



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**  
**Miscellaneous Civil Suit 579 of 2009**

**IN THE MATTER OF PORTION NUMBERS 2721, 2722, 2723, 2724 MALINDI**

**REGISTERED IN VOLUME LT 21 FOLIO NOS 584/1 FILE 4871, FOLIO**

**NUMBER 585/1 FILE 4872 FOLIO NUMBER 586 FILE 4874**

**AND**

**IN THE MATTER OF CAVEATS FORBIDDING REGISTRATION OF DEALINGS WITH  
LAND LODGED ON 13<sup>TH</sup> MARCH 2006 & REGISTERED IN VOLUME LT 21 FOLIO  
NO. 584/4 FILE 4871, FOLIO NO. 585/4 FILE 4872, FOLIO NO. 586/4 FILE 4873 & FOLIO  
NO. 587/4 FILE 4874 RESPECTIVELY**

**AND**

**IN THE MATTER OF LAND TITLES ACT CAP 282**

**BETWEEN**

**NAOMI MICHELE LEVY.....APPLICANT**

**AND**

**MARIANNE WILDT.....1<sup>ST</sup> RESPONDENT**

**LUCIANO PODESTA.....2<sup>ND</sup> RESPONDENT**

**VINCENZO LA CAMERA.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL (sued on behalf of the Senior Registrar of Titles Mombasa  
District.....4<sup>TH</sup> RESPONDENT**

**RULING**

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents, by their application dated 4<sup>th</sup> October 2006 by way of Chamber Summons, seek security for their costs. The application is expressed to be brought under section 3A of the Civil Procedure Act and Order XXV Rules 1, 3, 5, 6 and 7 of the Civil Procedure Rules. The application, which is supported by an affidavit sworn by the 3<sup>rd</sup> respondent on his own behalf and on the authority of the 2<sup>nd</sup> respondent, is based on the primary ground that the applicant ordinarily resides in the United Kingdom and has no known assets or business in Kenya.

The applicant has opposed the application. In Grounds of Opposition filed by her advocates, it is contended that the application is incompetent and as the applicant claims against all the respondents the discretion of the court should not be exercised in favour of ordering security. It is further contended that the application is frivolous, scandalous, vexatious

and an abuse of the process of the court.

Counsel agreed to file written submissions which duly happened by 2<sup>nd</sup> September 2009. It is submitted by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the two respondents are innocent purchasers of the suit property for value without notice and were not aware of any caveat having been lodged against the same or of any court order in respect of any caveat. In the premises, counsel contended that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have a bonafide defence to the applicant's claim. Reliance was placed upon the decision of the Court of Appeal in **Shah – v – Shah (Civil Appeal No. 34 of 1981)** for their contention that it is the strength of the defence rather than that of the applicant which is of prime consideration in the application.

In response to the application, counsel for the applicant submitted that any order for security is in the discretion of the court. For that proposition counsel cited the case of **Pancras T. Swai – v – Kenya Breweries Ltd [2004] e KLR** which cited with approval the decision of the Court of Appeal in **Kotecha – v – Bank of Baroda [C.A. Civil Application No. 43 of 1978] (UR)**. In counsel's view, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are not entitled to an order for security. Counsel further argued that as there are more respondents to the applicant's claim, no order for security is available to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents by dint of the provisions of Order XXV Rule 3 of the Civil Procedure Rules.

I have considered the application, the supporting affidavit, the submissions of counsel and the authorities cited. Having done so, I take the following view of the matter. The applicants claim as pleaded in the amended Originating Summons against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents is for a declaration that the transfer of the suit property to them is null and void and that they be restrained from transferring or otherwise dealing with the suit properties. That claim is made on the ground that the said transfer was effected when the applicant had lodged a caveat against the suit properties. In the grounds for the Originating Summons and in the supporting affidavit, the applicant does not blame the 2<sup>nd</sup> and 3<sup>rd</sup> respondents for the removal of the said caveat. In the premises, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' defence that they are bona fide purchasers of the suit property for value without notice is not challenged. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants would appear therefore to have a bonafide defence. They have therefore satisfied the test set in **Shah – v – Shah (supra)**. It is common ground that the applicant is ordinarily resident abroad. Besides that residence, the applicant has not denied that she does not have any business or assets in Kenya. She has not filed any affidavit in opposition to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' application. The averment by the 3<sup>rd</sup> respondent that they may not recover their costs in the event the suit is determined in their favour remains unchallenged. In my view therefore, the fear of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents is not altogether unfounded.

Can rule 3 of Order XXV of the Civil Procedure Rules operate to deny the 2<sup>nd</sup> and 3<sup>rd</sup> respondents the order for security? The rule reads as follows:-

**“3. Where it appears to the court that the substantial issue is which of two or more defendants is liable or what proportion of liability two or more defendants should bear no order for security for costs may be made.”**

It is plain, in my view, that this rule does not take away the court's discretion to order security. The language used is permissive. In any event, I have already found that, the applicant does not substantially blame the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and further that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have a bona fide defence.

In the results, I am satisfied that this application is not without merit. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have not suggested the amount of security to be ordered. I however feel that security valued at Kshs. 500,000/= would be appropriate. I allow the application in terms of prayer 2. The applicant should deposit a banker's or Insurance performance bond to the tune of 500,000/= as security for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' costs. The said bond to be deposited within thirty (30) days of the date hereof. Each party has liberty to apply.

Costs of this application shall be in the cause.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 1<sup>ST</sup> DAY OF OCTOBER 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Munyithya for the Applicant, Obura for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and Umara for the 4<sup>th</sup> Respondent.

**F. AZANGALALA**

**JUDGE**