



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC CIVIL CASE NO. E009 OF 2021 (OS)**

**PINA WAITHERA KAMAU.....**  
**PLAINTIFF**

**VERSUS**

**SHMINA MANDAL.....1<sup>ST</sup>**  
**DEFENDANT**

**SHANDEL MANDAL.....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

1. The subject of this ruling concerns 2 notices of motion. The first one is filed by the plaintiff and it is dated 16/02/2023, while the 2<sup>nd</sup> one is dated 7/11/2024 and filed by the defendants. In filing their motions, both parties have moved the court under several provisions of the law, and for the sake of good order, this court will shortly highlight the motions in a chronological order based on their respective date of filing. In doing so, it will also highlight the relevant responses thereto.

## **Notice of motion dated 16/02/2023**

2. In this one, the plaintiff sought the following reliefs from this court: -

***a. The honourable court be pleased to review its order and/or ruling delivered on 9/11/2022.***

***b. This honourable court be pleased to review its order and/or ruling in part by setting aside, varying the orders in excluding the property known as L.R. 1224 from the said judgment delivered on 9/11/2022.***

***c. This honourable court be pleased to review in whole the said judgment by setting aside, varying or discharging the said ruling and orders made by the court.***

***d. The costs of the motion be provided for.***

3. The motion is premised on the grounds set out on its face and on the plaintiff's supporting affidavit deposed on 16/02/2023 and annexures thereto. In brief of both, she avers that: a) she is aggrieved by the ruling of this court made on 9/06/2022, as there exists an error on the face of the record and impugned ruling, b) there are sufficient means and justification to review the impugned ruling either in part or in whole due to the errors and discoveries, c) the motion has been filed without delay; and

4. D) The court made an error in making a finding on a relief not sought, as the defendants' motion was primarily on land parcel no. **L.R. No. 1223 ("1223")** and not land parcel no. **L.R. No. 1224 ("1224")**, and e) the court made an error in finding that there was improper service as the defendants were out of jurisdiction.
5. This motion is strenuously opposed by the lengthy affidavit of counsel Phoebe Mwaniki, who is on record for the defendants that she deposed on 26/05/2023. In a nutshell, counsel contends that: a) the impugned ruling does not speak of 1223 or 1224 but rather **L.R. Nos. 12715/1223** and **12715/1224 ("suit properties")**; b) the defendants' motion dated 18/01/2022 that was the subject of the impugned ruling had a typographical error in seeking the injunctive reliefs, as it referenced **L.R. nos. 12715/1223**, which is one of the suit properties and not both; nonetheless, this relief was declined by the court; c) this court's findings on the issue of service can only be dealt with by an appellate court.
6. In rejoinder, the plaintiff deposed a supplementary affidavit sworn 20/06/2023, which is a general opposition to the averments contained in the replying affidavit and a reiteration of depositions contained in her supporting affidavit. Additionally, she maintains that the replying affidavit is sworn by counsel and should be struck out.

**Notice of motion dated 7/11/2024**

7. In this one, the defendants sought the following reliefs from the court;

***a. Before the subject suit is heard any further, the plaintiff does furnish security for costs to the defendants within such reasonable time as the honourable court shall deem sufficient and reasonable.***

***b. The said security for costs amounts as shall be determined by the honourable court, as per prayer (a) above, be held in a joint interest-earning bank account under the names of the advocates for both parties pending the hearing and determination of the main suit here.***

***c. If the security for costs is not deposited within the time ordered, this honourable court does dismiss the suit herein.***

***d. The costs of this motion be provided for.***

8. The motion is supported by grounds on the face thereof and the very lengthy affidavit of the 1<sup>st</sup> defendant, sworn on 7/11/2024. However, as this court summarises the grounds, it has observed that it is unfortunate that the 1<sup>st</sup> defendant could not contain herself and waded into the substance of the matters in dispute in the substantive suit. For these reasons

and not to prejudice any party at this nascent stage of the proceedings, this court will restrain itself to the substantive grounds.

9. Therefore and in summary, the 1<sup>st</sup> defendant asserts that: a) the defendants are the duly registered proprietors of the suit properties; b) the financial standing of the plaintiff is unknown; b) the plaintiff has no known assets and if the defendants successfully succeed in their defence and awarded costs by this court, the same may not be recovered without undue difficulty thus the defendants would suffer irreparable harm and financial loss, and, lastly, c) unless the plaintiff avails security for due performance of the decree, the defendants may have a paper judgment as they would be unable to enforce the same against the plaintiff.
10. Taking cue from the defendants' documents, the plaintiff swore an extensive replying affidavit dated 17/03/2023, albeit filed out of time, which this court finds inconsequential as the defendants have since filed a further affidavit. She states that since the matter is a retrial, security of costs should not suffice, and instead, the defendants should bear this burden. In rebuttal, the 1<sup>st</sup> defendant filed a further affidavit deposed on 28/03/2025, which essentially made assertions on the substantive originating summons (**"OS"**).
11. As directed by the court, the parties' arguments were adequately canvassed by the written submissions that were

received from the law firms of **Mss. Njoroge Mwaura & Co. Advocates** for the plaintiff, dated 19/01/2023, which is in respect of the plaintiff's motion and **Andrew & Steve Advocates** for the defendants, which are on both motions and they were respectively dated 12/02/2024 and 5/03/2025. In consequence, the counsels' arguments and provisions of the law and judicial precedents relied upon in presenting their rival submissions shall be considered by this court.

**Issues for determination, analysis and determination**

12. Having given careful thought to the motions, affidavits and rival submissions, the following issues arise for resolution and shall be handled chronologically are; a) **whether counsel for the defendants could adequately depose the affidavit of 26/05/2023**, b) **whether the plaintiff has met the legal threshold to warrant the review of the orders issued on 9/11/2022**, and c) **whether an order for security for costs should be made.**

**a) Whether counsel for the defendants could adequately depose the affidavit of 26/05/2023**

13. Concerning this issue, the applicable provision that gives leeway for counsel to swear an affidavit as an agent of the defendants is found in **Order 19 Rule 3(1)** of the **Civil Procedure Rules**, which allows counsel to make averments within her own knowledge. Moreover, **Rule 8** of the **Advocates (Practice) Rules** states as follows: -

***“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:***

***Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”*** Emphasis added.

14. In respect of prevailing jurisprudence, the courts in Kenya are abounding with precedents that speak to these laws. It is now settled law that counsels are capable of making depositions limited to facts that they can prove are well within their knowledge. This position is affirmed by the Court of Appeal decision of **Hakika Transporters Services Ltd v Albert Chulah Wamimitaire [2016] KECA 255 (KLR)**, which held: -

***‘The objection raised by the respondent regarding the affidavit supporting the application is not a sufficient reason to deny this application. The***

***deponent advocate has deponed to facts strictly within his knowledge as regards the fixing of the date for judgment, the subsequent deferment, the ultimate delivery of the judgment without notice, and the efforts that he made to file the notice of appeal upon learning of the delivery of the judgment. In Salama Beach Ltd v Mario Rossi, CA. No. 10 of 2015, this Court expressed the principle as follows:***

***“As regards the appellant’s objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See Pattni v. Ali & 2 Others, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters.” ‘***

15. Having juxtaposed the impugned affidavit against the forestated law, this court finds that the assertions contained therein did not run afoul of the law, as counsel’s averments in

the affidavit were all facts that were well within her knowledge, as she acts for the defendants, and the contents of the impugned ruling were well within her knowledge. Thus, this court finds that the replying affidavit dated 26/05/2023 is properly before this court.

**b) Whether the plaintiff has met the legal threshold to warrant the review of the orders issued on 9/11/2022**

16. The pertinent provisions that govern the review of court decisions are encapsulated by **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules**. **Section 80** states that;

***“Any person who considers himself aggrieved-(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”***

17. **Further, Order 45 Rule 1 (1) of the Civil Procedure Rules** provides as follows: -

***“(1) Any person considering himself aggrieved—***

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed,*

*and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”*

18. The salient conditions brought out in **Order 45 Rule 1 (1) of the Civil Procedure Rules**, such as the *discovery of new and important matter, mistake, and sufficient cause, have to be proved by an applicant, and in dealing with such applications, the court has to exercise its judicious discretion.*

19. As concerns the prevailing jurisprudence, this court associates itself with **paragraph 32** of the apex court's decision in **Parliamentary Service Commission v Wambora & 36 others [2018] KESC 74 (KLR)**, where it laid down the following non-exhaustive guiding principles in

considering applications for review of court decisions when it stated: -

**(i)A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.(ii)Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;(iii)An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.(iv)In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.(v)During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.(vi)The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:(a)as a result a wrong decision was arrived at; or(b)it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”**

20. Accordingly, in the circumstances of this case, the plaintiff has pointed out that the basis of the motion is that there is an error apparent on the face of the impugned ruling, but has not directed the court to the specific portions she believes it erred. Be that as it may, she has postulated two grounds, one is that the court did not adequately appraise the law on service of summons. In light of this, the defendants' counsel argues that this is an issue that should be dealt with by an appellate court and cannot be the subject of appeal. On this and being guided by **Parliamentary Service (Supra)**, the court agrees with the defence counsel and finds that the plaintiff is trying to re-argue her case, which is not allowed.

21. In respect of the 2<sup>nd</sup> ground, this court concludes that the plaintiff's position is totally misplaced, an abuse of the court process, baseless and frivolous for reasons that, amongst many prayers sought in the defendants' motion dated 18/01/2022 that was the subject of the impugned ruling, they sought the following reliefs: -

*“That this honourable court be pleased to set aside all that judgment entered on 18/11/2021 delivered by honourable Lady Justice A. Nyukuri against the defendants, the decree thereto and all consequential proceedings thereto.”*

22. On hearing the parties on merits and upon exercising its judicious discretion and on being satisfied, this court granted

this relief as sought by the defendants. To this court's mind, it is blatantly obvious there is no error whatsoever in the impugned ruling. This court is yet to comprehend the genesis of the plaintiff's misapprehension of the substance of the matter that was before the court that led to the impugned ruling. Therefore, this court finds this prayer by the plaintiff is misplaced, an abuse of the court process, and not merited.

**c) Whether an order for security for costs should be made.**

23. 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.”***

24. 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. Of significance is that 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 of 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. 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.
25. Concerning the prevailing jurisprudence, it is now settled law that an order for security for costs is a discretionary one. However, the discretion has to be exercised reasonably and judicially by making reference to the circumstances of each case, but of course anchored on law, evidence and reason. The non-exhaustive guiding principles were well explicated in the Supreme Court of Kenya decision of **Westmont Holdings**

**SDN BHD v Central Bank of Kenya & 2 others  
[2023] KESC 11 (KLR)** 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.”***

26. 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 defendants, who are the applicants, to satisfy the grounds for security for costs to the satisfaction of the court. In this case, the 1<sup>st</sup> defendant presented two related grounds as to why a security for costs order should be given, which were that the plaintiff's assets and financial standing are unknown. Nonetheless, these grounds are not substantiated by tangible evidence.
27. In this court's humble view, these grounds fell far short of the threshold established by law for reasons that there is no dispute that the plaintiff is located in Kenya and the defendants can always enforce the judgment herein (if at all) within the jurisdiction. In my humble opinion, just because the plaintiff's financial standing or assets are unknown, this should not be the sole reason for denying her the right to access justice or have her day in court. In any case, the onus was on the defendants to substantiate their grounds, which they failed

to discharge. In the circumstances and for the above-stated reasons, this court finds the defendants' grounds did not meet the legal threshold.

28. The upshot is that this court finds the notices of motion dated 16/02/2023 and 7/11/2024 not merited and are for dismissal with costs being in the cause. In the end, this court hereby issues the following final disposal orders;

***a) The notices of motion dated 16/02/2023 and 7/11/2024 are hereby dismissed with costs being in the cause.***

***b) Unless with leave of the court, there shall be no further filing of applications in this matter.***

***c) A mention date shall be given for purposes of pretrial directions.***

Orders accordingly.

**Delivered and Dated at Machakos this 7<sup>th</sup> day of October, 2025.**

**HON. A. Y. KOROSS  
JUDGE**

**7.10.2025**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform**

In the presence of;

Ms Kanja Court Assistant.

Mr. Mwaura for plaintiff.

Mr. Kisala holding brief for Mr. Kimathi for defendant.

ORIGINAL