



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 103 OF 2017

KIHUMWIRI FARMERS COMPANY LIMITED.....PLAINTIFF

VS

BREEZE INVESTMENTS COMPANY LTD.....1ST DEFENDANT

DIRECTOR OF SURVEY.....2ND DEFENDANT

REGISTRAR OF TITLES.....3RD DEFENDANT

COMMISSIONER OF LANDS.....4TH DEFENDANT

RULING

1. The 1st Defendant filed a motion dated 26/9/18 for orders that:-

- a. The Plaintiff be compelled to deposit security for costs within 7 days.
- b. That security for costs assessed at Ksh.3.0 Million since approximate value of the suit property is ksh.405,000,000/-
- c. Such security be deposited into a joint interest account in the names of Advocate's for the Defendant and Plaintiff.
- d. Costs of application be borne by the Plaintiff.

2. The application is based on the grounds that; The Plaintiff /Respondent might not be able to settle costs of the Defendants in the event the suit is unsuccessful; Further that the Plaintiff company was wound up and is not involved in any economic activity; It does not own any property that can be liquidated if the suit is dismissed; There is no guarantee the 1st Defendant will recover costs and as such the Defendants exposed.

3. The application is supported by the affidavit of Jagi Gakunju who has described himself as the chairman of the 1st Defendant and duly authorized to depone to the affidavit. The 1st Defendant/Applicant has referred the Court to the proceedings dated 24/10/12 and further orders of this Court issued when by consent the parties agreed *inter-alia* to invite the District Surveyor to visit the suit and point out the beacons and boundaries of the 1st Defendant's land vis-a-vis that of the Plaintiffs. The chairman of the 1st Defendant deponed that the Plaintiff could not raise Ksh.199, 000/= which was for the survey fees. Further that the Plaintiff/Respondent also confirmed that it was unable to raise Ksh.366, 000/= for survey fees when the matter came for mention. In addition, he deponed that Plaintiff has not taken any significant steps to prosecute the case while the Applicant /Defendant has incurred expenses /disbursement of Ksh.700, 000/= to defend suit. The Defendant has also alleged that the Plaintiff withdrew a previous suit between them in Milimani Civil Case 590 /11 and did not pay costs. The notice of withdrawal is annexed as **J93**.

4. The application is opposed vide the replying affidavit of Phares Mwangi Njoroge who swore an affidavit as one of the Directors and the Chairman of the company. The Plaintiff contends that the application is flawed and that the 1st Defendant is hell bent on scuttling the hearing of the main suit since the Defendant has filed frivolous applications to frustrate Plaintiff's case from being heard. That the Defendant did not disclose the source of facts that the Plaintiff will not be able to settle the imagined costs. The Plaintiff reiterates that it is a land buying company; it possesses big tracks of land whose value exceeds millions. The suit land also belongs to the Plaintiff and the 1st Defendant can attach the property whose value runs into millions. The Plaintiff deponed that the prayer for security lacks a legal basis and that non-compliance with the orders for survey was due to the fact that parties opted to settle for a private surveyor. That the Plaintiff never admitted it lacked financial muscle to carry out the survey. Further that there is nothing to demonstrate that the Respondent spent Ksh.700,000/- in defending the suit. The Defendant/Applicant is said to be in breach since it continues to develop the suit property despite the orders of the Court issued on the 24/10/17. The Plaintiff /Respondent also states that there are other Defendants and/or parties in this case

and the instant application is premature since the Court would not be able to determine who would bear the costs at this stage.

5. The 2nd - 4th Defendants did not file any response. It therefore follows that the application goes unopposed. The Plaintiff averred that there is a conspiracy between the other Defendants to take the suit land thus the 1st Defendant deliberately avoided to seek costs from them.

6. Parties filed Written Submissions which have been considered in the analysis of the issues below.

7. The application has been preferred under the provisions of Order 26 Rule 1, 5 & 6 which provides that;

“in any suit the Court may order that security for the whole or part of the costs of any Defendant or third or subsequent party be given by any other party”

8. The purpose of the order is to protect the Defendant from situations in which he is dragged to Court, and made to lose even the costs of litigation. It is also meant to prevent frivolous and useless litigation by persons. Having said that, Courts however must ensure that parties with just claims are not prevented from accessing the seat of justice for their claims to be determined. The balance to discourage useless litigation and provide access to justice by just claimants is the thin equilibrium that the Court must strive to achieve.

9. It is trite law that security for costs can be ordered by a trial Court in its discretionary power. In the case of **Marco Tools & Explosives Ltd V Mamujee Brothers Ltd**, [1988] KLR 730 held:

“...the Court has unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance is that the final result must be reasonable and modest”.

10. In an application for security of costs the Applicant must show that the Plaintiff will not be able to satisfy an order for costs made at the end of trial. In the case of **Europa Holdings Limited Vs Circle Industries (UK) BCLC 320 CA**, it was held that it must be proved that the Plaintiff would not be able to pay the costs at the end of the case. Mere inability is not enough. Secondly the Court must satisfy itself that it will be just to make the order for costs on the facts and circumstances of the case. Other factors that the Court would consider are the residence of the Plaintiff as well as the conduct of the parties. See the decision of **Kibiwott & 4 others Vs The Registered Trustees of Monastery of Victory Nakuru, HCCC No 146 of 2004** where Justice Kimaru observed that for a party to succeed in an application for security of costs he has to prove that the opposing party will not be able to pay the costs to be awarded in the event of the suit filed by such a party being dismissed.

11. The Court must exercise this power judicially and particularly ensure that it meets the end of justice as opposed to assisting a party act in the abuse of the Court process. In the case of **Gatirau Peter Munya Vs Dickson Mwenda Githinji & 2 Others, CA No. 38 of 2013 [2014] eKLR**, the Appex Court emphasized that in an application for further security for costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that he is unsuccessful. And the *onus* is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable.” (emphasis is mine).

12. The Defendant has alleged that the Plaintiff has been wound up. There is no evidence to support the claim. Such evidence would be in the form of a winding up order or such pronouncements that leave no doubt that the company is no longer trading. Further the 1st Defendant did not adduce evidence to show that the financial position of the company is in dire straits. Such evidence would have been the financial audited statements of the company for say 3 years to show disability to pay costs/meet its day to day commitments and or that it has ceased trading. The 1st Defendant has stated that the Plaintiff does not own any assets. This statement was not supported by any evidence. The Plaintiff however deponed that that it owns large tracks of land which can be sold if need be.

13. The 1st Defendant has invited the Court to look at the conduct of the Plaintiff through the proceedings on record. It has made certain claims to wit; that the Plaintiff failed to pay Kshs 199,000/-, and Kshs 366,000/- being their share of the survey fees pursuant to a Court order recorded by consent of the parties; failed to comply with the said orders and failed to take active steps to prosecute the case and further cited the withdrawal of the suit by the Plaintiff that had filed in Milimani Court.

14. I have perused the Court record. On the 23/10/17 the parties entered into a consent to the effect that the District Surveyor Murang'a to visit the locus quo and file a report within 21 days. The costs were to be shared between the Plaintiff and the 1st Defendant equally. On the 5/12/17, the parties reported that they had not complied with the orders of 23/10/17. Mr Njiraini for the Plaintiff sought a variation of the previous order so that instead of the District Surveyor it be the Director of Survey to visit the suit land and identify the beacons and the boundaries. Mr Ndegwa holding brief for Mr Karuga for the 1st Defendant concurred with the variation proposed by Mr Njiraini. In addition, he added that the fees charged by the District Surveyors office in the sum of Kshs 199,150/- was too high. The order of 23/10/17 was therefore varied to read the Director of Survey to visit the suit land.

15. Come the 24/1/18, the Plaintiff and its Advocate was absent in Court. Mr Karuga for the 1st Defendant informed the Court as follows;

“I am informed that the Director of Survey has not completed the exercise as the Plaintiff has not paid. I am informed that the Director of Surveys should not carry out the exercise, as the office is a party to the suit. It is proposed that a private surveyor be appointed to carry out the survey and the Plaintiff and the 1st Defendant to share the costs equally. I pray that the Court orders be reviewed.”

The Court declined his request on the basis that the orders were made by way of consent and therefore the same could not be varied

unilaterally in the absence of the Plaintiff.

16. The long and short of the proceedings are that there is nowhere on the Court record where the Plaintiff informed the Court that it is unable to pay the surveyors fees. Save for Mr Ndegwa for the 1st Defendant who remarked that the fees was too high, there is no evidence to support the 1st Defendant's averments. The 1st Defendant has not demonstrated if they have paid the said fees as well. It is the understanding of this Court that the issue is around whether or not the District Surveyor or for that matter the Director of Survey should prepare the report in view of the fact that it is a party. From the proceedings on record perhaps this conflict has led the Plaintiff and the 1st Defendant to propose each commissioning a private surveyor.

17. Balancing the interests of the parties and doing the best I can, I find that the Applicant has not proved to the Court that the Plaintiff is unable to meet its obligations for costs should it loose the suit . The application is unmerited. It is dismissed. Costs of the application shall be in the cause.

18. Parties should take steps to progress the case to trial without delay.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 28TH MARCH 2019.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Opiyo HB for Bwonwonga for the Plaintiff

Kirubi HB for Karuga for the 1st Defendant

2nd Defendant – Absent

3rd Defendant – Absent

4th Defendant – Absent

Njeri and Kuyiki , Court Assistants