REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MACHAKOS

ELC. CASE NO. 64 OF 2020

KASEVE WELFARE SOCIETY…….PLAINTIFF

VERSUS

HARP HOUSING LIMITED ……..DEFENDANT

RULING

1. This Ruling is in respect to two Applications: The Plaintiff's Application dated 11th August, 2020 and the Defendant's Application dated 18th August, 2020. In the Notice of Motion dated 11th August, 2020, the Plaintiff has prayed for the following orders:

> ***a) Pending the hearing and determination of this Application, the Honourable Court be pleased to grant injunctive orders against the Defendant either by itself or its servant, employees and or agent restraining them and any other persons from encroaching onto, or in any manner whatsoever alienating or charging or interfering with the Plaintiff's right to access, use and enjoy of Residential Plot L.R No. 337/1002-Athi River.***
>
> ***b) Pending the hearing and determination of this suit, the Honourable Court be pleased to grant injunctive orders against the Defendant either by itself or its servant, employees and or agent restraining them and any other persons from encroaching onto, or in any manner whatsoever alienating or charging or interfering with the Plaintiff's right to access, use and enjoy of Residential Plot L.R No. 337/1002-Athi River.***
>
> ***c) In the alternative to (2) above, the Honourable Court be pleased to grant a hearing date on priority basis for the Plaintiff's Application.***
>
> ***d) Costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the Plaintiff's member who has deponed that the Plaintiff is the *bona fide* owner of land known as L.R. No. 337/1002, Athi River *(the suit property)* and that before the Plaintiff was issued with a letter of allotment, it followed due process having applied for the land to the Ministry of Lands and the prior owner, Kenya Meat Commission.

3. The Plaintiff's member deponed that since the issuance of the letter of allotment, the Plaintiff's members have been in possession of the land and had paid all the requisite payments to the Mavoko Sub County land offices.

4. It was deponed by the Plaintiff's member that in May, 2020, he noticed some unknown persons claiming to be agents of the Defendant inspecting the suit property in what appeared to be a scouting of the property and showing of the property to prospective buyers.

5. According to the Plaintiff's member, the Plaintiff's members remain the legitimate owners of the land having occupied the land since it was allocated to them; that an allotment letter is sufficient proof of ownership of land and that despite the orders of the court of 19 th June, 2020 in Milimani CMCC No. 2196 of 2020, the police officers chased their members out of the suit property and have been guarding the land 24 hours a day.

6. The Plaintiff's member deponed that the Defendant contested the jurisdiction of the lower court to hear the matter, which objection was sustained by the Magistrate on 7th August, 2020; that he is apprehensive that the acts of the Defendant may cause the Plaintiff's members irreparable loss and prejudice and that it is in the interest of justice that the orders being sought should be granted.

7. In its Application dated 18th August, 2020, the Defendant has sought for the following reliefs:

a) That this Honourable Court be pleased to direct the Plaintiff/Respondent to deposit security for costs as may be stipulated by this Honourable Court taking into account the substantial value of the suit properties and the fact that the Plaintiff has no known assets and/or offices within the jurisdiction of the court and moreover the Plaintiff is yet to settle the costs awarded to the Defendant in the Chief Magistrate's Court at Milimani, CMCC 2196 of 2020 and in default of furnishing such security, this suit stands dismissed.

b) That the costs of this Application be provided for.

8. The Defendant's Application is supported by the Affidavit of its Director who has deponed that on 6th June, 2005, the Defendant purchased L.R No. 337/1002 measuring 20.47 Ha situated in Mlolongo area, Machakos County from Africa Floor (1969) Limited.

9. According to the Defendant's Director, the Defendant sub-divided the suit property and developed a portion thereof by constructing 417 Bungalows which it sold to third parties; that the remaining portion of the suit land was sub-divided into two portions, to wit, L.R Nos. 337/5371 and 337/5372 and that the Defendant has been in possession of the said two portions of land.

10. It was the deposition of the Defendant's Director that the Plaintiff instituted a suit in the Chief Magistrate's Court being Milimani CMCC No. 2196 of 2020 restraining the Defendant from interfering with the Plaintiff's right to access and use the suit property and that the Plaintiff used the ex parte orders it obtained in the lower court to encroach onto the suit property.

11. The Defendant's Director deponed that when the lower court ordered the OCPD, Athi River, to provide the court with the status report of the suit property, the OCPD provided the said report which showed that: the suit property has old houses and that the Plaintiff's members had invaded the suit property using the court order they obtained in the lower court.

12. The Defendant's Director deponed that on 7th August, 2020, the lower court struck out the Plaintiff's suit for want of pecuniary and territorial jurisdiction and that in any event, the Plaintiff does not have the *locus standi* to file the present suit.

13. According to the Replying Affidavit that was filed by the Defendant's Director in response to the Plaintiff's Application, the Applicant has failed to demonstrate whether it met the conditions stipulated in the letter of offer; that a letter of allotment cannot override a duly registered title under the law and that the Plaintiff's Application should be dismissed.

14. The Plaintiff's member filed a response to the Defendant's Application in which he deponed that the Certificate of Title produced by the Defendant is fake and contains many flaws which on the face of it renders it a nullity.

15. It was deponed that the Certificate of Title indicates that it was issued for a term of 99 years from 1st August, 1991 yet the Deed Plans to the property are dated 17th August, 2018 and that the foot note on the Certificate of Title is inscribed with reference viz GPK03 1148-50m-5/2016 which means that the title was printed in May, 2016 and not 1991.

16. The Plaintiff's member deponed that in any case, they visited the Survey of Kenya offices on 15th June, 2020 and purchased the survey map of the suit property; that the suit property is completely different from the Deed Plan furnished by the Defendant and that the injunctive order of the court in *Milimani Suit Number 2196/2020, Kaseve Welfare vs. Harp Housing Limited* was legitimately obtained.

Submissions:

17. The Plaintiff's advocate submitted that the Plaintiff has demonstrated that it is the *bona fide* owner of Residential Plot L.R No. 337/1002-Athi River by dint of the letter of allotment dated 6th July, 1998; that the Plaintiff's members have been in continuous occupation of the suit land since the issuance of the allotment letter and that the Plaintiff has been making the necessary statutory payments to the Mavoko sub-county land offices.

18. Counsel submitted that the Certificate of Title produced by the Defendant purporting to be evidence of ownership of the plot by the Defendant is fake and contains many flaws which on the face of it renders it fraudulent.

19. It was submitted by the Plaintiff's advocate that the illegal act of trespass by the Defendant has denied the Plaintiff the right to use and develop the suit property and that the Plaintiff has demonstrated a *prima facie* proof of ownership of the suit property.

20. The Plaintiff's advocate submitted that the Plaintiff has demonstrated that all its members are and have been in occupation of the suit property since the issuance of the letter of allotment. Counsel relied on the case of *Giella vs. Cassman Brown, (1973) E.A 358.*

21. The Defendant's advocate submitted that the Plaintiff claims to be the *bona fide* owner of the suit property by virtue of a letter of allotment dated 6th July 1998 and that a letter of allotment does not confer title or proprietary interest on an individual. Counsel relied on the case of *Marcus Mutua Muluvi & Another vs. Philip Tonui & another [2012] eKLR* where the court held that:

> *"I am satisfied that the applicants have not made out a prima facie case with probability of success……On the material placed before me, the applicants have failed to demonstrate to my satisfaction the foregoing. The applicants have no title to the suit premises. That being the case, I do not see the proprietary interest of their suit premises that have been infringed by the respondent. Their claim to the suit premises is anchored on letters of allotment."*

22. Counsel also relied on the decision of *Lilian Waithera Gachuhi vs. David Shikuku Mzee [2005] eKLR* where it was held as follows:

> *"I have considered the application and submissions of counsel for the applicant. I have no doubt that, legally, a letter of allotment is an intention by the Government to allocate land. It is not a title. Therefore, a letter of allotment cannot be used to defeat title of a person who has been registered as the proprietor land."*

23. Counsel submitted that the Defendant has demonstrated that it duly purchased the suit property, L.R. No. 337/1002, which was sub-divided and developed 417 units that were sold to third parties and the remaining portion was sub-divided into two parcels of land, to wit, L.R. Nos. 337/5371 and 337/5372; that the Defendant's Certificate of Title issued by the Registrar is to be taken by this court as *prima facie* evidence that the Defendant is the absolute and indefeasible owner of the suit property and that the Defendant's title should not be subjected to challenge by the Plaintiff's letter of allotment.

24. It was submitted by the Defendant's advocate that the Plaintiff has not demonstrated whether it met the conditions under the letter of allotment, to wit, paying the stand premium, rent, conveyancing fees, registration fees, stamp duty, survey fees, approval and planning fees as stated in the letter

25. It was submitted that the Plaintiff has not fully disclosed material facts and that the Plaintiff has misled the court by falsely claiming to be in possession and occupation of the suit property.

26. According to the Plaintiff's advocate, the Plaintiff lacks *locus standi* to file the suit herein since it's not a registered Society under the Societies Act; that the Plaintiff being legally non-existent, it lacks any legal capacity to acquire and own the suit property and that Societies are not legal entities capable of suing and being sued in their own names. Counsel relied on the case of *Eritrea Orthodox Church vs. Wariwax Generation Ltd. [2007] eKLR* where the court held as follows:

> *"The Plaintiff in that suit was registered under the Societies Act and that the institution of proceedings by the persons who form the society without complying with rules governing representative suits renders the suit null and void…."*

27. It was submitted that considering that the lower Court matter was struck out with costs to the Defendant, which the Plaintiff has not yet settled; and the fact that the Plaintiff does not have any known assets, and the Plaintiff being legally non-existent, it is only fair and just that the Plaintiff furnishes security for costs. Counsel relied on the case of *Pancras T. Swai vs. Kenya Breweries Limited [2005] eKLR* where the court held as follows:

> *"Wide and unfettered as this power (to order costs) may be however, it should be exercised reasonably and judiciously, having regard to all the circumstances of a particular case."*

28. It was submitted that in the circumstances of this case, the Plaintiff should deposit security for costs taking into account the substantial value of the suit properties *(around Kshs.600 million);* that the Plaintiff has no known assets and/or offices within the jurisdiction of the court and that the Plaintiff is yet to settle the costs awarded to the Defendant in the Chief Magistrate's Court at Milimani, CMCC No. 2196 of 2020.

Analysis and findings:

29. The only two issues that are before this court for determination are firstly, whether the Plaintiff should be granted an order of injunction in respect of land known as L.R No. 337/1002 measuring 20.47 Ha *(the suit property)* and secondly, whether an order for security for costs as against the Plaintiff should issue.

30. The conditions that have to be fulfilled before the court can exercise its discretion to grant a temporary injunction have been well laid out as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience (See *Giella vs. Cassman Brown & Co Ltd (1973) EA 358 and Fellowes and Son vs. Fisher [1976] I QB 122).*

31. What amounts to a *prima facie* case, was explained in *Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125* case as follows:

> *"...In Civil cases, it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

32. It is trite that interlocutory orders are granted without full investigation of the merits of either side's case. However, to be granted interlocutory relief of injunction, the Plaintiff must show a more than an arguable case. (See *Fessenden vs. Higgs and Hill Ltd [1935] ALL ER 435).*

33. In *Francome vs. Mirror Group Newspapers Ltd., [1984] 1 WLR 892,* Sir John Donaldson MR, while criticizing the expression *'balance of convenience'*, an expression posited in the House of Lords decision in *American Cynamid vs. Ethicon, [1975] AC 396,* said this about the purpose of interim injunctions:

> *"Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so*

doing we are seeking a balance of justice, not convenience."

34. The other factor that is relevant to an Application for injunction is the extent to which the determination of the Application, at an interlocutory stage, will amount to a final determination of the rights and obligations of the parties. That issue was addressed in *NWL Limited vs. Woods [1979] WLR 1294* by Lord Diplock as follows:

> *"Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm which will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the Plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other."*

35. In the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR,* the Court of Appeal held as follows:

> *"The party on whom the burden of proving* a *prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a* prima facie *case. The applicant need not establish title. it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that* prima facie *case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."*

36. The Plaintiff's case is that it is the *bona fide* owner of land known as L.R No. 337/1002, Athi River *(the suit property)* having been issued with a letter of allotment. According to the Plaintiff, it applied for the land to the Ministry of Lands and to the prior owner, the Kenya Meat Commission.

37. The Plaintiff's member deponed that since the issuance of the letter of allotment to the Plaintiff, the Plaintiff's members have been in possession of the land and had made all the requisite payments to the Mavoko Sub-County land offices.

38. The letter of allotment that the Plaintiff is relying on to claim the land known as LR No. 337/1002- Athi River *(the suit property)* was exhibited by the Plaintiff. According to the said letter of allotment dated 6th July, 1998, the Plaintiff was supposed to accept the offer by paying the government a total of 808,750 within 30 days.

39. From the documents annexed on the Plaintiff's member's Affidavit, it would appear that the sum of Kshs. 808, 750 that was to be paid by the Plaintiff to the government was never paid at all.

40. The letter of allotment shows that the Plaintiff was allocated L.R No. 337/1002- Athi River, meaning that as at the time of the said allocation, the suit property had already been surveyed.

41. The Grant annexed on the Defendant's Affidavit shows that L.R No. 337/1002 was registered in favour of African Floor (1969) Limited on 10th June, 1993 as IR 59320/1 for a term of 99 years, with effect from 1st August, 1991.

42. The said Grant shows that L.R No. 337/1002 was transferred by African Floor (1969) Limited to the Defendant on 6th June, 2005 before being charged to African Banking Corporation on 18th October, 2005 for Ksh. 120,000,000.

43. The documents exhibited by the Defendant shows that it developed 417 residential houses on a portion of the suit property which it sold to third parties, where after it sub-divided the remaining land into two portions being LR No. 337/5371 and 337/5372. The Defendant has exhibited the two Certificates of Titles which were issued to the Defendant on 5th March, 2019.

44. The title documents produced by the Defendant shows that by the time the letter of allotment was purportedly issued to the Plaintiff in 1998, the suit property had been surveyed and a Grant issued to African Floor (1969) Limited in 1993.

45. That being the case, the purported letter of allotment issued to the Plaintiff cannot defeat the Defendant's title, unless it is shown that the said title was issued fraudulently or by misrepresentation. That is the position that was taken in the case of *Marcus Mutua Muluvi & Another vs. Philip Tonui & another [2012] eKLR* where the Court held as follows:

> *"I am satisfied that the applicants have not made out a prima facie case with probability of success…*
>
> *On the material placed before me, the applicants have failed to demonstrate to my satisfaction the foregoing. The applicants have no title to the suit premises. That being the case, I do not see the proprietary interest of their suit premises that have been infringed by the respondent. Their claim to the suit premises is anchored on letters of allotment..."*

46. In *Lilian Waithera Gachuhi vs. David Shikuku Mzee [2005] eKLR* the court held that:

> *"I have considered the application and submissions of counsel for the applicant. I have no doubt that, legally, a letter of allotment is an intention by the Government to allocate land. It is not a title. Therefore, a letter of allotment cannot be used to defeat title of a person who has been registered as the proprietor land."*

47. In *Philma Farm Produce & Supplies & 4 others vs. The Attorney General & 6 others (2012) eKLR,* the court held as follows:

> *"The petitioners' claim is grounded on two letters of allocation of the suit properties. These letters do not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated therein. The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract. It is in this respect that the petitioner claim must fail…*
>
> *Even if I were to assume in the petitioners' favour that the 2nd to 5th Petitioners were partners and that they were entitled to the allotment of the suit property, acceptance of the allocation was a conditional offer to be accepted within the time limited and by payment of all the sums of money demanded within that period."*

48. It is trite that where a Grant has been issued in respect to government land to a person, the said land cannot be available for allocation to another person or entity, unless the said Grant has been nullified by the court. The Grant that was issued to African Floor (1969) Limited in 1993 is governed by the Registration of Titles Act. Section 23 (1) of the said Act provides as follows:

> *"23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party."*

49. The Grant that was issued to African Floor (1969) Limited in 1993 can only be defeated on the ground of fraud or misrepresentation. This is the position that was taken by the Court of Appeal in the case of *Dr. Joseph Arap Ngok vs. Justice Moijo Ole Keiwua & 5 Others, Civil Application No. Nairobi 60 of 1997,* where the Court held that:

> *"Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya would be placed in jeopardy."*

50. In its Plaint, the Plaintiff has not alleged that the Defendant acquired the title in respect to the suit property fraudulently or by misrepresentation. Indeed, the Plaint has not enumerated even a single particular of fraud on the part of the Defendant.

51. Even if I was to assume that the Certificate of Title that was issued to African Floor (1969) Limited was fraudulently acquired, acceptance of the allocation by the Plaintiff was a conditional offer within the time indicated in the letter of offer. Those terms were never complied with by the Plaintiff. The Plaintiff cannot therefore rely on the said letter of offer to claim the suit property.

52. That being the case, and considering that the Plaintiff never accepted the purported offer by paying to the government the requisite amount of Kshs. 808, 750 within 30 days or at all, I find that the Plaintiff has not established a *prima facie* case with chances of success.

53. In any event, the suit property no longer exists, the same having been sub-divided by the Defendant, and some portions developed and sold to third parties. Indeed, if the Plaintiff's members were in occupation of the suit property as they claim, they should have seen the developments that were coming up on a portion of the suit property, and objected.

54. The fact that the Defendant put up several bungalows on a portion of L.R No. 337/1002 which it has since sold to third parties without any objection clearly shows that the Plaintiffs' members have never been in occupation of the suit property.

55. Considering that the Plaintiff has not proved by way of Affidavit evidence that its members are in occupation of the suit property, and having failed to establish a *prima facie* case with chances of success, I find that the Plaintiff is not entitled to an injunctive order.

56. The next issue I will determine is whether the Plaintiff should deposit security for costs in court. Order 26 Rule 1 of the Civil Procedure Rules 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."*

57. The Defendant's counsel submitted that the Plaintiff lacks *locus standi* to file the suit herein since it's not a registered Society under the Societies Act and that the Plaintiff should deposit security for costs taking into account the substantial value of the suit properties *(approximately Kshs.600 million)* and the fact that the Plaintiff has no known assets and/or offices within the jurisdiction of the court.

58. According to the Defendant's counsel, the Plaintiff has not even settled the costs awarded to the Defendant in the Chief Magistrate's Court at Milimani, CMCC No. 2196 of 2020.

59. In the Plaint, the Plaintiff has described itself as *"a Society duly registered under the provisions of the Societies Act."* In the Verifying Affidavit and the Supporting Affidavit, the deponent has described himself, not as an official of the Plaintiff, but *"a member."* It is therefore not clear from the pleadings who the officials of the Plaintiff are.

60. It is trite law that Societies are not legal entities capable of suing and being sued in their own names. Unincorporate bodies registered under the Societies Act have no legal capacity to institute proceedings in any court in their own names and cannot maintain such proceedings.

61. Registered Societies can only sue through Trustees, or in the names of their officials in a representative capacity. In *Eritrea Orthodox Church vs. Wariwax Generation Ltd. [2007] eKLR* the Court held as follows:

> *"There is no doubt that the plaintiff is non-incorporated body of many members registered under the Societies Act, Cap 108 of the laws of Kenya. That is how it has indeed described itself in paragraph 1 of the plaint. Nor does the plaint clothe the plaintiff in any other way or with any other name or capacity. It will therefore be so treated. It is now trite law that a society registered under the said Act is not an incorporated body which can assume capacity to sue or be sued in its own name in any legal proceedings. It is an ordinary society whose members, if they wish to sue, can do so only under a representative capacity under Order 1 rule 8 of Civil Procedure Rules."*

62. In the case of *Free Pentecostal Fellowship in Kenya vs. Kenya Commercial Bank (1992) eKLR,* Bosire, J. *(as he then was)* stated as follows:

> *"The position in common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 of the Civil Procedure Rules. In the instant matter the suit was instituted in the name of the religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name."*

63. Having not sued through its officials, the Plaintiff in this matter is non-suited, and cannot maintain these proceedings as against the Defendant, or at all.

64. The circumstances under which the court may order for the deposit of security for costs was considered in the case of *Raw Bank PLC vs. Yusuf Shaa Mohamed Omar & another [2020] eKLR* the Court held that:

> *"The discretion is, however, to be exercised reasonably and judicially by taking absolute reference to the circumstances of each case. Such matters as;*
>
> *(a)absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs;*
>
> *(b) the general financial standing or wellness of the Plaintiff;*
>
> *(c) the bona fides of the Plaintiff's claim; or*
>
> *(d) any other relevant circumstance or conduct of the Plaintiff or the Defendant the list is not even exhaustive. The court had this to say in the case of GUFF ENGINEERING (EAST AFRICA) LTD vs. AMRIK SINGH KALGI, at page 281 quoting the dictum of Lord Denning MR in Sir Lindsay Parkinson & Co. Ltd (1973) 2WLR 632 and at page 284 quoting Maughan L J in Gill All Weather Bodies Ltd vs. All Weather Motor Bodies Ltd.*
>
> *"…if there is reason to believe that the company cannot pay the costs, then, security may be ordered, but not must be ordered… Some of the matter which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has reasonably good prospects of success. Again it will consider whether there is an admission by the Defendant on the pleadings or elsewhere that money is due.*
>
> *…the court might also consider whether the application for security was being used oppressively – so as to stifle a genuine claim. It would also consider whether the company's wand of means has been brought about by any conduct by the Defendants, such as delay in payment or delay in doing their part of the work."*
>
> *In most cases, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that she is unsuccessful. The same must be proven. See Hall -vs- Snowdon Hubbard & Co. (I), (1899) 1 Q.B 593, the learned Judge at page 594 stated:-*
>
> *"The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made."*

65. As I have stated above, the Plaintiff in this matter can only sue through its officials. In this case, the Plaintiff's officials have not been disclosed either in the Plaint or the Application. That being the case, it will be legally impossible for the Defendant to pursue its costs against the Plaintiff which is an unincorporated body that can neither sue nor be sued in the event the suit is dismissed.

66. Although the Defendant annexed on its Affidavit a letter dated 23rd June, 2020 from the Registrar of Societies stating that the Plaintiff does not exist in their database and records, the Plaintiff did not respond to the assertion.

67. Indeed, the perusal of the Certificate of Registration of the Plaintiff annexed on the Plaintiff's Affidavit shows that the same was never signed by the Registrar of Societies, thus reinforcing the assertion of the Registrar that the Plaintiff might never have been registered as a Society.

68. The uncertainty of the Plaintiff's legal status, and the failure by the Plaintiff to disclose its officials and the registered office are a good basis for this court to make an order for the deposit of security for costs. Furthermore, since Milimani CMCC No. 2196 of 2020 was struck out by the lower court for want of jurisdiction, the Plaintiff has never settled costs in that suit.

69. As demonstrated hereinabove, the Plaintiff's case has a low probability of success, and in the event that the Plaintiff is unsuccessful, it may easily avoid liability for costs since it has no known assets, physical location and more importantly, it is, *prima facie*, legally non-existent and has no known officials.

70. For those reasons, I make the following orders:

a) The Plaintiff's Application dated 11th August, 2020 is dismissed with costs.

b) The Plaintiff to deposit in this court Kshs 1,000,000 being security for costs within 30 days of the date of this Ruling.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 2ND DAY OF OCTOBER, 2020

O.A. ANGOTE

JUDGE