was canvassed through written submissions. For the applicant, it is argued while relying on the case of **Shah & 2 others v Shah & 2 others [1982] eKLR** that security is normally required from a plaintiff resident outside the jurisdiction and that the court has discretion to make such an order. It is pointed out that it is admitted in the replying affidavit that the donor of the power of attorney is not resident in Kenya. It is further argued that although the respondent alleges that he visits Kenya regularly and that he has assets in Kenya, no documentary evidence has been tendered to support those assertions. Citing the case of **Lonrho Motors E. A. Limited v Insurance Company of East Africa [2005] eKLR**, it is argued that the application should be allowed since the applicant has a strong defence of limitation which has high chances of success. Additionally, it is pointed out that the plaintiff had a similar case being **HCCC No. 3429 of 1998** which was dismissed for want of prosecution and that the present case ought to be stayed.

7. On the part of the respondent, it is argued that this suit is not statute barred since upon dismissal of the Nairobi case for want of prosecution the plaintiff had the option of applying for its reinstatement or filing a fresh case. It is further reiterated that although Elijah Ragira resides in the United States of America, he has a fixed place of abode in Kisii in Kenya and assets in Kenya. Finally, it is argued that the court has discretion under **Order 26 Rule 1** of the **Civil Procedure Rules** and that the present application is a mere technicality in view of the provisions of **Article 159** of the **constitution**. The respondent therefore urges the court to dismiss the application.

8. I have considered the application, the affidavits and the submissions. The application is brought inter alia under **Order 26 Rule 1** of the **Civil Procedure Rules** which provides as follows:

***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.***

9. Whether or not an order of security for costs is made is entire in the discretion of the court. Such discretion must of course be exercised judiciously. Indeed, **Order 26 Rule 4** emphasizes the discretionary nature of an order of security for costs by stating as follows:

***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.***

10. While considering the broad principles laid down under **Order 26 Rules 1** and **4**, I remind myself that the state has an obligation under **Article 48** of the **Constitution** to ensure access to justice for all persons, the right to a fair hearing under **Article 50** of the **Constitution** as well as the duty of the court under **Article 159** of the **Constitution** to exercise judicial authority in such a manner as to ensure that justice is done to all without delay and without undue regard to procedural technicalities. The Court of Appeal considered the principles applicable to an application such as the present one in the case of **Westmont Holdings SDN. BHD v Central Bank of Kenya [2017] eKLR** and stated thus:

***We have also drawn some further insights from another English case which has for several years now been regarded as modern and pragmatic guide in a matter for security for costs in the case of; Keary Developments V. Tarmac Construction, [1995] 3 All ER 534 . The guidelines enunciated therein were to guide a court while 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:-***

***1. The court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.***

***2. 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.***

***3. 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.***

***4. The court will look to the prospects of success, but not go into the merits in detail.***

***5. 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.***

***6. 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 resources might be available.***

***7. The lateness of the application can properly be taken into account.***

11. Applying these principles to the present case, I note that it is admitted that Elijah Ragira who is for all intents and purposes the plaintiff herein resides in the United States of America. Although it is claimed that he has a home in Kisii and assets in Kenya, nothing tangible has been offered to support those allegations. A litigant who is facing an application for security for costs must do more than just alleging that he has assets that will satisfy a decree for costs. He should place before the court sufficient material to enable the court to share that optimism with him.

12. I further note that it is not disputed that the cause of action herein has been the subject matter of litigation in another case which was dismissed for want of prosecution. The documents placed before the court by the plaintiff show that the case was **HCCC No. 3429 of 1988 (Nairobi)**. This case was filed after the dismissal. The plaintiff has argued that it had the option of filing a fresh case following the dismissal. I think there are significant issues to be addressed by the parties in due course as regards the consequences of the dismissal for want of prosecution on this case as well as on the issue of Limitation of Actions.

13. Having taken the foregoing into account, I have come to the conclusion that this is a fit and proper case in which to order security for costs. There is real risk that the defendant may be unable to recover such costs as may be finally awarded against the plaintiff at the conclusion of the case. In view of the discussion above, an order of security for costs will not stifle the plaintiff's claim but will in fact level the playing ground for all parties.

14. The defendant has urged that a sum of KShs 2,000,000 be deposited as security. In determining the amount to be deposited I take into account that the subject matter of the suit is 100.7 acres of land within the parcel of land known as Plot No. 197/Miti-Mingi/Nakuru. The consideration that was agreed between the parties as at 27<sup>th</sup> March 1985 was KShs 360,000. The value of the land must have substantially appreciated by now and indeed the plaintiff is in the alternative seeking a refund of the purchase price at the current value. Balancing the interests of the parties, I consider a sum of KShs 750,000 as appropriate in the circumstances.

15. In the result, I make the following orders:

**a) The plaintiff to deposit in court the sum of KShs 750,000 (Seven hundred fifty thousand) as security for the defendant's costs of defending this suit within twenty one (21) days from the date of delivery of this ruling.**

**b) In default, the defendant shall be at liberty to seek dismissal of the suit in terms of Order 26 Rule 5 of the Civil Procedure Rules.**

**c) Costs of this application shall be in the cause.**

16. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17<sup>th</sup> April, 2020).

**Dated, signed and delivered at Nakuru this 17<sup>th</sup> day of September 2020.**

**D. O. OHUNGO**

**JUDGE**