



Nyawira & 13 others v Galot Industries Limited (Enviromental and Land Originating Summons E005 of 2020) [2025] KEELC 4510 (KLR) (17 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4510 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2020**

AY KOROSS, J

JUNE 17, 2025

BETWEEN

MARTHA NYAWIRA & 13 OTHERS APPLICANT

AND

GALOT INDUSTRIES LIMITED RESPONDENT

RULING

1. This ruling seeks to determine the notice of motion dated 15/11/2023 that has been moved under several provisions of law. It seeks numerous reliefs from this court, some of which are spent, and the outstanding prayers for determination are: -
 - a. The applicants be ordered to deposit the security sum of kshs. 5,000,000/- towards the respondent's costs to the suit within 14 days, and in default of payment, the suit to stand dismissed with costs.
 - b. The costs of the motion and the suit be borne by the applicants.
2. The motion is supported by grounds on its face, together with an affidavit sworn on the instant date by Mohan Galot, who is the respondent's administration manager. A summary of the grounds are inter alia: (a) pursuant to eviction orders issued during the pendency of this suit in Machakos ELC No. 26 of 2014, Galot Industries Limited vs Rose Nyaga Njambi & Others (previous case), the applicants herein vacated L.R. No. 1286/511 located in Machakos Municipality (suit property); b) the whereabouts of the applicants and defendants in the previous case are unknown;
3. C) An application for a stay of execution was lodged in the Court of Appeal in the previous case by the defendant therein, but was dismissed by the court in Appl. No. 117 of 2020 Rose Nyaga Njambi & 3 Others v Galot Industries Ltd,



4. D) Similarly, in another related case, to wit, Machakos ELC No. 188 of 2011, Galot Industries Limited & Another vs Peter Wane & Another, which was over a different neighbouring property, the defendants therein disappeared without a trace. Lastly, e) The applicants had lost interest in the case, and the respondent had incurred and continues to incur legal expenses.

Applicants' case

5. The motion is opposed vide replying affidavit sworn by one of the applicants, Martha Nyawira, on 22/10/2024. In summary, she avers that: a) application has been presented in bad faith with an intention to diminish or stifle the applicants' enjoyment of the inalienable right of access to justice under Article 48 of the Constitution of Kenya, (b) the motion is improper and speculative as the respondent had not proved that they would be unable to pay costs.
6. C) The applicants were strangers to the previous cases, they possessed the suit property, and the respondent had not incurred any losses, d) Costs are not meant to be punitive but to remedy a situation and at last, e) they had been keen to prosecute the matter and furthermore, the respondent had been reluctant to avail documents to their counsel.

Parties' submissions

7. Despite the court's directions of 25/02/2025, the parties' counsels did not comply by filing their written submissions.

Issues for determination, Analysis and Determination

8. This court has carefully considered the motion, its grounds, affidavits and relevant legal framework and jurisprudence, and the singular issue arising for determination is whether the motion has met the legal threshold to warrant the grant of an order for security for costs.
9. Regarding this issue, an order for security for costs can emanate from a statute, regulation and in the case of civil proceedings, as the case herein where this court is a superior court, Section 27(1) of the Civil Procedure Act applies to it. This provision states as follows: -

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

10. Breathing life into this Section on security for costs, Order 26 of the Civil Procedure Rules particularly so Rule 1 thereof 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 considering a motion such as this one, the court exercises judicious discretion, which is usually anchored on law, evidence and reason.
11. As held in the Supreme Court of Kenya decision of Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others [2023] KESC 11 (KLR), when considering a motion for security of costs, the provision of Article 48 of the Constitution of Kenya should come to the fore as security for costs should



not be abused but instead, be used as an instrument that ensures there is a balance of interests between parties in the suit.

12. It is worth observing that to ensure the determination of a case on merits, security for costs is only granted in exceptional circumstances such as extraordinary and important cases, and moreover, each case is to be considered on its own merits.
13. In *Westmont* (Supra), the apex court summarised the non-exhaustive guiding principles on security for costs in the following manner: -

“ 13. In determining whether it was appropriate to make an order that a party gave security for costs, the court could have regard to the following matters and such other matters as it considered relevant in the peculiar circumstances of each case: –

- a. the prospects of success or merits of the proceedings.
- b. the genuineness of the proceedings.
- c. the impecuniosity of the plaintiff.
- d. whether the plaintiff's impecuniosity was attributable to the defendant's conduct.
- e. whether the plaintiff was effectively in the position of a defendant.
- f. whether an order for security for costs would stifle the proceedings and/or impede access to justice.
- g. whether the proceedings involved a matter of public importance.
- h. whether there had been an admission or payment in court.
- i. whether delay by the plaintiff in commencing the proceedings had prejudiced the defendant.
- j. the costs of the proceedings.
- k. Whether the security sought was proportionate to the importance and complexity of the subject matter in dispute.
- l. the timing of the application for security for costs.
- m. Whether an order for costs made against the plaintiff would be enforceable within the Republic of Kenya.
- n. the ease and convenience or otherwise of enforcing a Kenyan court judgment or order in the country of a non-resident plaintiff or appellant.
- o. if the plaintiff was a natural person, an order for security for costs could not be made merely on account of his or her impecuniosity.
- p. security for costs was to be given in such manner, at such time and on such terms (if any) as the court may by order direct.



- q. if the plaintiff failed to comply with an order under the instant rule, the court could order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed.
 - r. the provisions of any Act under which the court could require security for costs to be given such as the *Elections Act*.
 - s. a second motion for security for costs would not succeed unless there was an unforeseen and material change in circumstances since the first order for security. An example of an unforeseen and material change in circumstances might be where a plaintiff had come into a sum of money sufficiently large that they could no longer make an impecuniosity argument.
 - t. the defendant seeking increased security bears the onus of demonstrating a significant gap between the security ordered and the actual expenses which were not foreseeable and that in hindsight the original request for security for costs was based on an assessment of the complexity of the case which hindsight has established was not realistic.
 - u. the jurisdiction to increase or decrease the amount of security already ordered should not be exercised lightly or be used to second guess the court that made the original order, whether on consent or otherwise unless the gap between what was ordered and what later appears to be necessary is significant.”
14. Drawing guidance from the persuasive decision of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] KEHC 4068 (KLR), the onus lay with the respondent, who is the mover, to satisfy the grounds for security for costs to the satisfaction of the court.
 15. In this case, the respondent advanced 2 grounds as to why the security for costs order should be given, which was firstly, the existence of previous proceedings that led to an eviction of the applicants and that their whereabouts are unknown and further, that it had another related matter in which it had been unable to recover costs and secondly, the applicants were reluctant to prosecute the suit.
 16. As to the 1st ground on the existence of previous proceedings, only the judgment of *Machakos ELC No. 26 of 2014, Galot Industries Limited vs Rose Nyaga Njabi & Others* was availed to this court for consideration and scrutiny, having considered it, this court affirms that the applicants were not parties to these proceedings. It follows that they should not suffer for a case they are strangers to.
 17. Concerning losing interest in the suit, the court record speaks for itself and this court has taken time to go through its proceedings and agrees with the respondent that the applicants were indeed lethargic in the prosecution of this matter and were only jolted from their slumber on 23/10/2024 after absenting themselves from this court for 4 years from 17/02/2020.
 18. As a matter of fact, during this interlude of 4 years, they failed to attend court on 9 occasions, which is unquestionably a waste of the court's precious judicial time. It is worth observing that the decision of *Jayesh Hasmukh Shah v Navin Haria & another* [2015] KEHC 6006 (KLR) held that the applicants' conduct in the proceedings as the person who has sued should be tested in determining the question of security as to costs.



19. In considering this test, the court is called to carry out a balancing exercise between the applicants' right to access to justice as provided in Article 48 of *the Constitution*, and the other, it must weigh the injustice to the respondent whose right to expeditious disposal of the suit has been constrained as envisaged by Article 159 (2) (b) of *the Constitution*
20. Nevertheless, while considering these Articles in light of the applicants' behaviour of not being keen to attend court sessions, this court finds that this action is not sufficient to persuade the court that it would be impossible for the respondent to recover the costs in the event the applicants lose their case. Consequently, this court finds the respondent has not met the threshold to warrant the grant of an order of security for costs.
21. In the circumstances and for the above-stated reasons, this court hereby finds the notice of motion dated 15/11/2023 is not merited, and since costs follow the event, costs shall abide by the outcome of the main suit. In the end, this court hereby issues the following disposal orders:
 - a. The notice of motion dated 15/11/2023 is hereby dismissed with costs being in the cause.
 - b. This matter shall be mentioned for pretrial directions.

Orders accordingly.

DELIVERED AND DATED AT MACHAKOS THIS 17TH DAY OF JUNE, 2025.

HON. A. Y. KOROSS

JUDGE

17.06.2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

N/A for parties

Ms Kanja- Court Assistant

