



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 252 OF 2011 (OS)

STEPHEN MAINA MWENDWA

MARTIN IRUNGU MUTURI

SAMUEL ALILA AWUOR

CHARLES KOJO AGER

JOHN NDIRANGU NDEGWA

HARRISON KIRAGU GACHURU

**(Suing as Office Bearers of KAMATUTO SELF HELP GROUP
and on behalf of 1310 Members).....PLAINTIFFS**

VERSUS

ALICE WANGARI KIRIMA

SAMUEL NDEI KIRIMA

ANNE WANGARI KIRIMA

JAMES NJUGUNA KIRIMA

THE KNOWN APPOINTED ADMINISTRATORS,

TRUSTEES AND/OR SIGNATORIES OF THE ESTATE

OF

GERISHON KAMAU KIRIMA (Deceased).....1ST DEFENDANT

JOHN GERISHON KIRIMA.....2ND DEFENDANT

RULING

This is an application filed by the Defendants dated 1/11/2013, brought under **Order 26 Rules 1 and 6, Order 40 Rule 2(2) of the Civil Procedure Rules and Sections 1A, 1B, 3 & 3A of the Civil Procedure Act**. The Defendants seek an order that the Plaintiffs, within 30 days, do give security for costs in the sum of Kshs. 25 Million or to the satisfaction of the court pending the hearing of the suit. Secondly that in default of compliance, the orders in force be vacated for want of security of costs. The application is premised on grounds outlined in the application and supported by an affidavit sworn by Alice Njeri Kirima, one of the appointed Interim Administrators of the Estate of Gerishon Kamau Kirima. It is her disposition that it is fair, just and equitable that the Plaintiffs do provide security for the payment of the Defendants' costs for reasons that, the Defendants have reason to believe that the Plaintiff will be unable to pay the Defendant's costs in the likely event that they will be successful in view of the fact that the Plaintiff's do not assets or place of abode.

She deposes that that they can only ascertain six Plaintiffs while the rest totaling to 1,310 persons are not known and it would be difficult to pursue them for costs, should the suit be dismissed. The Defendants further aver that the subject matter is 160 acres situate in an area that one acres costs Kshs. 5 Million and therefore the party and party costs are projected to be in excess of Kshs. 25 Million. The Defendants contend that the estate of the deceased will go to waste and significantly prejudiced in terms of legal costs as a consequence of these proceedings in the event the orders sought are not granted.

Stephen Maina Mwenda, the Chairman of the Plaintiff group swore a Replying Affidavit sworn on 4/2/2014 wherein he deposed that the application is an attempt to have the court order discharged even before the matter is heard thereby leaving them vulnerable to forceful demolition and eviction as had previously taken place. It is deposed for the Plaintiffs that they have been willing and ready to proceed with the suit but the same has never been heard to date due to several adjournments made at the request of the Defendants. The deponent referred to a consent order annexed and marked "SMM8" wherein both parties mutually agreed that there should be no demolition and no further developments on the suit land until the next hearing date. The deponent contends that the court order has always been extended owing to the several adjournments but that all parties have since complied with the provisions of Order 11 of Civil Procedure Rules. In urging the court to dismiss the application the deponent stated that the Plaintiffs are poor squatters who have approached the court to seek justice and a demand of Kshs. 25 Million will be restricting accessibility of justice.

The application was canvassed by way of written submissions. Nyamu & Nyamu Advocates for the Plaintiff filed submissions dated 14/4/2014 wherein counsel reiterated the contents of the application in urging the court to allow the application. J.W. Wanjohi & Co. Advocates for the Plaintiff filed submissions dated 24/2/2014 wherein counsel submitted that there has never been an issue of costs for the past 4 years, only to be raised just when the suit is ready for hearing. Counsel submitted that there was no reason advanced for the delay, and that the court had issued directions that a hearing date be fixed. In support thereof, counsel cited several authorities including **Halsburys Laws of England 4th (ed.) Vol. 37 Par. 305** cited by Mwera J. in **Cancer Investment Ltd v Sayani Investment Limited Civil Case No. 854 of 2004**:

Application for security for costs: Although an application for security for costs may be made at any stage of the proceedings, it should be made as promptly as possible, and it should not be made too late or too close to the trial, since unless here is a reasonable explanation for the delay, it may be refused.

The Court has considered the pleadings and the submissions and the court finds that: -

The discretion of the Court to order security for costs is explicit. **Order 26 Rule 1** provides that:

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.

In exercising the discretion, wide and unfettered as this power may be however, this court is mandated to do so judicially. In doing so, the court must have regard to all the circumstances of a particular case. See Njagi, J. in **Pancras T. Swai v Kenya Breweries Ltd [2004] eKLR** and Kamau J. **Jaribu Credit Traders Limited v CFC Stanbic Bank Limited Civil Case No 832 OF 2010 [2014] eKLR**

The circumstances of this case have been ably narrated by the Plaintiffs in their pleadings, affidavits and annexures in support thereto, which this court has carefully perused. The Court recognizes the vulnerability of the Plaintiffs being poor squatters who have brought a claim of adverse possession against the Defendants. Seron J. in the case of **John Francis Muyodi v Peter Lunani Ongoma & another HCCC No 27 of 2000 (O.S) [2004] eKLR** observed as follows:-

However, the court has a wide discretion whether or not to order security or not. There is no burden one way or the other but it will depend on the circumstances of each case. It should be borne in mind that the court should consider whether the application for costs was commenced with a view to being used to oppress, so as to try and stifle a genuine claim.

It is my finding that a demand of Kshs. 25 Million as security for costs will be stifling and have the effect of denying the Plaintiffs the right to be heard and that of a fair administrative action as contemplated in **Articles 47 and 50 of the Constitution.**

The Court finds that the Defendant's Notice of Motion dated 1st November, 2013 is not merited. The same is dismissed with costs to the Plaintiff/Respondents. It is so ordered.

Dated, Signed and Delivered this **11th** day of **November** 2014

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiffs

.....For the Defendants

..... Court Clerk