



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO 3098 OF 1990**

**DUNCAN NDERITU.....PLAINTIFF**

**BETHWELL MAREKA GECAGA .....PLAINTIFF**

**JAMES SIDNEY NESBIT t/a Trustees**

**Of African Club.....PLAINTIFF**

**VERSUS**

**JOHN HARUN.....DEFENDANT**

**RULING**

The application before me for consideration is the one by Chamber Summons dated 12th March, 1992. The applicant is the defendant, in the suit one John Harun. There are 9 prayers as follows:

- 1) That the plaintiff herein “Africa Club” be ordered to give security for costs of the defendant herein.
- 2) That the Africa Club be ordered to deposit all the documents of title to LR 209/930, Monrovia Street Nairobi as the security for costs of the defendant herein as this said property is the sole and only property or asset owned or held by the Africa Club, which has nothing else absolutely; and in the alternative and without prejudice to this, any other such suitable and acceptable security as the honorable Court may direct.
- 3) That the honorable Court be pleased to direct also that the three persons to wit, Duncan Ndegwa, Bethuel Mareka Gecaga and James Sidney Nesbit be ordered further to personally give security of such amount as this honorable Court will see fit in the circumstances of this case as just and fitting so to direct.
- 4) That the honorable Court be pleased to order that in the event the three persons aforesaid disposing off the property LR 209/930 before the determination of this suit they will be held personally liable to pay all the costs, damages, interest and meet any other relief that might be granted to the defendant herein.
- 5) That within the purview of the law governing societies and the principles of natural justice and equity this honorable Court be pleased to make a ruling as to whether Africa Club is a “ person” capable of being joined as plaintiff or defendant, or capable of seeking any orders or moving the Court in any manner within the meaning of order 1 rule 1& 3 of the Civil Procedure (Revised) Rules.

6) That in the interest of natural justice and equity this honorable Court be pleased to review its order of 11.3.92 in so far as the same grounds the applicant/defendant 4 (four) days.

7) That in the alternative but without prejudice to (6) above, this honorable Court be pleased to stay its order of 11.3.92 until determination of this suit.

8) That this honorable Court make a ruling, as to whether the order complained of by the respondent/plaintiffs was executed or not.

9) That the costs of this application be provided for.

I have as far as possible reproduced the prayers as are set out in the application. That is so because the matter when it was argued before me was highly contentious and I did not want to overlook any of the prayers.

For a better appreciation of the matters in controversy I consider it essential to set out, in resume form only, the background facts.

The suit herein concerns property known as LR 209/930. Its registered in the names of three individuals viz Duncan Ndegwa, Bethuel Mareka Gecaga, and James Sidney Nesbit. They are described in the plaint as trustees of Africa Club. As per the plaint, Africa Club is a registered society.

The defendant is an individual. The plaint alleged that he wrongfully entered the suit property sometimes in or about November, 1989, and thereafter continued to be in possession of the suit property until the date of the suit.

In the suit, several prayers have been sought. Firstly, a permanent injunction to restrain the defendant by himself, his servants or agents or howsoever, from entering the suit property or in any way interfering with the plaintiff's use and enjoyment of the property. Thirdly, damages for trespass with effect from 1st November, 1989 until vacant possession. Lastly, costs and interest as and where applicable.

This Court (Githinji J) granted a decree of possession on 30th April 1991 pursuant to application under o XXXV Civil Procedure Rules. In his ruling he said, in pertinent part, as follows:

“There are no genuine triable issues regarding the tenancy raised by the respondent in his dispute and in his affidavit. It is quite clear that the respondent has unlawfully been laying claim to the possession of the premises and has forcibly retained possession which his remedy is in a claim against the lessors for the rates paid which claim has not been made in this suit.”

He then proceeded to decree that possession be given to the plaintiff forthwith. The effect of that ruling is that the defendant was ordered to vacate and deliver vacant possession of the suit property to the respondent.

The defendant did not vacate as decreed. Execution proceedings followed. He was, forcibly ejected by a court bailiff on 30th May 1991. Subsequently the defendant forced his way back. Thereafter an application for his committal for contempt of court was presented, argued, and disallowed on technical grounds which grounds are not relevant here. The applicant was given 4 days to vacate the suit premises. The ruling in that regard was given on 11th March 1992, and thereby provoked the present application.

The foregoing facts and a careful perusal of the pleadings reveals that the only outstanding issue is damages. Githinji J having ruled that the defendant was a trespasser on the suit premises it would appear to me that the liability of the defendant to pay damages for trespass was determined. Hence, the only matter outstanding is assessment of damages, costs, and interest.

In light of the foregoing, is the defendant entitled to his prayers in this application? I will defer the issue of security of costs until later.

In prayer No 5 this Court is called upon to rule on whether Africa Club is capable of suing or being sued. This Court lacks jurisdiction to rule on it in the manner prayed for. This Court having given judgment in favour of the plaintiff for possession of the suit premises, it is not open to it to reconsider the status of the plaintiff in this or any other application in the suit. It is *functus officio*. Moreover, Githinji J did consider the issue of the deregistration of Africa Club, as affects this case. I cannot revisit the issue regard being had of the fact that him and I have concurrent jurisdiction. The submissions by applicant's counsel on the issue are superfluous.

As for prayer (6) in the application, review of the ruling of this Court is sought. The power of the Court to review its own orders or judgments is donated by s 80 of the Civil Procedure Act, and o XLIV Civil Procedure Rules. The power is exercisable where certain conditions are satisfied. These include the discovery of new and important matters of evidence, on account of some mistake or error apparent on the face of the record, or any sufficient reason. The applicant did not endeavor to demonstrate that he should be granted review. His lamentation is that the time allowed him was too short. The Judge who decreed possession did not grant him time to vacate the suit property. He treated the defendant/applicant as a trespasser who deserved no indulgence from the Court. The four days this Court granted him were not deserved in light of the decree on record. This Court went out of its way to grant him that time. Learned counsel for the applicant, Mr KJ Kinyanjui appeared to appreciate this during his submissions before me in this matter. He, however, lacked the courage to abandon the prayer. The applicant is quite ungrateful for the Court's gesture in granting him unmerited time. If review were to be granted it would be to set aside the order with regard to those 4 days. The period having long elapsed, I do not consider it necessary to do so.

The applicant has in the alternative sought a stay of the order of 11th March 1992. A stay, if granted, will have the effect of staying the order decreeing possession in favour of the plaintiffs. An application for the stay of that order was dismissed. So that the applicant is in effect seeking to have another bite of the cherry. The matter is *res judicata* having been adjudicated upon (see section 7 of the Civil Procedure Act). I decline to reconsider the matter.

Having come to the foregoing conclusion, prayer (8) does not arise. There is a decree on record. It is a final determination of the matter, which was in controversy. It remains a decree of this Court unless and until it is set aside. It binds the defendant until it is set aside.

I now return to the issue with regard to security for costs. The Court's power to order security for costs of a suit is discretionary. That is what o 25 rule 1 Civil Procedure Rules says and that is what it means. The wording of the rule is that the "court may order". Being a discretionary power it has to be exercised on the basis of evidence. That is to say the Court must have a basis for ordering security for costs to be given.

The rule says that security for costs may be ordered to be given in any suit. It does not however state at what stage of the suit the order may be made. The Court is left with the power to determine when security may be given. The discretion is quite wide. A careful reading of the rule reveals that the Court needs to consider each case on the basis of its peculiar facts.

In our case here, there is a judgment, which is binding on the defendant/applicant. That is so because although the defendant does not agree with it the same has not been set aside. The general principle is costs of any suit follow the event. So, that in the instant matter the defendant is the one to pay costs.

It should be recalled that security for costs may only be ordered in exceptional circumstances only. Considering what I have stated above there are no special and exceptional circumstances, which militate in favour of an order for security for costs.

It may be argued that the question of damages is still outstanding. The damages sought here are for trespass. The Court has already decreed that the defendant is a trespasser. So that if anything only assessment of damages is outstanding. It is unlikely that when the Court will ultimately assess damages it will decree costs in favour of the defendant. In those circumstances, is there really any basis for an order for security of costs? I find none. Prayers (1) (2) and (3) must therefore be disallowed.

The only other matter outstanding for consideration is prayer (4) of the chamber summons. Considering what I have stated above, the prayer must be and is hereby disallowed.

The upshot of the foregoing is that the application must be and is hereby dismissed in its entirety. Costs to the respondents. Orders accordingly.

**Dated and delivered at Nairobi this 26th day of May, 1992.**

**S.E.O BOSIRE**

**JUDGE**