



IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 14 OF 2014

MICHAEL MUWAZI. 1ST DEFENDANT

DENIS KASULE SEKITTO. 2ND DEFENDANT

OSCAR KASULE KABUYE. 3RD DEFENDANT

VERSUS

FLORENCE KABUYE. 1ST DEFENDANT

ALOYSIOUS SEBUNYA. 2ND DEFENDANT

JOHN KALUNGI. 3RD DEFENDANT

CAROL KABUYE. 4TH DEFENDANT

LYNN KABUYE. 5TH DEFENDANT

RULING

The application before the court is the Notice of Motion dated 29th January, 2014 seeking in the main, a security for costs likely to arise in this case and assessed at a sum of Ksh.946,732/-.

To understand the basis of the application, the Applicants/Defendants stated that they were in the final process of burying the body of the deceased John Kabuye Katale. The latter an originally Ugandan citizen, came to Kenya in 1986. He settled here in Kenya, bought land, started business and married secondary wives. He sought and obtained the Kenya National Identification Card and a Kenya's Passport. He showed every intention of accepting Kenya as his new country of residence and appeared prepared to accept to live in Kenya until his death. When at one time one of his children died he showed no hesitation in burying him at Nairobi Langata Cemetery.

Then he himself met his death in Nairobi. His wife, the 1st Defendant and most of his children prepared him for burial at the said Langata Cemetery. It was when the burial was about to take place that the Plaintiffs' filed this suit seeking to stop it altogether to seek court orders to have the said deceased taken to and be buried in Uganda, his country of origin.

The Defendants who include most of the deceased's wives and children opposed the idea of transferring the body of the Late Kabuye to Uganda for burial. They argued that the deceased had chosen to live, die and be buried in the country Kenya in which he had adopted a new domicile of choice. They argued that

they had spent over one million Kenya shillings for the burial and the act of preventing it has and will cause further costs and expenses. Hence this application seeking security for costs for court and burial expenses to be deposited in court until the suit is decided. They further aver that the deceased had chosen his new domicile where also he would rightly and lawfully be buried and that the Plaintiff had no right to interfere with the deceased's wishes.

For the above reason the Defendants argued that the Plaintiffs chances of success are not high and that the Defendants should deposit the probable expenses arising from the suit as the Plaintiffs who are Ugandan and Germany citizens, are unlikely to have a probable order of costs enforced on them.

The Plaintiffs of course argue to the contrary, that they are as entitled to bury the deceased as the Defendants because they are brothers and children that any expenses increasing by this case would in any case have arisen during the burial and that there is no reason why they should be ordered to pay deposit for security for costs when the suit they have filed is proper and legitimate.

The relevant law in matters of security for costs is Order 26 Rule 4 of the Civil Procedure Rules. It provides thus: -

“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.”

The interpretation of the above provision was made by Justice Mulinga, Justice of the Supreme Court of Uganda in the case of **Noble Builders (U) Limited and another Vs Jabal Singh Sadhu** in Civil Application No. 15 of 2002. Quoting Lord Donaldson. M.R. in **De Bryers Fitzgerald and Another (1990) 1 AU E.R. 560**; he stated: -

“a defendant should be entitled to security if there is reason to believe that, in the event of his succeeding and being awarded costs of the action, he will have real difficulty in enforcing that order. If the difficulty would arise from the impecuniacy of the Plaintiff the court will of course have to take an account of the likelihood of his succeeding in his claim, for it would be a total denial of justice that poverty should bar him from putting forward what is prima facie a good claim. If, on the other hand, the problem is not that the Plaintiff is impecunious but that, by reason of the way in which he orders his affairs, including where he chooses to live and where he chooses to keep his assets, an order for costs against him is likely to be unenforceable or enforceable only by a significant expenditure of time and money, the defendant should be entitled to security.”

It is clear that the power of this court to order security for costs under Order 29 rule 4, is based on the practical difficulty or otherwise of enforcing an award of costs outside the jurisdiction of the court rather than any other ground, including involency of the Plaintiff or their inability to pay legal costs. It is also clear, at least to me, that the test on an application for security for costs is not whether the Plaintiffs have alone, no prima facie case, but whether also the Defendants have shown a bona fide defence with a high chance to succeed and get costs. Payment of which is to be not easily recoverable from the Plaintiffs.

In this case as earlier indicated, the deceased John Kabuye had left Uganda and lived in Kenya for many years. He did many things and conducted himself in a manner showing that he intended to live in Kenya all his life and be regarded as a Kenyan. He took up for himself a national Identity Card and a Passport that is showing the world at large and his close family members including the parties herein that he had become a Kenyan as a final deliberate resort. He clearly intended to be treated like a full Kenyan. When his child died, he buried him in Kenya as a Kenyan. The question which would remain to be answered by evidence to be adduced during the hearing is whether he intended, at the same time to be treated as an Ugandan or not. Evidence is waited to show whether he wanted or intended to be buried in Uganda or Kenya when he died.

In the view of the court however, evidence so far canvassed during the prosecution of related

applications, show and demonstrates that the Defendants defences are strong and bona fides. On that basis, they are entitled to be protected from a probable loss of the costs if the costs are granted in their favour eventually and there is a high chance that the plaintiffs who are foreigners will not easily available to pay them.

The conclusion this court reaches accordingly, is that it will be reasonable to order for the security of costs in favour of the defendants in the sum of Ksh.946,732/- as prayed, within a period of 30 days. In default of the deposit of the said sum, as ordered, the Plaintiff shall be denied the right to continue prosecuting their case until the sum is deposited in court. Orders accordingly.

Dated and delivered at Nairobi this 14th day of July, 2014.

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D A ONYANCHA

JUDGE