



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISCELLANEOUS APPLICATION NO. 146 OF 1992

1. SAMMY C. K. NZAI

2. SALIM KAMILA

3. ATHUMAN NYANJE

4. GULIE A. HARON.....PLAINTIFFS

VERSUS

1. KILIFI COUNTY COUNCIL

2. AWADH S. AWADH

3. KILIFI D. C.....DEFENDANTS

RULING

This is the application by the one defendant for security for costs. There are altogether 7 cases between the parties.

The tussle between them as I see it is over a plot which was allocated to the 2nd defendant by the Commissioner of Lands and Kilifi County Council. Originally, the plot was Government land and the Commissioner of Lands and Kilifi County Council are vested with power to allocate it to whomsoever they deem suitable. But the plaintiffs contend that since they were squatters on the plot they were entitled to priority over it when the decision to allocate was made. For my part, I have strong misgivings about the plaintiff's cause of action.

But I will only deal with the aspect of costs. There was case No SRMCC 275 of 1994 which has recently been transferred to this Court for determination. In it there was an interlocutory application for injunction by the plaintiffs. They lost the application in the SRM's Court; and their belated application for leave to appeal to the High Court was refused. The 2nd defendant's costs for that application have been assessed at Shs 89,217/-. The 2nd defendant has asked the plaintiffs to pay the amount. So far it remains unpaid. The plaintiffs are squatters and do not own any visible property on which the plaintiff can levy an attachment for the decreed costs.

It has been argued on behalf of the 2nd defendant that since the plaintiffs are manifestly defeated to pay

the costs in one file, they are unlikely to pay costs in other suits.

On behalf of the plaintiffs Mrs Khaminwa's arguments were most unsatisfactory. All she said was that:

“There is no reason for providing security”

or

“The plaintiffs should not be hindered from prosecuting their case”

or

“Just because a party is poor the Court should not order security for costs”.

I have already expressed doubts as to validity of the plaintiffs' claims. I am augmented in this view by the fact that the plaintiffs' application for injunction against the 2nd defendant was refused. If the Magistrate's Court was convinced that the plaintiffs had a *prima facie* case with a probability of success it would, according to the guidelines in *Giella v Casman Brown Ltd* [1973] EA 35, have been bound to grant the injunction. The ruling of the Court was delivered on the 29th July 1992. No appeal was filed. The plaintiff did nothing to activate that matter until 26th March 1993 when they were threatened with execution of the decree for costs. That is when they applied for extension of time for filing their appeal against the ruling of the Magistrate's Court. In his ruling which was delivered on 19th May 1994 Mbogholi Msagha J made the following observations:

“What transpires from the record that I set out hereinabove is that there is persistent multiplicity of litigation at the instance of the plaintiffs. The reasons are not hard to perceive. The plaintiffs are allegedly by in occupation of the plot in dispute. The same has allegedly been allocated to the second defendant.

By securing an injunction they can remain thereon for as long as the suit takes to be heard and determined. With respect that is an abuse of the process of the court. There must be an end to litigation. I am accordingly unable to grant leave to frustrate a course of justice”.

These are therefore not merely poor litigants as Mrs Khaminwa portrays them. They are mischievous men-out to abuse the process of the court. Under the order 25 rule 6 the Court has discretion to order security for costs. Our rule is similar to RSC order 23 rule 1.

In an *Annual Practice* 1991 at p 502 the authors said:

“In exercising discretion under rule 1 the Court will have to consider all the circumstances of the case..... A major matter for consideration is the likelihood of the plaintiff succeeding. If there is a strong *prima facie* presumption that the defendant will fail in his defence to the action the Court may refuse him any security for costs.”

For all these reasons I accede to the application and order the plaintiffs to pay to the defendant the decreed costs within five months from the date hereof. In addition they will within the same period, provide security for costs valued at Shs 100,000/- in respect of all other suits. In default all these orders plaintiffs' suits will be dismissed with costs.

Dated and Delivered at Mombasa this 10th day of November 1994.

I.C.C.WAMBILYANGA

JUDGE