



**Kimani (Suing as Personal Representative of Samuel Kimani Nganga - Deceased) v Ndichu
(Environment and Land Case 130 of 2018) [2021] KEMC 12 (KLR) (18 March 2021) (Ruling)**

Neutral citation: [2021] KEMC 12 (KLR)

**REPUBLIC OF KENYA
IN THE NGONG LAW COURTS
ENVIRONMENT AND LAND CASE 130 OF 2018
P ACHIENG, SPM
MARCH 18, 2021**

BETWEEN

**YUSTER NYAMWITHA KIMANI (SUING AS PERSONAL REPRESENTATIVE
OF SAMUEL KIMANI NGANGA - DECEASED) PLAINTIFF**

AND

JOHN KISEMEI NDICHU ALIAS JOHN MBUGUA NDICHU DEFENDANT

RULING

1. The Defendant filed the application dated 18th November 2020 seeking the following orders;
 - 1) That the Plaintiff do give security for the Defendant's costs in the sum of Ksh. 1,500,000/= to be deposited in a bank or a reputable financial institution in the joint names of the Plaintiff's and Defendant's advocates' firms and in default of giving such security within the time ordered, the Plaintiff's suit be dismissed with costs.
 - 2) That the costs of this application be provided for.
2. The said application is premised on the grounds on its face and is supported by an affidavit sworn by the Defendant/Applicant. The Plaintiff/Respondent filed a Replying Affidavit in response to the said application. The application was heard by way of written submissions which were filed by both parties.
3. I have considered the said application, the Replying Affidavit filed, the Further Affidavit and the written submissions filed. Order 26 rule 1 of the [Civil Procedure Rules, 2010](#) 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.”
4. This provision gives the court wide latitude on the granting of an order for payment of security for costs. In the present case, the Defendant's main basis for seeking an order for security of costs is the fact that the Plaintiff is ordinarily resident in the State of New York within the United States of America,



and has no known assets within Kenya that could offset the costs, were the same to be granted to the Defendant. In reply to the said application, the Plaintiff/Respondent states that the applicant must demonstrate that the Plaintiff will not be able to satisfy an order for costs made at the end of the trial should she lose the case. She states that no cogent evidence has been brought before this court. She further states that she is a Kenyan by birth and also has residence within the jurisdiction. She states that she was last in Kenya in February 2020.

5. In support of his submissions, Mr. Githuka counsel on record for the Defendant/Applicant relied on the authority in the case of *Indemnity Insurance Company of North America & 2 Others – v- Kenya Airfreight Handling Limited & Another* [2001]eKLR, where Hon. Justice T. Mbaluto stated as follows;

“In my view, the above passage as well as the other authorities already referred to establish that financial status is not a major factor in the consideration of an application for security for costs against a plaintiff residing abroad and that what is of significance is whether the defendant’s recovery of its costs, if it is successful in the litigation, would be difficult and costly. That I think is the correct test to apply in an application of this nature.”

6. In the case of *Rubrpumpen Global Limited – v- Zakhem International Construction Limited & Another* [2016]eKLR, Hon. Justice F. Ochieng stated as follows at page 4;

“Even if the Plaintiff has demonstrated ability to pay costs, if the said Plaintiff is resident abroad and if he does not have assets within the jurisdiction of the Court, it would usually be more expensive, time-consuming, inconvenient and uncertain to pursue him for costs. In such circumstances, the Court is likely to exercise its discretion, and to order the Plaintiff to provide security for costs.”

7. In the case of *Shah – v- Shah* (1982) KLR 95, at page 98, the Court stated as follows;

“The general rule is that security is normally required from the Plaintiffs resident outside the jurisdiction but as was agreed in the court below, a court has a discretion, to be exercised reasonably and judicially, to refuse to order that security be given.”

8. From the material placed before the Court, it is evident that the Plaintiff herein is mainly based in the United States of America. Though she states that she has residence in Kenya, the Court cannot tell whether she has assets in Kenya. The purpose of issuing an order for security for costs is not in any way to punish the Plaintiff or to stifle a genuine claim by the Plaintiff, but to alleviate difficulty on the part of a successful defendant in realizing costs awarded. It is also to save a successful defendant from incurring extra costs in having a judgment executed abroad. Under Section 1A of the *Civil Procedure Act* Cap. 21, the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. For purposes of furthering the overriding objective under Section 1A, Section 1B requires that the Court handles all matters presented before it for purposes of attaining inter alia the timely disposal of the proceedings at a cost affordable by the respective parties.

9. The fact that the application was not brought earlier on or during the lifetime of the deceased Samuel Kimani Nganga is not a bar to the same being brought now. Having considered the present application in totality, I find that it merits grant of the order sought. The applicant seeks security for cost in the sum of Ksh. 1,500,000/=. He did not however provide justification for the said amount. In the circumstances and being guided by decided cases of the Superior Courts, I assess the security for costs at Ksh. 1,000,000/=.



10. I therefore allow the application dated 18th November 2020 and order the Plaintiff to deposit the sum of Ksh. 1,000,000/= being the security for the Defendant's costs, in a bank or a reputable financial institution in the joint names of the Plaintiff's and the Defendant's Advocates' firms within 60 days from the date of delivery of this ruling.

Costs of the application shall be in the cause.

RULING DELIVERED AND SIGNED AT NGONG THIS 18TH DAY OF MARCH 2021

In the Presence of:

Ms. Cuna for Plaintiff/Respondent

Mr. Githuka for Defendant/Applicant

Court Assistant - Caroline

HON. P. ACHIENG

SENIOR PRINCIPAL MAGISTRATE

